1959
Oct. 5, 6, 7
Dec. 15

BETWEEN:

REGAL HEIGHTS LIMITED .....APPELLANT;

AND

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

Revenue—Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6, 81(1) and 139(1)(e)—Profits from land purchased for development of a shopping centre and later sold—Income or capital—"An undertaking"—A "venture in the nature of trade"—A business—Appeal dismissed.

A group of persons formed a partnership for the purpose of developing a shopping centre in the City of Calgary, Province of Alberta. Appellant company was incorporated and certain lands were purchased for the purpose of proceeding with the development. Due to the occurrence of certain matters the shopping centre plan was dropped and the holdings of the appellant were disposed of at enhanced prices resulting in considerable gain to appellant.

Appellant was assessed for income tax on this gain and an appeal by it to the Income Tax Appeal Board was dismissed. A further appeal was taken to this Court. Appellant contends that the amount of profit is a capital gain and not income.

Held: That the profits in question are the regular outcome of "an undertaking", a "venture in the nature of trade" within the Income Tax Act and in short of a business and so properly assessed for income tax.

2. That from its inception the sole subject of the partnership consisted in profit-making through the operation of a shopping centre; the profit was attained by a quick turnover of three transactions and the mode instrumental in ensuring this result though at one remove from the company's initial and most favoured ambition does not detract from a basic profit-seeking venture.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Calgary.

R. H. Barron, Q.C. for appellant.

Ernest S. Watkins and *T. E. Jackson* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

1959

REGAL HEIGHTS LTD. v. MINISTER OF NATIONAL REVENUE

Dumoulin J.

DUMOULIN J. now (December 15, 1959) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board, dated December 5, 1957[1], dismissing Regal Heights' prior appeal in respect of its income tax assessment for taxation year 1955.

Appellant, for the year 1955, reported in its regular annual return a taxable income of $970.94.

By a notice of assessment dated May 15, 1956, appellant was told that the minister had calculated the income taxable in an amount of $138,690.98.

Even before any recital of facts, it may be readily conjectured that I am faced with the ever-recurring technical distinction between income, i.e. net profits, and capital accretion, within the purview, *inter alia,* of ss. 3, 4, 6, 81(1) and 139(1)(*e*) of the 1952 *Income Tax Act.*

The conclusions of both parties, as we shall see, encompass the whole problem. On the one hand, Regal Heights Limited argues that (*vide*: Statement of Facts, ss. 10.(*d*) and 11.):

> 10(*d*) The gains which arose on realization were the result of disposing of capital assets and are not taxable under the provisions of the Income Tax Act.
>
> 11. In any event sales made by the liquidator of capital assets for the sole purpose of carrying out his statutory obligations to distribute the assets of the appellant do not in law constitute income.

To which, on the other hand, respondent counters that (*vide*: Reply to Notice of Appeal, s. 7):

> . . . the profit of the Appellant arising from the sale of real estate in 1955 is a profit from a business within the meaning of that word as used in the Income Tax Act and thereby income by virtue of sections 3 and 4 of the said Act.

And now the material occurrences leading up to the actual issue. On September 1, 1952, one Ben Raber, then of Medicine Hat and presently residing in Los Angeles, Calif., learned that a 40-acre property, known as Regal Golf Course, situate at 6th Street East and 16th Avenue, North-East Calgary, was for sale.

This land, located along the proposed route of the Trans-Canada Highway, about one mile from the Hudson's Bay

[1] (1957-58) Tax A.B.C. 266.

1959

REGAL HEIGHTS LTD. v. MINISTER OF NATIONAL REVENUE

Dumoulin J.

store, admittedly the central sector of Calgary, at once suggested many alluring potentialities to Mr. Raber's keen business acumen.

He, as prime mover of the scheme, envisioned the feasibility of using this site to provide North Calgary's growing population with a shopping centre. With this object in mind, Raber and his brother-in-law, Mr. Jacob Belzberg of Lethbridge, needed but very few days to organize a partnership with two more associates, Messrs. Harry Cohen and M. T. Riback, on an equal footing, and on September 8, 1952, the newly formed association purchased the 40 acres for $70,000 from Canada Permanent Mortgage Corporation of Edmonton. This land, as per the date of its acquisition, was under lease to Regal Golf Course until December 31, 1953.

However, this intervening period afforded the four partners ample time to further their plans for a shopping centre. At the end of November, 1952, Active Realty Company was retained to promote this shopping centre project and to negotiate in consequence with such commercial leaders as T. Eaton Co. Ltd., Hudson's Bay Co., Woodwards Ltd., and any other concern of comparable standing.

An application for rezoning the property from residential to commercial purposes was submitted to the Calgary Planning Board, on November 23, 1952, with an accompanying sketch plan (Ex. 3). Favourably considered by the Board, full approval of this request was withheld pending the start of construction work.

