
THE MINISTER OF NATIONAL } APPELLANT;
 REVENUE }

AND

INDEPENDENCE FOUNDERS LIM- } RESPONDENT.
 TED }

1953
 *May 19, 20
 *Oct. 6

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income and excess profits tax—Investment trust business by company—Whether profits on securities lying passive in its hands taxable—Income War Tax Act, R.S.C. 1927, c. 97.

The respondent's business consisted of the sale of certificates representing fractional interests in Trust Shares issued by the Royal Trust Co. against "blocks" or "units" of American and Canadian securities deposited with it by the respondent. These certificates could be purchased outright or by periodic payments. The holder of these certificates could exchange them for Trust Shares which in turn could be disposed of on the market. Fees were charged by the respondent on these transactions.

*PRESENT: Rand, Kellock, Estey, Locke and Cartwright JJ.

1953
 MINISTER OF
 NATIONAL
 REVENUE
 v.
 INDE-
 PENDENCE
 FOUNDERS
 LTD.

During the taxation years in question, the respondent was unable to buy the American securities required to create new "blocks" or "units" against which further Trust Shares could be issued. Consequently, in order to be able to make further sales of certificates and to meet the requirements of deferred sales already made, the respondent was forced to re-purchase Trust Shares from holders desiring to dispose of them. The profits realized when these re-purchased Trust Shares were sold at prices in excess of their cost to the respondent were assessed by the Minister but held to be not taxable by the Exchequer Court.

Held (reversing the judgment appealed from), that the dealings in the Trust Shares were part of the respondent's business and the profits, therefore, taxable.

APPEAL from the judgment of the Exchequer Court of Canada (1), Sydney Smith, Deputy Judge, holding that the amounts received by the respondent in the years 1943, 1944, 1945 and 1946 from the sale of Independence Founders Trust Shares were not income.

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

J. L. Lawrence for the respondent.

RAND J.:—The business structure of the respondent consisted of transactions of the following type. A block or unit of selected stocks was purchased and, along with certain money for incidental purposes, deposited with a trust company which I shall call trust company A. Against that unit 2,000 trust shares represented by appropriate transferable certificates were issued to the respondent. These trust shares, in turn, were placed by the respondent in the custody of a second or trust company B, and against them investment certificates were issued, representing fractional interests in one or more trust shares according to the amount paid by an investor. The sale of the certificates was carried on by the respondent and as can be seen, the business lent itself to a wide scale diffusion of small investment. Provision for contract purchases by periodic payments was contained in the certificates. The holder of a sufficient number was entitled to require trust company B to redeem them in cash by way of sale at the current price or to deliver to him their equivalent in trust shares; the holders of trust shares could require their redemption in cash or, in lots of not less than 400, the surrender of stock share certificates of equivalent value. New units might

from time to time be deposited with trust company A, followed in turn by the issue of trust shares and investment certificates.

The obligations of the respondent were to manage the original investment units which entailed a continuing rapport with market conditions and such substitutions in the shares as might be necessary to preserve the balance in the investments looking to soundness and stability of value; and to maintain sufficient trust shares with trust company B to meet all purchases, present or contracted. The respondent was entitled to a percentage fee for supervising investments and various other fees payable on the sale of trust shares and investment certificates. Fees were payable also to the trust companies.

The shares specified for unit purchases included a number of United States securities, but in the period from 1943 to 1946 dealings in them became difficult by reason of the Foreign Exchange Control regulations. In order, therefore, to meet unexecuted contract purchases of investment certificates, the respondent was obliged to purchase trust shares on the Canadian markets, and this it did on a substantial scale during the taxation years 1943, 1944, 1945 and 1946.

The dispute is whether profits accruing to the respondent from those dealings are taxable. The contention is that since the respondent was under an obligation to maintain a certain capital with trust company B as the subject matter of value represented by the investment certificates, it was not in the position of an ordinary broker; that it was carrying out only an obligation related to capital; and that any resulting increase in value realized is an accretion to capital and not income.

