
BETWEEN:

ABE POSLUNS ..... APPELLANT;

AND

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

AND BETWEEN:

JOSEPH A. POSLUNS ..... APPELLANT.

AND

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

AND BETWEEN:

SAMUEL POSLUNS ..... APPELLANT.

AND

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

AND BETWEEN:

LOUIS H. POSLUNS ..... APPELLANT.

AND

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

1963
Dec. 4, 5

1964
Aug. 14

Revenue—Income Tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3 and 4 —Discounts on mortgages purchased by taxpayer—Income or capital gain—Whether purchase of such mortgages an investment.

1964

POSLUNS
v.
MINISTER OF
NATIONAL
REVENUE

The appellants, who are brothers, appealed from the assessment of the respondent as income of amounts realized as discounts on mortgages purchased individually by them at the rate of about one mortgage per year by each appellant during the period 1951 to 1956. The face value of the mortgages ranged from $30,000 to $160,000 and all provided for interest to be paid at or below the prevailing rate for prime first mortgages, although part or all of several of the mortgages in question were second or third mortgages. All were for terms of not more than five years and all were held by the appellants until maturity or payment before maturity. The mortgages were of a highly speculative nature.

Held: That the determination of this issue must depend on the totality of the facts and surrounding circumstances of the case, because no single criterion has been laid down upon which to decide whether the transactions were investments or adventures in the nature of trade.

2 That the multipilicity of transactions may be an important factor when considered in the light of surrounding circumstances and the purchase of one mortgage per year by each of the appellants does not necessarily lead to the conclusion that the transactions were not numerous having regard to the large amount of each purchase.

3. That the mortgages purchased by the appellants were not the kind that would be considered for investment purposes by a person who was primarily concerned with a return on his money by way of interest

4 That the appeal is dismissed.

APPEALS under the *Income Tax Act*.

The appeals were heard by the Honourable Mr. Justice Cattanach at Toronto.

J. J. Robinette, Q.C. and *W. R. Latimer* for appellants.

H. D. Guthrie, Q.C. and *M. Barkin* for respondent.

The fact and question of law raised are stated in the reasons for judgment.

CATTANACH J. now (August 14, 1964) delivered the following judgment:

These are appeals against the appellants' assessments under the *Income Tax Act*, R.S.C. 1952, c. 148 for their respective 1954, 1955 and 1956 taxation years. There are twelve appeals, one for each of the three taxation years by the four appellants and since the identical problem is involved in each, the appeals were heard together. The appeals relate to amounts realized as discounts on mortgages purchased individually by the four appellants. The question for determination is whether the amounts received as discounts were income from the operation of businesses in schemes of profit making within the meaning of sections 3

and 4 of the *Income Tax Act*, as contended by the Minister, or were merely gains upon the realization of investments that had increased in value, as contended by the appellants.

The four appellants are brothers who were originally engaged in the garment and fur trade.

Each appellant, prior to 1951, owned 12½ percent of the shares in Popular Cloak Company Limited, a manufacturer of ladies garments, with head office and factory in Toronto, Ontario, so that the four appellants together owned one half of the shares. The remaining shares were owned by two persons not within the appellant's family group. Because of a disagreement between the appellants and the other shareholders, this company ceased to carry on business in 1961.

In addition, the four appellants at one time also owned, in equal proportions, all the shares of Super Fur Company Limited, a company engaged in the fur trade in Toronto, which ceased operations in 1956.

The appellants at one time also owned equally all the shares of Superior Cloak Company, Limited, which ceased operations in 1959.

In 1948 the appellants acquired 50 percent of the shares in two loan companies, Superior Finance Limited and Superior Discount Limited, the other half being owned by another person. In 1952 the appellants, together with the son of each of two of them, acquired the remaining shares in these companies. Each of the appellants then owned 20 percent of the shares and each of the two sons owned 10 percent.

Superior Finance Limited was in the business of making loans under the *Small Loans Act*. Superior Discount Limited was in the business of making loans exceeding the limit allowed under that statute and of accepting negotiable commercial paper.

Subsequent to the taxation years in question, these two companies, of which the appellants were the directors, adopted a policy of seeking mortgage business, but mortgages, other than chattel mortgages, were not acquired prior thereto except as collateral security to a note for more than $500. It is true that during 1955, notices were inserted in newspapers under the heading "Mortgage Loans" advertising a "Superior Home Owner Plan". These advertisements were explained as being a device to stimulate the loan

1964

POSLUNS v. MINISTER OF NATIONAL REVENUE

Cattanach J.

business, although it was a frequent result that, in addition to a note or chattel mortgage on household effects, as assignment of a mortgage was taken as security for a loan. The homeowner plan was actually an invitation to prospective home purchasers to take loans from the appellants' loan company instead of financing by second mortgages. Such loans, if larger than the amount prescribed by the *Small Loans Act,* were often secured by mortgages subsequently.