Two subsequent acquisitions took place, first, a corner property at 639 16th Avenue, N.E., bought on May 26, 1953, at a price of $14,700, in order to facilitate traffic conditions around the proposed enterprise; next, on March 1, 1954, "a one third undivided interest in additional property", paid $4,000, for advertising boards and commercial publicity. The total price of appellant's real estate holdings amounted to $88,700.

In the meantime, on February 15, 1954, the partnership above-mentioned had merged into a regularly incorporated company, under the provincial laws of Alberta (cf. Exhibits 1 and 2). At a subsequent stage of these notes, appellant's corporate status and more especially certain features of its Memorandum of Association, will require some scrutiny.

It should also be noted that newspaper publicity, consequent upon the application to the Calgary Planning Board, led some 60 business firms to inquire about available space; a list of these appears in the record as Ex. 5.

Early in June, 1954, a Winnipeg firm, that of David Slater Limited, conducted a survey of the site. David Slater & Co. specialized in these ventures and had assisted Simpsons-Sears Ltd. in planning their Winnipeg shopping centre. The consequent report dated October 27, 1954, and costing $3,000, proved a disappointment, since it concluded against the practicability, at this time, of the proposed scheme.

There may have existed several reasons for this adverse finding, one of which would amply suffice to explain it; a month before, on September 24, the press published as a news item Simpsons-Sears' decision to build a shopping centre in Calgary, on 16th Avenue and 14th Street N.W., some two miles from the Regal Heights' 40-acre estate.

Appellant's president, Mr. Harry Cohen, said in his testimony that Simpsons-Sears' unexpected move: "just took the wind out of our sails", and that it would be nothing short of temerity to erect, at tremendous cost, a second centre two miles distant from another major one.

Misfortunes usually happening in pairs, appellant's officers were told in December, that land taxes on the property ". . . would be revised upwards for 1955 because of the failure to commence construction of the centre", entailing a rise in valuation from $30,000 to $60,000.

For the above reasons: "the project as originally envisaged was thus frustrated and the only feasible alternative was to liquidate in an orderly fashion the capital assets of the appellant" (cf. Statement of Facts, s. 6(*h*), last paragraph).

Consequently, the four shareholders, on May 10, 1955, implemented their decision to wind up Regal Heights Ltd., and passed the necessary resolution, herein filed as Ex. 6.

According to Mr. Cohen's evidence, however, it would appear that appellant in December of 1954, five months or so previous to the voluntary winding-up of May, 1955, had disposed of 30 acres for $88,500, thereby assenting to "an unsolicited offer" from Quality Construction Ltd.

1959

REGAL HEIGHTS LTD. v. MINISTER OF NATIONAL REVENUE

Dumoulin J.

Two other sales followed: Royalite Oil Co. Ltd., buying the property at 639, 16th Avenue N.E., for $21,000; and, in May, 1955, Lyle Brothers Ltd. taking 6.3 acres of the residue at the rather astounding price of $143,200.

Both these sales were negotiated through the intermediary of Mr. Robert H. Barron, the company's liquidator. Regal Heights Ltd. still holds a remainder of 1.48 acres.

The practical and monetary results of this venture's less than three years' active duration (September 8, 1952–May, 1955), bring to the fore an investment of $88,700, gross returns of $252,700, from which $8,000 of known expenses ($3,000 to David Slater Ltd., and $5,000 for publicity costs, according to Mr. Cohen), must be deducted leaving a net profit not far below $150,000, if liquidation disbursements are somewhat arbitrarily valued at $6,000.

Such are the facts in this case, and before any attempt at unravelling the complexities of law involved, I feel in duty bound to say that Messrs. Cohen, Raber and Belzberg's testimonies substantiate full well the averment inserted in para. 5(*b*) of the Notice of Appeal, which I quote:

> . . . The intent of the partnership was to develop and construct a shopping centre for investment purposes, and it was felt that to do this successfully it was first necessary to have a major chain department store to locate in the centre and to act as nucleus.

The primary and preponderant aim, this much I readily grant; on the other hand, was there not the alternate, unescapably foreseen loop-hole of a profitable disposal of the land, should major expectations fail to materialize as, for instance, recently found in the matters of *Fogel v. M.N.R.*[1], and more particularly still in *Bayridge Estates Limited v. M.N.R.*[2].

Counsel for appellant, at the inception of trial objected to any evidence of facts prior to the company's incorporation in February, 1954.