I am unable to attribute to that obligation the effect claimed by Mr. Lawrence. The business of the respondent was one and entire and the profits of a business may consist in what are in one sense capital gains as well as what is strictly income. The business being an entirety, it embraced all those relations, obligations and responsibilities with which its activities were bound up. The duty to keep trust company B supplied with trust shares was just one feature of it. The necessity for maintaining the security

1953
 MINISTER OF
 NATIONAL
 REVENUE
 v.
 INDEPENDENCE
 FOUNDERS
 LTD.
 Rand J.
 —

1953
 MINISTER OF
 NATIONAL
 REVENUE
 v.
 INDE-
 PENDENCE
 FOUNDERS
 LTD.
 Rand J.

followed from the respondent's mode of disposing of investment certificates; if it had not invited contract purchases, the necessity would not have arisen; and the fact that the Exchange Regulations entered into the matter cannot affect the nature of its dealings.

Smith J. (1) states the essence of his judgment against the Crown in these words:—

What have been assessed in this case are the increases in market value of securities that have been lying passive in the appellant's (respondent's) hands. Appellant claims that these increases in value are capital increments and not income at all; the Minister claims that they constitute a profit in a commodity that it is the appellant's business to deal in, and so are income within the relevant acts.

And he proceeds:—

As I have said, the appellant has neither profits nor loss on securities while they are the subjects of deals with clients. Though it can gain or lose on securities that are lying passive in its hands, it is as liable to lose as to win, according to the general market . . . The effect of all this is that, though buying and selling interests in securities are essential to the appellant's business, these transactions are not its livelihood. In fact, with regard to these transactions the appellant is in much the position of a broker relying on commissions. It is only on fluctuations on the market for shares not being bought or sold that appellant can make a profit. It does not seek the profit, which is just as likely to be a loss. If profit, it is a fortunate profit.

He likens these securities in the hands of the respondent to timberlands held by a logging company, and rejects the view that in contrast to that situation, here there is a case of dealing in securities and that they are bought for resale. This he does not think "necessarily enough to attach the tax."

No doubt increases in market value accrue while securities are retained in the respondent's hands, but obviously as such they have not been taxed: it is the profit made on selling them that is in question.

He uses the analogy also of maintaining a picture gallery for exhibition purposes only, intended to be supported by admission charges. To sustain the interest of patrons, the proprietor may be obliged to keep the collection revolving and in that way keep buying and selling pictures even though he has no desire to be a dealer and though he is "as likely to lose as to gain by his dealings", and he adds:—

Similarly the appellant keeps securities not as a dealer but as an inducement to persuade clients to buy and to pay it commissions. These

securities are like the tools of a trade; the user of tools must keep replacing them and may be lucky enough to have them rise in value after replacement; but I quite fail to see how the increase could be treated as income.

But, apart altogether from the question of taxability of the art dealer, is the analogy valid? From the initial purchase of stock shares down to the special purchase of trust shares the respondent bought for the specific purpose of reselling by means of investment certificates. The purchase of the trust shares was to protect outstanding contracts but, in effect, by way of resale as instalments were paid. But the exhibitor did not buy pictures for the purpose of resale, even though the course of his business might from time to time require a change of exhibits. The trial judge appears to disregard the obligation to maintain trust share value to meet outstanding contracts; but, in the circumstances, the respondent was bound to make the purchases as part of the transactions under which the contract sales of interests were made: these features cannot be separated.

Once all contracts or sales have been concluded, the respondent can, in a sense, be said to stand by as manager or servicing agent of a trust structure in which the legal and beneficial interests in the property are vested in other persons. The possibility exists that the entire beneficial interests might be converted into the original legal interests and the total structure disappear, but that is not what is contemplated; and a complete liquidation is provided for at the end of twenty years. But the duties of management, the responsibilities associated with redeemed or exchanged certificates or trust shares, the interest of an increasing body of distributed investment: all these, as well as other incidental features, such as that which actually developed in 1943, remain at the charge and for the benefit of the respondent. What was in the minds of those who set this scheme on foot was a business of expanding and recurring transactions of purchase and sale within the period mentioned. The income from the transactions in question, forming part of this totality, whether profits or fees, is taxable income.