The companies engaged in the garment and fur business before mentioned, were successful and profitable. However, it was agreed among the appellants that the finance business offered a more lucrative and less arduous future as a long term business than the garment and fur trade resulting in the gradual withdrawal by the appellants from those trades in favour of the loan business. In addition to being directors of the loan companies, the appellant Abe Posluns was a full time employee and the appellants Joseph A. and Louis H. were part-time employees.

The activities of the appellants also included the ownership of office buildings and other real estate and of securities, which were managed and operated through a registered partnership in which the four appellants were equal partners. It was the general principle amongst the appellants that their assets were held in this partnership which assets, at the end of 1954, were in the approximate amount of $1,600,000 comprised of a loan to Superior Cloak Company Limited of $312,000, a loan to Superior Discount Limited of $454,800, stocks in an amount of $109,000, equity capital in a land development project in an amount of $52,000 and other real estate. The foregoing assets were not all liquid. The partnership had borrowed $779,700 from a bank secured by the personal guarantee of the appellants and an assignment of equity in real estate.

In 1951 each of the appellants began to acquire mortgages at a discount. The mortgages were acquired by the appellants individually and not in the name of the partnership. In each instance the funds wherewith to purchase the mortgages were borrowed from the partnership and, because the amounts were invariably substantial, the matter was almost certainly discussed among them. The necessary loan from the partnership was always readily forthcoming. Interest on such loans was paid to the partnership at the current prime rate.

In the case of each acquisition of a mortgage, the purchaser acted upon advice of a solicitor, personally known to him, who had approached him to ascertain whether he would be willing to purchase a mortgage that was available for sale at a discount. None of the appellants investigated the mortgagors or the property which was security for a mortgage, except on rare occasions when the inspection was quite casual. At no time did any of the appellants advertise that he had money available for such purposes. However, the fact that they had money so available was obviously known to the solicitors who approached them and who did all legal work in connection with the transactions. All mortgages acquired by the appellants were of a high risk nature, being mortgages on hotels, motels and licensed premises, construction loans and loans on vacant lands.

The payments on principal and interest received by the appellants were not deposited in the partnership account, but in their respective personal accounts. Payments were made to the appellants at their respective office premises. Records pertaining to payments were kept for them by a Mr. Jackson, a longtime employe of Posluns Brothers, the partnership.

I reproduce in tabular form information respecting the mortgage transactions of each of the appellants for the years 1951 to 1956:

ABE POSLUNS

	Date acquired	Type of mtg.	Int. rate	Term of Mtge	Maturity date	Time to maturity	Mtg. security	Face value	Cost	Discount
1.	Oct. 10/51	2nd	5%	2 yrs. 6 mos.	Apr. 28/54	2 yrs. 6 mos.	Hotel Pembroke Limited Pembroke, Ontario	$44,000	$37,000	$7,000
2.	Jan. 17/52	1st	5%	5 yrs.	Nov. 5/57	5 yrs.	Iroquois Hotel Hamilton Ontario	84,612.54	73,850	10,762.54
3.	Sep. 1/53	2nd	6%	5 yrs.	Sep. 1/58	5 yrs.	King Edward Aparts. Toronto Ontario	80,000	64,000	16,000
4.	Jun. 25/54	1st & 2nd	6%	1 yr 2 mos.	May 10/55	1 yr 2 mos.	White & Davis Ltd. Toronto Ontario	116,665	100,000	11,665
5.	Aug. 24/55	Building loan	6%	1 yr.	June 11/56	1 yr.	G. Spoiala Windsor Ontario	60,000	50,000	10,000

1964

POSLUNS v. MINISTER OF NATIONAL REVENUE

Cattanach J.

OSEPH A. POSLUNS

	Date acquired	Type of mtg.	Int. rate	Term of Mtge.	Maturity date	Time to maturity	Mortgagor	Face value	Cost	Discount
1.	May 1/52	1st	5½%	5 yrs.	Apr. 2/54	5 yrs. 2 yrs. to disc.	G. & I. Spoiala New Ritz Hotel Windsor Ontario	$62,000	$52,000	$10,000
2.	June 28/53	1st & 3rd	5%	5 yrs.	June 15/58	5 yrs.	Moe Koffman Ottawa, Ontario	160,000	125,000	35,000
3.	Dec. 20/54	2nd	6%	1 yr.	Aug. 26/55	1 yr.	Mayzel Realty Ltd. Toronto, Ontario	128,000	117,000	11,000
4.	Nov. 23/55	1st	6%	5 yrs.	Nov. 1/60	5 yrs. seriously in default	Grand Central Hotel Windsor, Ont.	46,000	35,000	10,500

