

THOMAS CAMPBELLAPPELLANT;

1952

AND

*Jun 5
*Oct. 7

THE MINISTER OF NATIONAL
REVENUE } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Revenue—Income tax—Profit from resale of real estate by individual—Whether income or capital gain—Whether realization or change of investment—Whether carrying on business—Income War Tax Act, R.S.C. 1927, c. 97, s. 3(1)—Practice—Appeal from Income Tax Appeal Board a trial de novo.

The appellant was assessed for income tax in respect of profits realized by him on the sale of three apartment blocks which he had caused to be built in the City of Vancouver between the years 1945 and 1948. The first of these had been built in 1945 and sold in 1946; the second had been commenced in 1946 and sold in the summer of 1947 and construction of the third had been commenced in 1948 and sold in that year before it was completed.

The appellant appealed to the Income Tax Appeal Board contending that his purpose in building each of the apartments was as an investment in the expectation of receiving an income from the rentals and providing living accomodation for himself and his family. The Board held upon the evidence that the profits were not realized from the enhancement in value of an ordinary investment but rather from what was in fact the carrying on of a business. An appeal to the Exchequer Court from this decision was dismissed.

Held: The appeal should be dismissed, there being evidence upon which the Income Tax Appeal Board and the Exchequer Court might properly hold that the appellant was carrying on the business of constructing the buildings for the purpose of resale at a profit.

Californian Copper Syndicate v. Harris [1904] 5 Tax C. 159 and *Commissioner of Taxes v. Melbourne Trust Ltd.* [1914] A.C. 1001 referred to.

APPEAL from the judgment of the Exchequer Court of Canada (1), Sydney Smith, Deputy Judge, dismissing an appeal from the decision of the Income Tax Appeal Board and holding that the appellant was assessable for income tax.

A. S. Gregory for the appellant.

W. R. Jackett Q.C. and F. J. Cross for the respondent.

*PRESENT: Kerwin, Kellock, Locke, Cartwright and Fauteux JJ.

(1) [1951] Ex. C.R. 290.

1952

CAMPBELL
v.
MINISTER
OF
NATIONAL
REVENUE

The judgment of the Court was delivered by:—

LOCKE J.—The question to be determined in the present matter is as to whether certain profits realized by the appellant in the taxation years 1946, 1947 and 1948 were income, within the meaning of that term as defined by subsection 1 of section 3 of the *Income War Tax Act* (c. 97, R.S.C. 1927 as amended). The subsection, so far as relevant, reads:—

For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere.

To the income as reported by the appellant in his income tax returns there was added by the Minister a sum of \$2,000 for the taxation year 1946, \$29,500 for the year 1947 and \$31,880 for the year 1948, these amounts being profits made by him on the sale of three apartment blocks, which he had caused to be constructed in the City of Vancouver between the years 1945 and 1948. The first of these, the Promenade Apartments, had been built in the year 1945 and sold in the month of April 1946; the second called the Seacrest, the construction of which was commenced in 1946 was sold in the summer of 1947 and the third called the Harcrest, the construction of which was commenced in March of 1948 was sold by the appellant in that year, before completion.

The appellant appealed to the Income Tax Appeal Board. While the proceedings before that court are in form an appeal from the decision of the Minister of National Revenue, the hearings are in the nature of a trial in which both parties are entitled to call evidence. In the present matter, the appellant gave evidence before the Board in support of his contention that his purpose in building the first of these apartments was as an investment in the expectation of receiving an income from the rentals, at the same time affording living accommodation for himself and his family in one of the suites, and that it was due to unforeseen circumstances that it became necessary for him to sell the property. The two other blocks were

built with the same end in view, according to the appellant, and in each case it was necessary for him to sell for reasons which he had not foreseen when undertaking the construction. The appellant accordingly contended that the profits realized were in the nature of capital gains and did not fall within the definition of income in the statute. On cross-examination it was disclosed that in the year 1943 the appellant had sold an apartment block containing ten suites which he had had built some four years earlier and which, the appellant said, had been constructed for the same purpose as the apartments in question, and that in that year he had purchased a large house on Hudson Street which he intended to turn into suites and which, after it had been remodelled, he had sold.