I would, therefore, allow the appeal, restore the assessment and dismiss the appeal to the Exchequer Court with costs in both courts.

1953
 MINISTER OF
 NATIONAL
 REVENUE
 v.
 INDE-
 PENDENCE
 FOUNDERS
 LTD.
 Rand J.

1953
 MINISTER OF
 NATIONAL
 REVENUE
 v.
 INDE-
 PENDENCE
 FOUNDERS
 LTD.
 —

KELLOCK J.:—In the course of its business the respondent company purchases securities which it deposits in “units” or “blocks” with the Royal Trust Company, receiving from that company “trust shares”, all as provided for in the agreement relating to this part of the business. These trust shares are, in turn, under the terms of a further agreement, deposited with the Prudential Trust Company and certificates representing an interest in the trust shares are sold as investments to clients of the respondent. Some of the contracts represented by these certificates cover immediate purchases while others provide for deferred purchases. The holders of certificates are entitled to present them to the Prudential Company at any time and to receive in exchange their value in trust shares or in cash.

During the years here in question the respondent, as a result of a change in circumstances which need not be specified, was no longer able to acquire satisfactory securities for the purpose of making deposits with the Royal Trust Company. The respondent accordingly found it necessary to purchase the trust shares which the Prudential Trust Company from time to time were called upon by holders of certificates to realize upon, in order that the respondent might thus be in a position to make further sales of certificates or to meet the deposit requirements of deferred sales already made. From such transactions the respondent realized profits which the Crown claims represent taxable income but which the respondent claims represent capital gains.

The argument on behalf of the respondent is that its real business is the making of the fees provided for under the agreements, namely, for its services with respect to the management of the underlying securities deposited with the Royal Trust Company as well as the various other fees provided for by the agreements upon the issue and surrender of trust shares and certificates. As to the transactions in question, the respondent contends it did not enter into them with the intention of making profit and that this factor is determinative of the character, for taxation purposes, of the profits which are the subject of these proceedings.

In my opinion this contention is insupportable. The dealings in the trust shares were an essential part of the business in which the respondent company was engaged. Without them, what the respondent calls its main business would have been very much contracted if not brought completely to an end. The principle stated by Lord Maugham in *Punjab Co-operative Bank v. Income Tax Commissioner* (1), in words used in the *California Copper* case (2), is applicable, namely,

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.

I would allow the appeal with costs throughout.

ESTER, J.:—This is an appeal from a decision in the Exchequer Court (3) holding that the amounts received by the respondent in each of the years 1943, 1944, 1945 and 1946 from the sale of Independence Founders Trust Shares (hereinafter referred to as Trust Shares) were not income within the meaning of the *Income War Tax Act* (R.S.C. 1927, c. 97, and amendments thereto) and the *Excess Profits Tax Act* (S. of C. 1940, c. 32). The appellant here contends that these amounts were income as defined in these statutes and taxable under the provisions thereof.

The respondent, Independence Founders Limited, incorporated under the laws of British Columbia in 1933, invested its capital in Canadian and American securities which, under the terms of an agreement made between it and the Royal Trust Company dated January 1, 1936, were deposited in units or blocks with the Royal Trust Company as trustee. When so deposited these securities were registered in the name of the Royal Trust Company as trustee, which issued to the respondent Trust Shares, each Trust Share representing a $\frac{1}{2000}$ th undivided interest in the unit or block of securities.

The respondent, under the terms of an agreement made with the Prudential Trust Company Limited dated March 23, 1933, as amended April 1, 1936, sold trustee investment certificates to persons desiring to invest in Trust Shares, either on a cash or time basis, and deposited with the

(1) [1940] A.C. 1055 at 1072.

