1959
Sept. 17-18
Oct. 15

BETWEEN:

ARTHUR STEKL ..... APPELLANT;

AND

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

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 67(1), 67(3), 68(1), 68(1)(c), 139(1)(e)—Companies Act of British Columbia, R.S.B.C. 1936, c. 42—Taxability of profit on sale of timber license dependent on true nature of transaction—Character of income not affected by subsequent use of it—Holding of property for re-sale at a profit not per se proof of profit from adventure in nature of trade—Meaning of adventure or concern in nature of trade—Dealing with subject matter of transaction as trader would do evidence of adventure in nature of trade.

The appellant with his wife and their two children came to Canada in 1940 from what had been Austro-Hungary where he had been in the lumber business for 33 years. After his arrival he engaged in various activities, including a lumber business, in the course of which he caused a company to be incorporated for the purpose of taking over certain assets, including a saw mill and some timber, which he had purchased in the name of the company. In 1945 the mill and the timber were disposed of and the appellant retired from active business but continued to be the manager of the company which lay dormant until 1952. In 1949 the appellant, who was interested in buying a timber license, was offered a timber license covering land on Gambier Island and bought it in 1950 for $5,500. It was the last asset in the estate of a company that was in voluntary liquidation. The purchase price came out of funds held by a Trust Company for the appellant's children and the title to the license was taken in the name of the Trust Company which held it in trust for the children. In 1952 the appellant decided to revive the company, his reason for doing so being that he bought a large apartment block in its name, the money for its purchase coming partly from funds held by the Trust Company for the children and partly from himself. He then reorganized the company in such a way that while the beneficial interest in it was entirely in the children he had complete control of it. In 1953 all the assets of the children, including the timber license, were brought into the company, the price at which it was taken being stated to be its fair market value of $15,000. The timber license was not actually transferred into the name of the company but, pursuant to a direction from the children, the Trust Company held it in trust for the company.

There was never any operation of business under the timber license and it remained the property of the company until it was sold in 1955. In that year, after the appellant had listed it for sale he sold it for $50,000 and the company invested the net proceeds of the sale in common stocks.

In its financial statement for 1955 the company showed the profit on the sale of the timber license as a capital profit of $32,236.68.

The company was a personal corporation within the meaning of section 68(1) of the *Income Tax Act*. In 1957 the Minister added the profit of $32,236.68 made on the sale of the timber license to the profit reported

by the company. Pursuant to section 67(3) of the Act this total was deemed to have been distributed to the shareholders of the company and the Minister assessed the appellant, his wife and the two children accordingly.

The appellant appealed against his assessment to the Income Tax Appeal Board which dismissed his appeal and he then appealed to this Court.

The appellant contended that he had purchased the timber license for an investment only but that when he received the offer of $50,000 for the license he saw the possibilities of buying other pieces of property with the money and decided to sell.

The appellant also contended that since the company's memorandum of association provided that it was incorporated for investment purposes only it did not have the right to engage in business and that if it did so its act was *ultra vires*. And he also contended that if the company engaged in business resulting in a taxable profit it could not be a personal corporation and that it, rather than he and the members of his family, should have been assessed for the profit.

Held: That in order to determine whether the profit on the sale of the timber license was the realization of an investment or a profit from a business, including therein an adventure or concern in the nature of trade, it is necessary to determine the true nature of the transaction relating to the timber license, including its purchase, the manner in which it was dealt with and its sale.

2. That the character of income cannot be affected by the use that is subsequently made of it, so that if the profit from the sale of the timber license was taxable as being a profit from an adventure in the nature of trade it cannot cease to be such by reason of the fact that the amount of the sale price was used to purchase common shares as investments. *Mersey Docks v. Lucas* (1882-3) 8 A.C. 891 applied.

3. That the appellant purchased the timber license in the name of the Trust Company, that when he sold it he acted for the company of which he had complete control and that his conduct must be considered as that of the persons for whom he acted from time to time.

4. That the appellant purchased and held the timber license with the intent, in the interests of the children, of selling it at a profit when what he considered was a good price could be obtained for it.

5. That while the fact that the appellant held the timber license for resale at a profit does not *per se* establish that the profit from its resale was a profit from an adventure in the nature of trade, the fact that the timber license was not the kind of property that is normally used for investment and an annual return from it could be produced only by an operation of business under it and that it was held for resale at a profit without any expectation of a return from it is some evidence that the profit was a profit from an adventure in the nature of trade. *Commissioners of Inland Revenue v. Reinhold* (1953) 34 T.C. 389 distinguished.