Even though this objection were upheld, I doubt whether it could appreciably bear upon the final outcome. As things stand, the appellant itself devoted three pages of its Notice of Appeal to a chronological narration of certain developments anterior to 1954. Moreover, the corporate status

[1] [1959] C.T.C. 227; [1959] Ex. C.R. 363.
[2] [1959] C.T.C. 158; [1959] Ex. C.R. 248.

obtained in 1954, in virtue of which the four partners became the four sole shareholders, limited their individual liability to the public, but remains a mere incident so far as the relevant law is concerned. Nothing began in 1954, matters simply continued on their course with a "provincial" modification, nowise detracting from the requirements and implications of the "federal" statute applicable, albeit enhancing, possibly, the commercial intent of this enterprise. Therefore, this objection should be overruled.

The ten witnesses heard were unanimous in their joint belief that Regal Heights, and its 1350 feet of frontage along the already begun Trans-Canada Highway, offered quite a promising site for a shopping centre, until Simpsons-Sears' decision to build one two miles distant.

A different line of inquiry gave rise to a certain amount of contradiction between respondent's main witness, one Gerhart Feil, and Messrs. Aubrey Edwards, Benjamin Raber and Jacob Belzberg, called by appellant.

Mr. Edwards, a Calgary real estate operator, said he approached Harry Cohen, in July of 1954, suggesting to buy the company's land for a house-building plan. "Mr. Cohen, according to this witness, absolutely rejected my offer, explaining that his company had other aims in mind".

Gerhart Feil, also a local real estate agent, next took the stand. A director of Active Realty Co., this man contacted Harry Cohen sometime in 1952, offering to purchase the property at a price of $90,000, which was turned down and a counter-proposal of $150,000 made by Cohen.

Feil goes on to say that: "a hitch occurred when the income tax question arose, a matter raised by Mr. Belzberg of the Cohen group. We approached Mr. Donahue of the Calgary income tax office, and since the problem remained unsettled. Mr. Cohen intimated I should increase the offer to $225,000; the stretch of $75,000 intended to defray income dues".

Active Realty Co. had deposited $10,000, with its initial tender and kept alive its interest in the project, even after the "hitch" just referred to. Feil went to Toronto where he met several Simpsons-Sears officials, whom he strove to win over to this Regal Heights shopping centre scheme in Calgary.

1959

REGAL HEIGHTS LTD. v. MINISTER OF NATIONAL REVENUE

Dumoulin J.

On the other hand, and although hard to reconcile with Feil's preceding assertion, he also insisted, and I quote: "that at no time was I under the impression that I should find tenants for the proposed shopping centre. I always understood that I should attempt to dispose of this property piecemeal or otherwise".

At this same operator's request, on his own initiative, Mr. John Herbert Cook, a Calgary architect, was required, in February, 1953, to prepare with the greatest despatch, for the morrow, plans (now Ex. 8), of a commercial development on 6th Street East and 16th Avenue, North East Calgary.

Cross-examined as to these plans (Ex. 8), Feil was far from positive that he showed them to Harry Cohen who, questioned anew by counsel, flatly denied having ever seen them. The architect's bill, $190, was attended to by Feil out of his own money.

Mr. Cohen, whether anticipating or not Feil's statements, had nevertheless contradicted them in advance, maintaining that, in December of 1952, his partners and himself declined Feil's proposal to pay $164,000 for the estate, because ". . . we all were decidedly interested in our own development plan". No mention was made of a visit to Mr. Donahue, and no admission nor denial of any doubt or "hitch" having arisen concerning a possible tax complication.

Mr. Benjamin Raber, the real promoter, the *deus ex machina* of this venture, testified that he had arranged with Canada Permanent Trust Co. the purchase of these golf course links as a tentative spot for a shopping centre. Possessed of insufficient funds to personally handle the deal, he got in touch with Riback, Cohen, Belzberg and others, these latter of unrevealed identity assenting to join later on. Raber eventually met Gerhart Feil and told him his sole interest consisted in furthering a regional shopping centre and in nothing else.

At a meeting of the four partners, in January, 1953, adds Mr. Raber, "we unanimously resolved to refuse Feil's tempting offer of $164,500, so as to pursue our initial intention of investing in a commercial development.

Jacob Belzberg's evidence substantiated Raber's, with the additional information that, in October of 1952, Feil approached him with a view of buying the land at a price of $150,000, an attempt which, of course, also proved unsuccessful.

This ended the oral evidence.

Paragraph 4 of the Notice of Appeal recites some of the objects listed in appellant's Memorandum of Association (Ex. 2, s. 3, s-ss. (*a*) and (*b*)), inferring therefrom they "... do not include that of the business of selling real estate, and the appellant therefore did not have power to enter into such business and had it done so same would have been ultra vires".

This instrument contains other subsections, one of which, (*f*), to my mind, would refute such a restrictive connotation, since one of the company's objects is:

> (*f*) To transact or carry on all kinds of financial agency business, and in particular in relation to the investment of money, *the sale of property* [italics are mine] and the collection and receipt of money.

We have here another of those "frustration" cases which, of late years, seem to occur with increasing frequency.