(2) (1904) 5 T.C. 159.

(3) [1952] Ex. C.R. 102.

1953
 MINISTER OF
 NATIONAL
 REVENUE
 v.
 INDE-
 PENDENCE
 FOUNDERS
 LTD.
 Estey J.

Prudential Trust Company Limited the Trust Shares. These certificates, signed by the respondent, certified that the investor was the registered holder of the "Investment Certificate evidencing and embodying an agreement for Investment in Trust Shares." Upon each certificate the Prudential Trust Company Limited certified that the investor named therein was registered at the office of the Prudential as holder of the certificate. When the investor had paid one or more instalments he had a right, under the terms of the investment certificate, to surrender that certificate and to be paid in cash the value thereof. The investor who held his certificate until maturity might exercise certain other options not material to the present issues.

Under the foregoing the respondent's income was derived only from certain charges provided for in the agreement under which the investor bought the Trust Shares.

In 1943 Foreign Exchange Control Board regulations first restricted and then prohibited the purchase of United States securities. Thereafter it was impossible for the respondent to purchase United States securities and create further units or blocks of Canadian and United States securities to be deposited with the Royal Trust Company upon which the latter would issue further Trust Shares. The respondent's position then was as stated in its factum:

To stay in business the Respondent abandoned its former practice of selling securities whenever an Investor wished to cash in and instead paid him in cash.

or, as stated by respondent's Managing Director, Mr. Barker, in referring to the situation after the Foreign Exchange Control Board regulations came into force:

Yes, it was different, in that the requirements now had to be principally filled by the redemption of old accounts—accounts that were surrendered. We provided the principal part of the trustee property that was allocated; whereas prior the principal part of which property as we were doing business and opening new accounts came through acquiring an underlying unit with the trust company, creating new trust shares.

The company had the power to purchase and sell these Trust Shares and did so by exercising its option to purchase Trust Shares from those who desired to surrender same.

Mr. Barker agreed that the dealing in these Trust Shares was thereafter a necessary part of the business of the company. It would, therefore, seem that at least in part its business was the buying and selling of Trust Shares. Each purchase and subsequent sale was carried out at the market value of these shares on the day of the respective transactions. In each of the years the company benefited by the fact that the sales totalled an amount greater than the purchase price. In other words, while the Trust Shares were in respondent's hands they appreciated in value in each of the years as follows:

1943	\$ 7,498.89
1944	10,876.05
1945	11,798.96
1946	20,727.15

The relevant difference in the nature and character of respondent's business after the Foreign Exchange Control Board regulations prohibited purchase of American securities may be summarized as follows: Prior thereto when an investor desired to surrender and realize the cash value of his trust shares the respondent complied with his request by selling underlying securities. The respondent would then purchase additional underlying securities upon which new Trust Shares would be issued. Under this procedure any fluctuation of the value of the Trust Shares was entirely a loss or gain to the investor. This procedure was abandoned after the Foreign Exchange Control Board regulations came into force. The respondent would then, when the investor desired to surrender and realize the cash value of his Trust Shares, exercise its option to purchase these, which it did in its own right at the current market value, for the purpose of selling or allocating them subsequently to other investors at the then current market price. In the interval between the purchase and sale the Trust Shares were the property of the respondent and it profited or lost according as the Trust Shares fluctuated upwards or downwards.

The respondent, however, contends that the "Trust Shares are only title to these securities which still remain capital" and "What the Respondent did was to allocate an interest in the securities to an investor and thereafter manage his interest for him. What was capital in its hands