6. That the timber license was an asset such as a person engaged in the lumber business would be likely to have, that it would be more fairly regarded as a business or trade asset than as part of a business portfolio and that the actions of the appellant, throughout the whole of the timber license transaction, were like those that might be expected from a trader.

7. That the timber license transaction was an adventure in the nature of trade.

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8. That the taxability of the company's profit was not affected by the fact that it was incorporated for investment purposes only. The taxability of the profit depends on the true nature of the transaction and on what the company did, not on what it was empowered or not empowered to do.

9. That the fact that the company's timber license transaction was an adventure in the nature of trade did not put it into the category of having carried on an "active" business in 1955 in such a way as to deprive it of its character as a personal corporation.

10. That the appeal must be dismissed.

APPEAL from decision of the Income Tax Appeal Board.

The appeal was heard before the President of the Court at Victoria.

Max Grossman, Q.C., and *D. R. Sheppard* for appellant.

T. E. Jackson and *P. M. Troop* for respondent.

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

THE PRESIDENT now (October 15, 1959) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board, *sub nomine No. 556 v. M. N. R.*,[1] dated August 6, 1958, dismissing the appellant's appeal against his income tax assessment for 1955.

The issue in the appeal is whether the profit made by Somerset Limited, hereinafter called the Company, in 1955 on the sale of a timber license, described as Timber License No. 10598-P on Gambier Island in British Columbia, hereinafter called the timber licence, was the realization of an investment or a profit from a business within the meaning of sections 3 and 4 of the *Income Tax Act*, R. S. C. 1952, Chapter 148, and the definition of "business" in section 139(1)(e) with the inclusion therein of "an adventure or concern in the nature of trade."

Section 3 of the Act provides:

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.

[1] (1958) 20 Tax A.B.C. 77.

And section 4 enacts:

> 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.

and 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;

At the time of the sale the title to the timber license stood in the name of The Toronto General Trusts Corporation, hereinafter called the Trust Company, which held it in trust for the Company under circumstances to be set out later. At all material times the Company was a personal corporation, within the meaning of section 68(1) of the Act, formerly section 61 of *The Income Tax Act,* Statutes of Canada, 1948, chapter 52, consisting of the appellant and the members of his family, namely, his wife Magdalena, his son George and his daughter Eva (now Mrs. Cairns).

Since section 67(1) of the Act provides that the income of a personal corporation whether actually distributed or not shall be deemed to have been distributed to, and received by, the shareholders as a dividend on the last day of each taxation year of the corporation, the profit received by the Company on the sale of the timber license was assessed to the shareholders of the Company, the appellant and the members of his family, pursuant to section 67(3) of the Act and not to the Company. The members of the family have also appealed from the decision of the Income Tax Appeal Board dismissing their appeals from their respective assessments for 1955, but since they are in the same position of tax liability or otherwise as the appellant it has been agreed by counsel that their appeals should stand over until after this appeal has been determined and that they will abide by its result.

To determine whether the profit on the sale of the timber license was the realization of an investment, as contended for the appellant, or a profit from a business, including therein an adventure or concern in the nature of trade, as held by the Minister, it is necessary to determine the true nature of the transaction relating to the timber license, including its purchase, the manner in

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which it was dealt with and its sale. It was one of several transactions of various kinds entered into by the appellant, some of which were for himself and others for his children or for the Company. It would, I think, assist in the determination of the issue to set them out even although some of them may seem irrelevant.

The appellant, who now resides at Vancouver, came to Canada from Europe in 1940 with his wife and their two infant children. He had previously been the managing director and shareholder of the biggest lumber company in what had been Austro-Hungary and had been in the lumber business for 33 years. He was, of course, familiar with the tremendous inflation that had followed the first world war but this had not affected him personally as much as it had others by reason of the fact that his assets had been in real estate or shares in the lumber company which had exported its products in exchange for sound money. When he came to Canada he brought with him not more than 10 per cent of his European assets. This was in the form of United States dollars which he exchanged for Canadian currency.

After his arrival in Canada he looked for a lumber business and found one in 1940, but his means were not sufficient to carry it on and he sold his share in it in 1941. Then he looked for something on a smaller scale and found it in the form of the Royston property near Courtenay on Vancouver Island. This was held by the Custodian of Alien Enemy Property. He purchased the assets of this property in the name of Somerset Limited, the Company to which I have referred, which he had caused to be incorporated for the purpose of taking over these assets, which included a saw mill and some timber. The Company held the assets for only a few days and then transferred them to the appellant, his brother Albert and their respective wives, who operated the property. They formed two companies, Royston Saw Mills Limited and Royston Logging Company Limited. These companies had difficulty in finding the necessary crew to operate the mill and closed it with a loss in 1944 and finally disposed of the mill and the timber in 1945. The appellant sold his interest at a profit. He had also had a substantial share interest in Eburn Sawmills Limited which he had also disposed of at a profit.