I already spoke my conviction that Messrs. Cohen, Raber and Belzberg should be taken at their word that the motivating intention of this transaction was indeed to erect a shopping centre.

Even so, does a primary purpose necessarily exclude a secondary or ancillary one, meant to save the day should a "bolt out of the blue" shatter all else? Highly competent and experienced business men such as these surely did not ignore there was a second string to their bow: the estate's profitable resale, should, peradventure, the shopping centre one snap. A contrary opinion seems hardly tenable.

From its inception, the sole object of the partnership consisted in profit-making. This, it was hoped, would be achieved through the operation of a regional shopping centre. In the latter expectation, profit-taking could extend over a period of years. Fortuitously, the underlying intent of this enterprise, namely: profit, was attained by a quick turn-over of three transactions. The mode instrumental in

1959

REGAL HEIGHTS LTD. v. MINISTER OF NATIONAL REVENUE

Dumoulin J.

ensuring this result, though at one remove from the company's initial and most favoured ambition, does not detract from a basic profit-seeking venture.

After sifting the component factors of the case, its substantive residue shows a real estate transaction involving an outlay of $88,700, as of September 8, 1952, and netting a disposal price of $252,700, less than three years later, an over-all profit of approximately $150,000 for the newly formed company. Again, what might have happened, but failed to do so, is no concern of mine.

If this undertaking falls short of being ". . . an adventure or concern in the nature of trade . . ." or at the very least an ". . . undertaking of any kind whatsoever . . ." and therefore a "business" as outlined in s. 139(1)(*e*) of our Act, I am at a loss to find a more suitable qualificative.

A quotation from Hannan and Farnsworth's treatise *The Principles of Income Taxation,* may aptly conclude this analysis of appellant's motives and actions. I quote from p. 186:

> Where a company has been formed for the purpose of acquiring real property and turning it to account—whether by holding the property and deriving rents therefrom, or by disposing of it to advantage—the courts in this country (England) lean strongly to the view that the whole of the company's activities amount to the conduct of a business. Consequently, the fact of incorporation assumes great significance, while the motives of the persons who formed the company are treated as of little or no consequence.

Two cases previously alluded to, bear a close resemblance to the instant one, *Fogel v. M.N.R.*[1] and *Bayridge Estates Limited v. M.N.R.*[2]. In the former, Thurlow J. wrote:

> . . . it may well be that the partners preferred, as the course by which profit should be made from these particular lots, to carry out their schemes for building apartments on them and that, with this in mind, they held them, *preferring not to sell them even at a profit so long as any hope for the success of the scheme remained* [italics are mine]. But that is far from saying that the erection of apartment buildings to be held as income-producing investments was the sole purpose for which the lots in question were acquired.

[1] [1959] C.T.C. 227 at 234; [1959] Ex. C.R. 363.

[2] [1959] C.T.C. 158 at 160, 165; [1959] Ex. C.R. 248.

Several aspects of this and the *Bayridge* affair, also decided by Mr. Justice Thurlow, have in common several points strikingly alike, a few of which I quote:

> The case put forward on behalf of the appellant is that the land at Lachine was not purchased in the course of any business of dealing in real estate but was acquired for the sole purpose of constructing and operating a motel and service station thereon, *that it was only when such purpose failed* because of the appellant's inability to borrow the moneys required to carry out that purpose *that the appellant accepted an offer for the property and realized the profit in question*, . . .

Confronted with such a set of facts so closely allied with the actual matter, the learned judge held that:

> In my opinion, the sale of property for profit was one of the several alternative purposes for which the property was acquired, *and it was in the carrying out of that alternative purpose, when it became clear that the preferred purpose was unattainable, that the profit in question was made.* It was, accordingly, a profit made in an operation of business in carrying out a scheme for profit-making and was properly assessed.

It could go without saying that in all of these so-called "frustration" matters, recourse is had by Bench or Bar to a *locus classicus* of fifty-six years' standing *Californian Copper Syndicate v. Harris*[1], in a fashion somewhat reminiscent of a devout Moslem's dutiful pilgrimage to Mecca. So as not to depart from a time-honoured custom, I will insert a very concise excerpt from Lord Justice Clerk's speech:

> There are many companies which in their very inception are formed for such a purpose (i.e. profit), and in these cases it is not doubtful that, where they made a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

Short of holding that appellant's four shareholders set out upon this financial venture merely as disinterested crusaders for the shopping centre ideal, a notion which, I am positive, these gentlemen would unhesitatingly repudiate, then, in all respects, the issue squares with the precedents above.

The profits in question are the regular outcome of "an undertaking", a "venture in the nature of trade", in short of a business, and were properly assessed.

Therefore, the appeal is dismissed with costs.

Judgment accordingly.

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[1] (1904) 5 T.C. 159 at 165.