SAMUEL POSLUNS

	Date acquired	Type of mtg.	Int. rate	Term of Mtge.	Maturity date	Time to maturity	Mortgagor	Face value	Cost	Discount
1.	Sep. 3/52	1st & 2nd	5%	4 yrs.	Discount rec'd 1954	2 yrs.	Murawsky Furniture Ltd. Kitchener, Ontario	$41,000	36,500	4,500
2.	July 18/51	1st & 2nd	5%	5 yrs.	Jan. 10/56	5 yrs.	Lyle Cook St. Thomas, Ontario	30,000	26,500	3,500
3.	Dec. 15/52	2nd	6%	2 yrs.	Dec. 15/54	2 yrs.	Albert W. Mendelson Toronto Ontario	30,000	30,000	nil
4.	June 23/53	1st	6%	5 yrs.	Discount rec'd Feb. 21 1956		Lincoln Motel North Bay Ontario	58,000	48,000	10,000
5.	Mar. 17/54	2nd	6%	2 yrs.	June 13/56	2 yrs.	Crosstown Construction Ltd. Toronto, Ontario	100,714 28	87,428.56	13,285.72
6.	Mar. 14/55	2nd	6%	5 yrs.	Mar. 14/60	5 yrs. seriously in default	G. Spoiala Ambassador Hotel Windsor, Ontario	85,000	65,000	20,000
7.	Apr. 5/56	1st	6%	5 yrs.	Discount rec'd Apr. 13/57	1 yr.		40,300	31,000	9,300 bonus reduced by 3,905.66 on settlement

LOUIS H. POSLUNS

Date acquired	Type of mtg.	Int. rate	Term of Mtge.	Maturity date	Time to maturity	Mortgagor	Face value	Cost	Discount
Jul. 2/52 1.	1st & 2nd	5%	5 yrs.	Discount rec'd Apr. /54	2 yrs.	G. & I. Spoiala Windsor, Ontario	63,800	52,000	11,800
Feb. 2/53 2.	2nd	6%	5 yrs.	Feb. 1/58	5 yrs.	Mariaggi Hotel Port Arthur	84,000	60,000	24,000
Sep. 15/54 3.	loan	6%	2 yrs. 7 mos	Apr. 26/57	2 yrs. 7 mos.	Rotman Bldg. Co., Ltd. Tor. Ont.	35,850	25,800	10,050
May 3/55 4.	2nd	6%	5 yrs.	June 1/60	5 yrs.	Metropole Hotel Ltd. Windsor Ontario	70,000	50,500	19,500

A review of the information in the foregoing tables discloses that the appellant, Abe Posluns acquired five mortgages at a total cost of $314,850 over a period of five years at the rate of one mortgage a year. Of those five mortgages only those numbered 1, 4 and 5 are involved in the present appeals. Two of the five mortgages were for terms of five years, one for two years and six months and two for one year. The face value of these mortgages exceeded their cost by $55,427.51.

With respect to the transactions of the appellant Joseph A. Posluns the tabular information discloses that he acquired four mortgages in the four years 1952 to 1955 inclusive also at the rate of one mortgage per year at a total cost of $329,000 of which only those numbered 1 and 2 are involved in the present appeals. Of the four mortgages acquired by him three were for five years and one for one year. The face value of these mortgages exceeded their cost by $66,500.

The appellant, Samuel Posluns acquired seven mortgages during the years 1951 to 1956, of which six were at a discount. Those numbered 1, 2, 3 and 4 in the table respecting this appellant are the subject of the present appeals. This appellant also acquired one mortgage at a discount in each of the years 1951 to 1956. Of the seven mortgages so acquired at a total cost of $334,428.56 four were for a term of five years, one for four years and two for two years. The face value of these mortgages exceeded their cost by $51,285.72.

1964

POSLUNS v. MINISTER OF NATIONAL REVENUE

Cattanach J.

The table respecting the appellant Louis H. Posluns shows that he acquired four mortgages at a total cost of $188,300 during the years 1952 to 1955 also at the rate of one mortgage per year, three of which were for terms of five years and one for a term of two years and seven months. The face value of these mortgages exceeded their cost by $65,350.

The factors common to each appellant are that each acquired one mortgage per year all for substantial amounts and at substantial discounts. In each case new funds were borrowed for the particular acquisition. In every instance the appellants borrowed money from the partnership, Posluns Brothers, to make their purchases.

It was agreed by counsel that the rates of interest on first mortgages on prime residential property in the Toronto area, where the amount of the loan did not exceed 60 percent of the value of the property, were 5½ percent in 1951, 6 percent in 1952 and 1953 and 6½ percent in 1954 and 1955. A review of the interest rates applicable to the mortgages acquired by the appellants indicates that the greater majority are slightly less than the prevailing rates on prime first mortgages and in a few instances equal thereto.