After the appellant had disposed of his interest in the Royston property he retired from the lumber business as such and from active business generally. But he continued to be the manager of the Company.

I now come to the circumstances in which the timber license was purchased. It had been issued under the *Land Act* of British Columbia to Joseph Chew Lumber and Shingle Manufacturing Co., Ltd. on October 24, 1912, for the period of one year, renewable from year to year, and is now subject to the *Forest Act* of British Columbia, R.S.B.C. 1948, Chapter 128, as amended. It is a timber license of the type that, while it is for the period of one year, it is renewable from year to year, subject to certain payments, as long as there is timber on the land covered by it, so that, in effect, the licensee is the owner of the timber. The amount required to be paid annually to hold the license, inclusive of taxes and fire protection fees, was about $250.

The evidence relating to the purchase of the timber license may be put briefly. It was known to several timber license brokers, with whom the appellant was acquainted, that he was interested in buying a timber license and they offered several licenses to him. He considered some of them from the point of view of the timber covered by them but did not buy any until he bought the one in question. This was offered to him late in 1949 by Mr. E. R. Birnie, a timber license broker in Vancouver, whom he had known previously but with whom he had not had any previous dealings. Mr. Birnie knew that the appellant was a prospective purchaser of a timber license and offered him the timber license in question for $6,000. After some discussion the appellant made a counter-offer of $5,500. At the time the licensee, whose name had been changed from its former one to Joseph Chew Shingle Company Limited, was in voluntary liquidation. The timber license was the last asset in the estate and the liquidators were anxious to wind it up. Consequently, they gave the appellant an option to purchase the timber license for $5,500. He then investigated the matter, including a report by Mr. Birnie to him, dated November 16, 1949, of the results of a timber cruise that had been made in 1912. Having made his investigation, the appellant took up the option. On his cross-examination he stated that he found that the timber license was "a fair buy." The evidence does not disclose the date of Mr. Birnie's offer or the appellant's

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counter-offer or the liquidator's option but the purchase of the timber license was not completed until June 2, 1950. All the dealings respecting the purchase of the timber license were transacted by the appellant but the title to it was taken in the name of the Trust Company, the purchase price coming out of funds held by the Trust Company for the appellant's children, and the license was held by it in trust for the children who were then still infants.

It is now desirable to refer further to the Company. It was incorporated on May 26, 1943, under the *Companies Act* of British Columbia, R.S.B.C. 1936, Chapter 42, now R.S.B.C. 1948, Chapter 58, and the object for which it was incorporated, as set out in its memorandum of association, was stated to be

> (*a*) For investment purposes only to purchase, take in exchange or otherwise acquire real and personal property of all kinds.

The appellant said that he had caused the Company to be incorporated because he and his wife wanted to have an investment Company for their children. This statement is not correct. On his cross-examination he admitted that it had been incorporated for the purpose of purchasing the Royston property assets from the Custodian of Alien Enemy Property, who was willing to accept it, rather than the appellant, as a purchaser, and that after it had served that purpose he had no further use for it and it lay dormant until 1952. Thus the appellant's statement that the Company had been incorporated because he and his wife wanted an investment Company for their children is plainly an afterthought. At the time of the incorporation the children's assets were held in trust for them by the Trust Company which then served as an investment company for them.

In 1952 the appellant decided to revive the Company. Up to that time it had no assets and had not done anything except to take over the assets of the Royston Company for a few days as already stated. The reason for the revival was that in 1952 the appellant bought a large apartment block, called Somerset Manor, in the name of the Company. The money for the purchase came partly from funds held by the Trust Company for the children and partly from the appellant against debentures issued by the Company after its re-organization.

Originally the Company's authorized capital consisted of $10,000 in 100 shares of $100 each but in December, 1952,

it consisted of $10,000, divided into 200 preference shares of $1 each, 4,800 common "A" shares of $1 each and 5,000 common "B" shares of $1 each. The holders of common "A" shares had no rights to participate in the profits or assets of the Company and the holders of common "B" shares had no right to attend or vote at general meetings of the Company.