In a carefully considered judgment the learned Assistant Chairman of the Income Tax Appeal Board, Mr. Fabio Monet, Q.C. found that the appellant had realized the profits in question while engaged in carrying on a business or activity, within the meaning of subsection 1 of section 3. Mr. Monet, with whose reasons for judgment Mr. W. S. Fisher, Q.C., the other member of the Board who presided at the hearing agreed, applying the principle stated in the judgment of the Lord Justice-Clerk in *Californian Copper Syndicate v. Harris* (1), found that these were not profits realized from the enhancement in value of an ordinary investment but rather from what was in fact the carrying on of a business. Considering, however, that the appellant had been improperly assessed in the sum of \$2,000 for the taxation year 1946, his appeal in this respect was allowed, the assessment for the year 1947 amended by deducting from it the amount of \$300. The appeal in respect of the year 1948 was dismissed.

The proceedings on an appeal in such matters to the Exchequer Court are in the nature of a trial de novo and the appellant again gave evidence in that Court (2) and was cross-examined at length, and further evidence was given by his wife as to the reasons which had led her husband to sell certain of the properties. In the reasons for judgment of Mr. Justice Sidney Smith (2) he expressed the opinion that on the evidence the appellant was carrying on a trade, business or calling for the purpose of making

1952
CAMPBELL
v.
MINISTER
OF
NATIONAL
REVENUE
Locke J.

(1) (1904) 5 Tax C. 159 at 165.

(2) [1951] Ex. C.R. 290.

1952
 CAMPBELL
 v.
 MINISTER
 OF
 NATIONAL
 REVENUE
 ———
 Locke J.
 ———

profits during the periods in question, saying that his reasons for this conclusion of fact were substantially those of the learned Assistant Chairman of the Income Tax Appeal Board and that he agreed with the latter's statement as to the applicable principles of law. On the evidence before him he held, however, that for the year 1946 \$8,700 should be added to the amount of the assessment and a like amount deducted from that made in the year 1947: for the year 1948 he considered the amount as found by the Board should remain unchanged and, with these variations, dismissed the appeal.

While the proceedings before the Income Tax Appeal Board under the provisions of the *Income Tax Act* are by way of appeal from decisions of the Minister, the proceedings in the present matter are indistinguishable from those upon the trial of issues in other courts of record. By subsection 2 of section 91 of the *Act*, upon completion of the steps required by the statute on an appeal to the Exchequer Court, the matter is to be deemed as an action in that Court and the proceedings are conducted in the same manner as in other actions. The question as to whether the appellant was engaged during the years in question in carrying on the business of building apartment blocks with a view to reselling them at a profit is one of fact. While the decision in *Californian Copper Syndicate v. Harris* turned upon the interpretation of Schedule D of the Income Tax Act of 1842, the passage from the judgment of the Lord Justice-Clerk, referred to in the judgment of the learned Assistant Chairman, in my opinion, expresses the principle which is applicable here. In delivering the judgment of the Judicial Committee in *Commissioner of Taxes v. Melbourne Trust Limited* (1), Lord Dunedin quotes with approval the passage from the judgment in the *Californian Copper Syndicate* case reading:—

It is quite a well settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business.

(1) [1914] A.C. 1001 at 1010.

The learned members of the Income Tax Appeal Board having heard the evidence of the appellant did not accept his statement that he had caused to be built these various properties for the purposes of investment and concluded that in truth he was carrying on the business of constructing them for the purpose of resale at a profit. The learned Deputy Judge of the Exchequer Court having again heard the appellant's evidence in the matter has come to the same conclusion. Mr. Gregory's able argument for the appellant has failed to satisfy me that there is any ground upon which we are justified in interfering with these findings.

1952
CAMPBELL
v.
MINISTER
OF
NATIONAL
REVENUE
Locke J.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. S. Gregory.*

Solicitor for the respondent: *F. J. Cross.*