1953
 MINISTER OF
 NATIONAL
 REVENUE
 v.
 INDE-
 PENDENCE
 FOUNDERS
 LTD.
 Estey J.

1953
 MINISTER OF
 NATIONAL
 REVENUE
 v.
 INDE-
 PENDENCE
 FOUNDERS
 LTD.
 Estey J.

became capital of the investor." The Trust Shares represented a claim to an undivided interest in the underlying securities. (In certain events not material hereto an investor might, at maturity of the contract, surrender his shares and obtain a proportionate share of the underlying securities.) The title to the underlying securities at all times material hereto remained in the Royal Trust Company as trustee. The respondent, in purchasing these shares, was in reality purchasing the investor's contractual undivided interest in the underlying securities. In these circumstances this is not a sale of a capital asset such as a timber limit purchased by a logging company for the extraction of timber, nor of pictures of an art collector who charges fees for admission to his gallery, nor the instruments of a music teacher used in giving lessons, nor the automobiles of a taxi company. It is rather the purchase of these Trust Shares for the purpose of reselling them at such time as the investor's payments might require them.

The amounts here in question would seem to have been realized in the ordinary course of the respondent's business and taxable as income within the meaning of the oft-quoted statement of Lord Justice Clerk in *Californian Copper Syndicate v. Harris* (1):

It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise 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 realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business.

The part of the foregoing statement material to this discussion was quoted with approval by Duff J. (later C.J.) in the judgment of this Court in *Merritt Realty Company Limited v. Brown* (2), where the revenue realized by a private company from the sale of real estate was held not to be accretions to capital but rather profit realized by the company in carrying out a scheme for profit-making. As Duff J. stated at p. 189:

When the facts proved are taken into consideration, there seems to me no real ground for doubting that the properties in which the company dealt were acquired for the purpose of turning them to account to the profit of the company, by sale, if necessary.

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

(2) [1932] S.C.R. 187.

See also *Atlantic Sugar Refineries Ltd. v. Minister of National Revenue* (1).

In *Punjab Co-operative Bank Ltd. v. Commissioners of Income Tax* (2), where the bank sold its securities in order to provide funds to meet the withdrawals of its depositors, it was stated:

It seems to their Lordships to be quite clear that this is a normal step in carrying on the banking business; in other words, that it is an act done in what is truly the carrying on of the banking business.

The respondent's counsel cites a passage of Lord Buckmaster in *Ducker v. Rees Roturbo Development Syndicate* (3). In that case the company was formed for the purpose of purchasing and acquiring patents but without any intention of manufacturing thereunder. The company disposed of patent rights to a United States company which agreed to pay royalties with the option to purchase same. The American company did purchase them and the sum in question of 26,500 pounds represented royalty and purchase price. The company contended that their share of this sum, less proper expenses, represented the sale of a capital asset and that the proceeds arising therefrom should not be brought into account. In the passage quoted Lord Buckmaster, following *Californian Copper Syndicate v. Harris, supra*, held the sum to be taxable and, concluding his judgment, His Lordship stated at p. 141:

It is one of the foreign patents with which this appeal has to do, and the agreements, which are set out, showing the way in which the foreign patents in the case of France and of Canada have also been dealt with, show that that statement was not a statement of a mere accidental dealing with a particular class of property, but that it was part of their business which, though not of necessity the line on which they desired their business most extensively to develop, was one which they were prepared to undertake.

The fact that under this plan for the selling of Trust Shares, prior to Foreign Exchange Control Board regulations becoming effective, respondent's income was derived from the deductions provided for under the terms of the contract upon which the investor purchased Trust Shares does not militate against the fact that revenue earned when the method of providing Trust Shares to the investor is varied may be held to be income within the meaning of the aforementioned statutes. The buying and selling by the

(1) [1949] S.C.R. 706.

(2) [1940] A.C. 1055 at 1073.

(3) [1928] A.C. 132.

1953
 MINISTER OF
 NATIONAL
 REVENUE
 v.
 INDE-
 PENDENCE
 FOUNDERS
 LTD.

respondent of the Trust Shares here in question was a necessary part of respondent's business as developed after the aforementioned regulations became effective and the revenue derived therefrom was income within the meaning of the above-mentioned statutes.

The appeal should be allowed with costs.

Estey J.