Counsel for the appellant stated, and the fact is confirmed by a table of adjustments for 1955 prepared by the Department, that 124 common "B" shares were issued to each of the children, that 50 common "A" shares were issued to the appellant and that 1 common "A" share was issued to each of the children with the result that while the beneficial interest in the Company was entirely in the children the appellant had complete control of it.

The appellant stated that it was his and his wife's intention to bring all the assets of the children into the Company. This was done in 1953. These assets consisted of cash, common stocks and the timber license. The authorized capital was increased by 100,000 preference "A" shares of $1 each and each of the children who had now become of age, received preference "A" shares for the transfer of the assets respectively made by them. By reason of sections 17(1) and 17(2) of the Act the price at which the timber limit was transferred to the Company was stated to be at its fair market value of $15,000 subject to certain conditions, and it was for half of this amount that preference "A" shares were issued to each of the children. The timber license was not actually transferred into the name of the Company but on June 26, 1953, the children directed the Trust Company to hold it in trust for the Company and to its order.

The timber license remained the property of the Company until it was sold in 1955. But before I set out the evidence relating to its sale I should refer to the reason given by the appellant for acquiring the timber license and the manner in which it was dealt with from the time of its acquisition to the time of its sale.

The appellant made much of his experience of inflation when he was in Europe prior to coming to Canada and stated that he had come to Canada with the knowledge that timber, real estate and company stocks were the investments that were safest against inflation, that his experience

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of inflation in Europe had motivated his actions in Canada and that this had been the reason why he had bought these three types of investments. He also said that he had a common purpose in the purchase of the timber license, the apartment block and the common stocks, namely, the benefit of the children, and that immediate income was not of tremendous interest because he had means of his own with which to support them. And he said that he had bought the timber license for an investment only, that he did not think at the time of its purchase of selling it at any time, that he wanted to keep it as an investment but that when he received such an offer as the one to which I shall refer and saw the possibilities of buying other pieces of real estate with the money he decided to sell.

The manner in which the timber license was dealt with while it was held for the children or by the Company is important. During that period, namely, from 1950 to 1955, there was no operation of any kind under the license by the appellant, the Trust Company or the Company. The appellant stated that revenue could have been obtained from the license in one of two ways, namely, either by cutting logs on the limits covered by the license and marketing them or by selling the right to cut logs and receiving royalties therefrom, the latter being the more usual way. But neither of these ways of obtaining revenues was followed. And when the appellant was asked why nothing had been done to obtain revenue from the license his answer was that he was looking at the timber limit as an investment—and not as a revenue producing property.

There is one other fact to which reference should now be made. The appellant was an experienced lumber business man and he knew the value of the timber license. The timber limits covered by it were on Gambier Island in Howe Sound about 10 miles from Vancouver. It will be remembered that when the timber license was transferred to the Company in 1953 its fair market value was put at $15,000, subject to certain conditions that indicated that it might be more, and the appellant gave two reasons for the increase from the sum of $5,500 which had been paid for the license in 1950. One of these was that the big lumber companies were buying up all the valuable timber so that the smaller companies were left practically without timber. The other

reason was that the Government of British Columbia had brought in a system of forest management licenses which had the effect of cutting the log supply of the small mills because not all of them could qualify for a forest management license. These facts gave a special value to the timber license. And there can be no doubt that the appellant with his lumbering experience and his knowledge of lumbering in British Columbia after his various activities in that field was fully aware of these factors and believed that they would be likely to make for an increase in the value of the timber license.

I now come to the evidence relating to its sale. There is some conflict in this. The appellant stated that Mr. Birnie, the person who had sold him the timber license in 1950, asked him whether he wanted to sell it because he had a buyer for it, that he repeatedly stated that he was not interested in selling it, that in November, 1954, Mr. Birnie told him that he had a buyer who was willing to pay $50,000 for it and that then he became interested, that he thought that this was such a price that he could invest the money for the children's sake and that early in 1955 he gave Mr. Birnie a listing of it against $5,000 down and $45,000 in two or three months. The details of the listing are set out in a letter from the Trust Company to Mr. Birnie, dated January 31, 1955. It was an exclusive one for a period of a week at the price of $50,000, on the basis of $5,000 cash as option money and the balance of $45,000 within 90 days, Mr. Birnie to be entitled to a commission of 10 per cent. On February 14, 1955, the Trust Company gave Mr. C. M. Johns a sole and exclusive option to purchase the timber license for $50,000 to be open for acceptance until May 9, 1955. Subsequently, on May 10, 1955, Mr. Johns asked for a month's extension which was granted for $2,000. The option was taken up and the purchase price paid to the Trust Company. The Company had a savings account with it and it credited the Company in its savings account with the amount of the money received. Thus the Company some time in June, 1955, received a net $47,000 for the timber license after payment of the commission of $5,000 to Mr. Birnie. The appellant said further that he thought that the price was an exorbitant one but that he saw other possibilities of investing the money and therefore decided to give Mr. Birnie a chance to sell it for $50,000.