The appellants did not act in concert with any one else in acquiring these mortgages, or with each other, except in one instance when Joseph A. Posluns acquired a one-half interest in a mortgage on property owned by Mayzel Realty Limited, item No. 4 in the table applicable to him, jointly with Arthur Cohen, who also acquired a one-half interest therein.

None of the appellants set up an organization for the acquisition of these mortgages. None ever advertised for them. Apparently they never bargained over the price to be paid for them because they were content to rely on the advice of the solicitor who recommended them. The records required by the appellants were kept for them by an employee of the partnership.

None of the appellants sold any mortgages purchased by them, but the mortgages were held until maturity or until paid off prior to maturity.

In each and every mortgage there was an obvious and real element of risk. The substantial discounts were explained by the nature of the risk.

I repeat that the issue herein is whether the profits from the mortgage transactions under review were enhancements

of the value of investments of profits from a business, including therein transactions that were adventures in the nature of trade and accordingly income within the meaning of sections 3 and 4 of the Act. The determination of this issue must depend on the totality of the facts and surrounding circumstances of the case, which I have set out with all the emphasis given them by counsel for the appellants, because no single criterion has been laid down upon which to decide whether the transactions were investments or adventures in the nature of trade.

Counsel for the appellants in argument put stress particularly on the fact that each of the appellants entered these transactions on his own account, that no organization was set up by any of them to acquire the mortgages and that they never advertised their willingness to purchase mortgages. Above all he pointed to the scant number of transactions—one mortgage per year acquired by each appellant.

There was no need for the appellants to set up an organization or to advertise in order to acquire the mortgages. The mortgages were offered to them by solicitors who did all legal work necessary and who knew that each of the appellants had substantial funds available to purchase mortgages that they had to offer for sale.

While the multiplicity of transactions does not of itself determine that they were operations in a scheme of profit-making, it has been held that it may be an important factor when considered in the light of the surrounding circumstances. I am not persuaded that, so considered, the transactions entered into by the respective appellants were not numerous. During the years in question, the appellants each bought one mortgage in each year which demonstrates a pattern of conduct. Having regard to the large amount of each purchase it is understandable that the purchases were not more numerous.

Each of the appellants had experience in the business of loaning money through the finance and small loan companies owned and actively operated by them and in which mortgages were frequently taken as collateral security. While there are differences between that business and the acquisition of mortgages at a discount, nevertheless, there are areas of similarity.

1964

POSLUNS v. MINISTER OF NATIONAL REVENUE

Cattanach J.

Taking all such facts into consideration, I am of the opinion that it would be unrealistic to think of the mortgages purchased by the appellants as being merely investment of capital for the purpose of attaining income by way of interest on the money invested. The appellants were not merely acquiring investments and then choosing to realize them and obtaining greater amounts by way of incidental enhancement of values. The appellants received the amounts that were expected, with minor adjustments, on the discounts when the mortgages were purchased. The mortgages were not the kind that would be considered for investment purposes by a person who was primarily concerned with a return on his money by way of interest. All the mortgages were of an admittedly highly speculative nature. The attraction of the transactions to the appellants was not income return by way of interest. The interest rates on the mortgages in question, all highly speculative, and in many instances second or third mortgages were, in almost every instance, less than the prevailing rates on prime first mortgages. It is fair to infer that the attraction of the transactions to the appellants was the prospect of profits when the discounts were realized within a comparatively short time.

Despite the disparity in the number of transactions involved, which I think is offset by the greater amounts for which the fewer mortgages were purchased, I am of the opinion that it is impossible on the facts to distinguish the character of the transactions in these appeals from the character of those in *Scott v. M.N.R.*[1], in which the decision of the former President of this Court was unanimously confirmed by the Supreme Court of Canada[2]. I am also of the view that it is impossible to distinguish the facts in these cases from the facts in *M.N.R. v. MacInnes*[3], in which the Supreme Court of Canada, by a unanimous decision, reversed the decision of this Court. The Supreme Court of Canada decided that the appellant and respondent in those respective cases were in the highly speculative business of purchasing obligations of this nature at a discount and holding them to maturity in order to realize the maximum profit out of the transactions.

I, therefore, find that the discounts realized by the appellants in the taxation years in question were taxable income

[1] [1963] C.T.C. 176. [2] [1963] S.C.R. 223. [3] [1963] S.C.R. 299.

since they were profits or gains from a trade or business within the meaning of sections 3 and 4 of the *Income Tax Act*.

1964

POSLUNS v. MINISTER OF NATIONAL REVENUE

Cattanach J.

Accordingly the appeals are dismissed with costs subject to certain changes in the amount of some of the assessments upon which counsel intimated that they were in agreement and required no direction from me.

Judgment accordingly.