LOCKE, J.:—The business of the respondent company during the four yearly taxation periods in question was the sale of what were designated as Investment Certificates, by which the purchasers acquired either outright or upon the completion of a series of payments a defined undivided interest in shares of stock held by the Royal Trust Company, pursuant to the terms of an agreement entered into between that company and the respondent dated January 1, 1936. In respect of the shares so deposited the Royal Trust Company issued what were called Independence Founders Trust Shares representing, in the terms of the agreement, "an undivided interest in such deposited stocks and other property."

The Investment Certificates acquired by the purchasers (referred to therein as investors) were issued by the respondent and each was endorsed with a statement signed by Prudential Trust Company Limited, declaring that the named person was registered at the office of the trustee as the holder of the certificate.

The Investment Certificates were of two kinds: one, a fully paid certificate which acknowledged the payment to the Prudential Trust Company Limited, as trustee, of a lump sum: the other which recited that the purchaser had made an initial payment and would pay further payments of an amount specified thereafter at stated intervals and that, upon making these payments, the purchaser should become the beneficial owner of what was designated the "Trusteed Property", to the extent that the payment, less certain deductions, would purchase such property at the price prevailing at the close of business on the day the funds were received. The "Trusteed Property" was, by the terms of the agreement, to consist of Trust Shares issued by the Royal Trust Company pursuant to the terms of the agreement first above mentioned.

It was one of the terms of the Investment Certificates that the purchasers might surrender their certificates and obtain the value of the trust property held for the investor by the Prudential Trust Company Limited, less certain deductions. This value was to be ascertained by determining the then market value of the shares of stock held by the Royal Trust Company and referred to in the Trust Shares which had been purchased with the investors' money, a value which, of necessity, would fluctuate.

By the terms of an agreement made between the respondent and the Prudential Trust Company Limited, dated March 23, 1933, as amended by a further agreement dated April 1, 1936, the respondent had agreed at the outset to deposit with that trust company an initial amount of fifty of the Trust Shares, a number which represented a one-fortieth undivided interest in one group of the shares held by the Royal Trust Company. Such groups of shares were referred to in the agreement under which the deposit was made by the respondent with the Royal Trust Company as a stock unit. As payments were made by purchasers under Investment Certificates, the Prudential Trust Company Limited agreed to purchase Trust Shares from the respondent at their current value determined as aforesaid. In the event of the respondent not having Trust Shares available for that purpose when so required, it was provided that the Prudential Trust Company Limited might purchase them from the Royal Trust Company. The agreement further provided that, if and when any of the holders of either class of the Investment Certificates exercised the option to surrender his certificate and take the value of the Trust Shares held on his behalf, the Trust Company would sell such interest and, after making certain defined deductions, pay the amount realized to the owner of the surrendered certificate.

The units of shares deposited with the Royal Trust Company included shares in American companies and, owing to foreign exchange regulations during the time in question, the respondent could not obtain the necessary American exchange to buy shares in such companies in order to constitute new stock units with the Royal Trust Company. The result of this was that, in order to continue its business of the sale of Investment Certificates, the respondent

1953
 }
 MINISTER OF
 NATIONAL
 REVENUE
 v.
 INDE-
 PENDENCE
 FOUNDERS
 LTD.
 —
 Locke J.
 —

1953
 MINISTER OF
 NATIONAL
 REVENUE
 v.
 INDE-
 PENDENCE
 FOUNDERS
 LTD.
 Locke J.

acquired Trust Shares by purchases from the holders of Investment Certificates wishing to surrender them and take the value of the securities held. The taxation period which ended on April 30, 1943, is typical of the four annual periods in question. When the respondent was notified of the assessment made upon it in respect of that period, it filed with the Minister a notice of dissatisfaction and an accompanying statement of facts. This statement, after referring to the arrangements made with the Royal Trust Company for the issuing of the Trust Shares and the manner in which the taxpayer issued the Investment Certificates to purchasers providing that if the purchasers of these certificates wished to sell their Independence Founders Trust Shares the taxpayer was required to take them over at the price thereof as of that day, said in part:—