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Mr. Birnie's evidence differs from that given by the appellant. He stated that after he had sold the timber license to the appellant in 1950 he used to meet him on the street and ask him whether he did not feel like selling it, that no price was discussed and that the appellant said that he was not ready to sell, but that, finally, in November, 1954, the appellant set a price of $50,000 for it and said that he would accept $50,000 and pay 10 per cent commission, that he then worked on the matter for some time and had four or five interested good prospects, that he then asked the appellant for an option which he said he would get, that he had a verbal listing before that but nothing that would prevent the appellant from selling the timber license himself, that when he asked for the written option he told the appellant that he had a very likely prospect. After Mr. Birnie got the listing Mr. Johns came up from Portland and he made all the necessary arrangements and closed the purchase.

I should here add the fact that the appellant admitted on his cross-examination that about the middle of 1954 he had given a Mr. Kerwin an option to purchase the timber license for about the same amount as its eventual sale price and that Mr. Kerwin had paid $1,000 for this option.

The first year for which the Company filed an income tax return was the year 1952. In that year its income, as shown by its financial statement, consisted of rent from the apartment block, Somerset Manor. In the following year, in which it had taken over from the Trust Company the assets of the children, the income consisted of rent and dividends from common shares in Canadian companies. In 1954 its income came from the same sources and the sum of $1,000 received for the option given to Mr. Kerwin appeared in the statement of assets and liabilities. In the financial statement for 1955 the profit on the sale of the timber license was shown as a capital profit of $32,236.68. This was the difference, subject to some adjustments of costs, between the net sum of $47,000, left after payment of the commission of $5,000, and the sum of $15,000, said to be the fair market price of the timber license when it was turned over to the Company in 1953.

On February 15, 1957, the Minister re-assessed the appellant and the other members of the Company. To the

profit of $7,180.66 reported by the Company for 1955 the Minister added the profit of $32,236.68 made on the sale of the timber license making a total of $39,417.34. Pursuant to section 67(3) of the Act this amount was deemed to have been distributed to the shareholders of the Company as follows, namely, $12,298.21 to the appellant, $12,455.88 to his son George Stekl, $12,298.21 to his daughter Eva Cairns and $2,365.04 to his wife Magdelena Stekl. On the re-assessment of February 12, 1957, the Minister added to the amount of income reported by the appellant on his income tax return for the year the sum of $12,298.21. And the Minister in assessing the other members of the Company added to the amounts respectively reported by them the amounts respectively referred to, less the appropriate adjustments.

There is no dispute about the amount of the assessment if the appellant and the others are found to be taxable. The appellant and the other members of the Company objected to the assessments but the Minister confirmed them and the appellant and the others appealed to the Income Tax Appeal Board which dismissed the appeals. It is from this decision and from the assessment that the appeal to this Court is brought.

Before commenting on the evidence I should refer to two arguments advanced by counsel for the appellant. He submitted, in effect, that since the Company's memorandum of association provided that the object for which it was incorporated was for investment purposes only it did not have the power to engage in business and that if it did so its act was *ultra vires* and void. But it is obvious that this cannot affect the taxability of a profit made by it if such profit was from a transaction that was a business transaction or an adventure or concern in the nature of trade. The taxability of the profits of a corporation depends on the true nature of its transaction, that is to say, on what it did, not on what it was empowered or not empowered to do.

And there is likewise no substance in the submission that if the Company was engaged in business resulting in a taxable profit it could not be a personal corporation and that, consequently, the corporation rather than the appellant and its members should have been assessed for the profit. The submission was based on section 68(1)

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(c) of the Act which included in the definition of a personal corporation the requirement that during the whole of the taxation year in respect of which the expression was applied the corporation "did not carry on an active financial, commercial or industrial business". In my opinion, even if the Company transaction relating to the timber was an adventure in the nature of trade that did not put it into the category of having carried on an "active" business in 1955 in such a way as to deprive it of its character as a personal corporation.

I should also point out that the fact that the net amount of $47,000 received for the timber license was invested in common stocks, as appears from the Company's statements, cannot affect the question of whether the profit on the sale of the timber license was taxable or not for it is a well settled principle that the character of income cannot be affected by the use that is subsequently made of it. If the income was taxable when it was earned its taxability cannot be affected by the fact that it was put to a particular use: *vide Mersey Docks v. Lucas*[1], so that if the profit from the sale of the timber license was taxable as being profit from an adventure in the nature of trade it cannot cease to be such by reason of the fact that the amount of the sale price was used to purchase common shares as investments.

I should also refer to a factor that somewhat complicates the issue. The timber license was purchased in the name of the Trust Company which held it in trust for the appellant's children and it was sold in the name of the Trust Company which then held it in trust for the Company which had acquired it from the children in 1953 by the issue of preference shares. But the appellant was the prime mover throughout. He negotiated the purchase and also negotiated the sale. It will, therefore, be more convenient to deal with the transaction as if it had been his transaction for he acted on behalf of the children when the timber license was purchased. And when it was sold he acted for the Company of which he had complete control. His conduct must be considered as that of the persons for whom he acted from time to time.

I now come to my findings of fact and my conclusion as to the true nature of the transaction under consideration. I have mentioned that there was conflict in the evidence

[1] (1882-3) 8 A.C. 891.

relating to the sale of the timber license. I have no hesitation in saying that in this conflict I prefer the evidence of Mr. Birnie to that of the appellant. I do not believe his statements that when he bought the timber license he did not think of selling it at any time or that he was not interested in selling it or that it was not until after Mr. Birnie told him that he had a buyer who was willing to pay $50,000 for it that he began to be interested. I prefer Mr. Birnie's statement that it was the appellant himself who set the price of $50,000. This is borne out by the appellant's admission on his cross-examination that about the middle of 1954 he had given Mr. Kerwin an option to purchase the timber license for about the same amount as it was eventually sold for and that he had received $1,000 from Mr. Kerwin for the option. This indicates that, notwithstanding his statements, he had tried to sell the timber license. And, while on his cross-examination he stated at first that he was not interested in the price of $50,000 but in the possibility of investing it in some other way, he finally admitted that if the price was right he was prepared to have the Company sell. The appellant sought to convey the impression that he was a reluctant vendor but that the price of $50,000 was exorbitant and he saw the possibility of investing the money and, consequently, decided to give Mr. Birnie a chance to sell it at $50,000, whereas the fact is that he set the price of $50,000 himself. I am satisfied that the appellant purchased and held the timber license with the intent, in the interests of the children, of selling it at a profit when what he considered was a good price could be obtained for it.

Moreover, I do not believe the appellant's statements that he bought the timber license for investment only and that he looked upon it as an investment. They did not ring true and the facts contradict him. He spoke as if the same consideration, namely, the fear of inflation, had motivated the purchase of the three types of property held by the Company, namely, the timber license, the apartment block and the common shares, and sought to convey the impression that they were basically the same. The facts do not support the statements or the impression. The appellant purchased the timber license in 1950 in a transaction that was quite different in character from that of the other transactions. The purchase of the apartment block in 1952 and the acquisition of the common shares in 1953 were plainly

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purchases of investments. Even if the fear of inflation motivated their acquisition, which I doubt, it had nothing whatever to do with the purchase of the timber license. The appellant bought it after examining several other timber licenses because he thought it was a "fair buy". I shall refer to this in greater detail later. Moreover, the timber license was different in character from that of the other types of property. It was not the kind of property that is normally used for investment. Revenue could not be produced from it except by some operation under it that was of a business nature, such as logging the timber and marketing it or selling the right to log the timber and receiving royalties. Revenue could not come from it by mere retention of it. In this respect it was different from the apartment block and the common shares. Nothing was ever done to produce any revenue from the timber license and it was never intended that any revenue should come from it. The appellant stated that he did not look upon the timber license as a revenue producing property. He was not interested in revenue from it. The fact is, notwithstanding his statements, that he did not purchase the timber license as an investment and did not really deal with or consider it as such. He was holding it for a rise in value and resale at a price which he considered really profitable. The fact that he had the children's welfare in mind does not affect the matter.