As stated above each portfolio comprises a list of selected Canadian and American securities. Upon the coming into force of the Foreign Exchange Control Act the Appellant was prevented by the Regulations from acquiring American Securities to form further portfolios or units. It therefore became necessary for the Appellant to find some means of acquiring Trusteed Property to complete outstanding contracts and this was accomplished by permitting the Prudential Trust Company to hold and apply shares acquired from clients who exercised their right to liquidate. During the taxation period the Appellant thus acquired approximately 24,987 Trust Shares and of the said shares so acquired 22,930 were allocated by the Trustee to satisfy the terms of existing contracts. The difference between the price of the shares so acquired and the price at which the same were so allocated (being the sum of \$7,912.90) is claimed by the Minister as income, on the ground that it is a profit on Trading in Securities.

It would have been more accurate had the statement said that the Prudential Trust Company Limited acted on behalf of the present respondent in acquiring Trust Shares from investors who elected to surrender their Investment Certificates and that the shares so acquired enabled the respondent to sell further Investment Certificates and remain in business. That a profit was made during this period is admitted. The manner in which it was made was that the Trust Shares so acquired from investors were sold to the purchasers of Investment Certificates at amounts greater than their cost to the respondent, due, no doubt, to the increase in the value of the underlying shares.

Had the respondent sold Independence Founders Trust Shares directly to the public for amounts in excess of their cost to it, its liability to taxation upon the resulting income

would, in my opinion, have been undoubted. I do not think the fact that, instead of doing so, the plan of selling these shares through the medium of the Investment Certificates upon terms requiring the respondent to repurchase the shares at the owners' election was adopted alters the situation. The respondent in this matter during the taxation periods in question was, in my opinion, in the same position as the seller of any other commodity. What it offered for sale was simply an undivided interest in the shares deposited with the Royal Trust Company, the title to which was evidenced by the Trust Share Certificates. The method of selling these interests in the form of Investment Certificates enabled the respondent to earn certain fees for services, which were deducted from the purchase moneys paid by the investors to the Trust Company. In addition, the Trust Shares purchased by the respondent in the year 1943 were resold at prices in excess of their cost to the respondent and their acquisition and sale and the resulting profit were, in my opinion, part of the business and the income from it, just as were the rendering of services and the fees earned for such services. The fact that the respondent obligated itself to the investors to repurchase their Trust Shares if they wished to liquidate their holdings does not appear to me to affect the matter. The shares were sold at a price calculated in the manner above stated and, if at the time the investor elected to sell his Trust Shares, the then value of such shares was in excess of the amount which the respondent had received from their sale, the resulting loss would properly be taken into account in determining the respondent's income for that year.

In the years following 1943 the respondent had on hand at the end of its fiscal years Trust Shares acquired through the Prudential Trust Company Limited in the manner above described which had not yet been sold and the appellant complains of the value placed upon these shares by the Department of National Revenue. The audited accounts of the respondent for the taxation periods in question showed that they were kept upon an accrual basis and the evidence satisfies me that the valuations placed upon them by the Department were determined in accordance with recognized accounting practice.

1953
MINISTER OF
NATIONAL
REVENUE
v.
INDE-
PENDENCE
FOUNDERS
LTD.
Locke J.

1953
 MINISTER OF
 NATIONAL
 REVENUE
 v.
 INDE-
 PENDENCE
 FOUNDERS
 LTD.
 Locke J.

I would allow this appeal with costs throughout and restore the assessments made by the Minister of National Revenue.

CARTWRIGHT J.:—I agree that, in the particular circumstances of this case, the gains which accrued to the respondent from the purchase and sale of the trust shares described in the reasons of other members of the Court were properly assessable as profits received by it from the carrying on of its business.

I would allow the appeal with costs throughout and restore the assessments made by the appellant.

Appeal allowed with costs.

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

Solicitors for the respondent: *Lawrence, Shaw & McFarlane.*