But, of course, the fact that a person held property for resale at a profit does not *per se* establish that the profit from its resale is a profit from an adventure or concern in the nature of trade. There was a clear application of this principle in *Commissioners of Inland Revenue v. Reinhold*,[1] on which counsel for the appellant strongly relied. In that case the respondent, a director of a company carrying on the business of warehousemen, bought four houses in January, 1945, and sold them at a profit in December, 1947. He admitted that he had bought the property with a view to resale, and had instructed his agents to sell whenever a suitable opportunity arose. On appeal before the General Commissioners he contended that the profit on the resale was not taxable. On behalf of the Crown it was contended that the purchase and sale of the property constituted an adventure in the nature of

[1] (1953) 34 T.C. 389.

trade, and that the profits arising therefrom were chargeable to income tax. The General Commissioners, being equally divided, allowed the appeal and the question of law for the opinion of the Court was whether they were justified in treating the profit as not assessable. It was held that the fact that the property was purchased with a view to resale did not of itself establish that the transaction was an adventure in the nature of trade, and that the Commissioners were justified in treating the profit as not assessable.

It appears from the reasons for judgment of Lord Carmont that the Lord Advocate, who appeared as counsel for the Crown, had argued that if at the time of purchase of the property the purchaser had resolved to sell on the happening of certain conditions, and *multo magis* if he had at the time of purchase instructed his agent to sell on the happening of that selected event, the transaction could never be treated as an investment but must be viewed as an adventure in the nature of trade and the profit or accretion treated as taxable income. The question could not have been put more directly. Lord Carmont could not accept this argument as valid. He relied upon the statement of Lord Dunedin in *Leeming v. Jones*:[1]

> . . . The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or concern in the nature of trade in respect of his investments, but *per se* it leads to no conclusion whatever.

And then Lord Carmont stated, at page 392:

> I do not wish, however, to read this passage out of its context and without regard to the facts then under consideration, and I draw attention to Lord Dunedin's language being used with reference to "an investment", meaning thereby, as I think, the purchase of something normally used to produce an annual return on such lands, houses, or stocks and shares. The language would, of course, cover the purchase of houses as in the present case, but would not cover a situation in which a purchaser bought a commodity which from its nature can give no annual return. This comment of mine is just another way of saying that certain transactions shew inherently that they are not investments but incursions into the realm of trade or adventures of that nature.

It is plain from this statement that Lord Carmont drew a distinction between the purchase for resale of property

[1] [1930] A.C. 415 at 423.

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normally used to produce an annual return and the purchase for resale of a commodity which from its nature can give no return. He repeated this distinction, at page 393:

> A disclosed intention not to hold what was being bought might, as Lord Dunedin said, provide an item of evidence that the buyer intended to trade, and if the commodity purchased in the single transaction was not of a kind normally used for investment but for trading, and if the commodity could not produce an annual return by retention in the hands of the purchaser, then the conclusion may easily be reached that the venture was a trading one.

In view of the distinction thus made the decision in the *Reinhold* case *(supra)* does not apply to the facts in this one and the defendant cannot find any comfort in it. Indeed, there is warrant in it for finding that, since the timber license was not the kind of property that is normally used for investment and "could not produce an annual return by retention in the hands of the purchaser" and since an annual return from it could be produced only by an operation of business under it, the holding of the timber license for sale at a profit is some evidence that the profit made on its sale was a profit from an adventure in the nature of trade.

The meaning of the term "adventure in the nature of trade," contained in the definition of business in section 139(1)(*e*) of the Act, was considered by this Court in *Minister of National Revenue v. Taylor*.[1] There I reviewed the English cases dealing with the meaning of the term and defining its ambit, there being no Canadian decisions on the subject up to that time, and expressed the view that it is not possible to determine the limits of the ambit of the term or lay down any single criterion for deciding whether a particular transaction is an adventure in the nature of trade for the answer in each case must depend on the facts and surrounding circumstances of the case. This was simply the repetition of statements made in several cases, of which the statement of Lord Russell in the *Reinhold* case *(supra)*, at page 394, is an example. There he said:

> The profit of an isolated transaction by way of purchase and resale at a profit may be taxable income under Schedule D if the transaction is properly to be regarded as "an adventure in the nature of trade." In each case regard must be had to the character and circumstances of the particular transaction.

[1] [1956] C.T.C. 189.

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It is the true nature of the transaction that must be determined.

But while it is not possible to lay down any single criterion of what constitutes an adventure in the nature of trade there are some specific guides in the decisions. One of them is that the nature and quantity of the subject matter of the transaction may be such as to exclude the possibility that its sale was the realization of an investment or otherwise of a capital nature or that it could have been disposed of otherwise than as a trade transaction: *vide* the reasons for judgment of Lord Sands in *Rutledge v. The Commissioners of Inland Revenue*[1] and the statement of Lord Carmont in the *Reinhold* case (*supra*), at page 392, that there are cases "where the commodity itself stamps the transaction as a trading venture." And there is an important guide in the decisions that if the transaction is of the same kind and carried on in the same way as a transaction of an ordinary trader or dealer in property of the same kind as the subject matter of the transaction it may fairly be called an adventure in the nature of trade. The decisions of the Lord President (Clyde) in *The Commissioners of Inland Revenue v. Livingston et al.*[2] and in the *Rutledge* case (*supra*), at page 497, and that of Lord Radcliffe in *Edwards v. Bairstow*[3] clearly afford a guide of this sort.

These guides have assisted me in reaching the conclusion that the purchase and resale of the timber license was an adventure in the nature of trade. I have already referred to the fact that it was property of a different kind from that normally used for investment, such as the apartment block and the common shares, and that no revenue could be obtained from it and I have expressed the opinion that the decision in the *Reinhold* case warrants a finding that in the circumstances the holding of the timber license for sale at a profit is some evidence that the profit made on its sale was a profit from an adventure in the nature of trade and I so find. The timber license as such was valuable only for use in a business activity and if no business operation was done under it the only value that it could have would be the amount for which it could be sold. In my opinion, the factors to which I have referred indicate that the timber license was an asset such as a person engaged in the lumber

[1] (1929) 14 T.C. 490 at 497. [2] (1926) 11 T.C. 538 at 542.
[3] [1955] 3 All E.R. 48 at 55.

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business would be likely to have and that it would be more fairly regarded as a business or trade asset than as part of an investment portfolio.

Moreover, the actions of the appellant, throughout the whole of the timber license transaction, were like those that might be expected from a trader. Its purchase bore all the indications of a trading venture. The appellant was an experienced lumber business man. He had been in that business for 33 years before he came to Canada and his first ventures in Canada were in the lumber business and, with the exception of his dealings with the Royston property, he made a profit out of them, including his first venture and a later association with Eburn Saw Mills Limited. And while he retired from active lumber business in 1945 his interest in it did not cease. He was anxious to acquire a timber license for the benefit of his children and it was known to several timber license brokers that he was in the market for one. He was in touch with market conditions and knew the value of such a property. Several timber licenses were offered to him and he considered some of them. Then when Mr. Birnie, who knew that he was a prospective purchaser, offered him the timber license in question for $6,000 he was interested in it and obtained an option to purchase it for $5,500. It was the last remaining asset of a company in liquidation and the liquidators were anxious to wind up the estate. The appellant investigated the facts and obtained a report of a timber cruise that had been made. He was satisfied with the report even although it was that of a cruise that had been made in 1912. After his investigation he purchased the timber license for the benefit of the children because, as he put it, he thought it was a "fair buy". I have no doubt in my mind that he knew that he had made a great bargain as, indeed, it turned out to be.

The appellant never did anything with the license either during the period when it was held by the Trust Company for the children or during the period when it was held for the Company and he never did intend to do anything with it except to sell it. No revenue was ever produced from it and it was not intended that any should be produced. The appellant did not look upon the timber license as a revenue producing property. He never dealt with it as an investment and I have no hesitation in finding that he never regarded it as such. He knew that the limits covered by the timber

license were favorably located and that there was every likelihood that there would be a substantial increase in its value. When he set its fair market value at $15,000 when it was transferred to the Company in 1953 he knew that it was worth more than that. As a matter of fact, the appellant is fortunate that only the increase from $15,000 to $47,000 was assessed against the members of the Company. In my judgment, it is clear that the appellant was not interested in the timber license as an investment but held it for re-sale at the highest price that he could get and he knew that it would be a good one.

There is support for this conclusion in the appellant's efforts to sell the timber license. He knew, for the reasons given by him to which I have referred, that it was a valuable one. This is proved by the fact that about a year after its transfer to the Company he tried to sell it for approximately $50,000 and that early in January, 1955, he listed it with Mr. Birnie for sale at $50,000 and sold it for that amount.

Consequently, I find that the timber license transaction was an adventure in the nature of trade and that the profit resulting from its sale was a profit from an adventure in the nature of trade and, consequently, a profit from a business within the meaning of the definition in section 139(1)(*e*) of the Act and therefore taxable income under sections 3 and 4. The Minister was, therefore, right in assessing the appellant as he did and his appeal from the decision of the Income Tax Appeal Board and from the assessment for 1955 must be dismissed with costs.

Judgment accordingly.