BALSTONE FARMS LIMITED .....APPELLANT;

AND

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

1967
*Nov. 8, 9

1968
Jan. 23

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Capital gain or income—Real estate transaction—Private company formed to dispose of farm land—Whether trading company or investing company—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

Mr. L and his wife had acquired several parcels of farm land and had them farmed under crop leases. In 1955, both being well in their seventies, they incorporated the appellant company by letters patent. The stated object of the company was to carry on the business of farming, and its shareholders were trustees for other members of the family and charities. The company then purchased the land from Mr. L and his wife at an appraised value of $144,000 in return for debentures and promissory notes. The company continued to have the lands farmed under crop leases. During the next few years, the company received the proceeds from the forfeiture of several options to purchase parts of the land and from the sale of part of the land. These monies were used to pay off the debentures and promissory notes. The Minister assessed all the monies received by the appellant

*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Hall JJ.

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company as income. The appellant contended that the lands were acquired as a capital asset for the ultimate purpose of orderly and advantageous liquidation and that the receipts were capital gains. The Minister submitted that the profits were income from a business within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148. The Exchequer Court upheld the Minister's assessment. The company appealed to this Court.

Held (Cartwright C.J. dissenting): The appeal should be dismissed.

Per Martland, Judson, Ritchie and Hall JJ.: It was clear on the evidence that the real purpose of the company was not to carry on the business of farming but to acquire the farm lands with a view to selling them. The company was not realizing or selling these properties for the benefit of prior owners or creditors of prior owners, but was selling on its own behalf to make a profit. The only way the company could produce anything for the shareholders was to produce a profit. The company was in business for this purpose and the profits were correctly taxed.

Per Cartwright C.J., *dissenting:* On the evidence the appellant was not a trading company but a realization company. This realization was for the benefit of Mr. L and his wife and the relatives and charities. The company did not embark in a trade or a business. Its real function was simply to dispose of capital assets and to distribute the proceeds.

Revenu—Impôt sur le revenu—Gain de capital ou revenu—Transactions immobilières—Compagnie privée créée pour vendre une ferme—Compagnie de placement ou compagnie faisant le commerce—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, arts. 3, 4, 139(1)(e).

Un monsieur L et sa femme avaient acquis plusieurs terres qu'ils faisaient cultiver par d'autres. En 1955, ayant 77 et 78 ans respectivement, ils ont formé, par lettres patentes, la compagnie appelante, dont l'objet déclaré était l'exploitation agricole et dont les actionnaires étaient des fiduciaires pour d'autres membres de la famille et pour des charités. La compagnie appelante a alors acheté la terre de monsieur L et de sa femme pour une somme de $144,000, valeur à laquelle la propriété avait été évaluée, en retour de titres d'obligations et de billets promissoires. La compagnie a continué de faire cultiver la terre par d'autres. Durant les quelques années suivantes, la compagnie a reçu des sommes d'argent provenant de l'abandon d'options d'acheter des parties de la terre et provenant aussi de la vente d'une partie de la terre. On s'est servi de ces argents pour acquitter les titres d'obligations et les billets promissoires. Le Ministre a cotisé les argents reçus par la compagnie appelante comme étant un revenu. La compagnie appelante prétend que les terres ont été acquises comme un bien en capital dans le but ultime d'en faire la liquidation d'une façon ordonnée et avantageuse, et que par conséquent les argents reçus étaient un gain de capital. Le Ministre prétend de son côté que les profits étaient un revenu provenant d'une entreprise dans le sens des arts. 3, 4 et 139(1)(*e*) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148. La Cour de l'Échiquier a maintenu la cotisation du Ministre. La compagnie en appela devant cette Cour.

Arrêt: L'appel doit être rejeté, le Juge en Chef Cartwright étant dissident.

Les Juges Martland, Judson, Ritchie et Hall: La preuve démontre clairement que l'objet véritable de la compagnie n'était pas l'exploitation agricole mais bien l'acquisition de la terre dans l'intention de la revendre. La compagnie ne convertissait pas des biens en espèces ou ne vendait pas cette propriété pour le bénéfice des propriétaires antérieurs ou les créanciers de ces propriétaires, mais vendait à son compte dans le but de faire un profit. La seule manière que la compagnie pouvait rapporter quelque chose aux actionnaires était d'obtenir un profit. C'était là le but de l'entreprise de la compagnie et les profits avaient été à bon droit taxés.

Le Juge en Chef Cartwright, *dissident:* La preuve démontre que l'appelante n'était pas une compagnie faisant un commerce mais était une compagnie dont le but était de convertir des biens en espèces. Cette conversion était pour le bénéfice de monsieur L et de sa femme ainsi que pour les autres membres de la famille et pour les charités. La compagnie n'entreprenait pas un commerce. Sa fonction véritable était simplement de vendre des biens en capital et d'en distribuer le produit.

APPEL d'un jugement du Juge Cattanach de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel rejeté, le Juge en Chef Cartwright étant dissident.

APPEAL from a judgment of Cattanach J. of the Exchequer Court of Canada[1], in an income tax matter. Appeal dismissed, Cartwright C.J. dissenting.

Stuart Thom, Q.C., and *T. E. J. McDonnell,* for the appellant.

M. A. Mogan and *M. J. Bonner,* for the respondent.

THE CHIEF JUSTICE (*dissenting*):—This is an appeal from the judgment[1] of Cattanach J. dismissing an appeal from the income tax assessments of the appellant for the taxation years 1957, 1958, 1959 and 1960.

While the record is voluminous the facts are not complicated and the question raised for decision is a narrow one.

The relevant facts are summarized in the reasons of my brother Judson and I shall endeavour to avoid repetition.

The sole question appears to me to be whether the appellant was a trading company or a realization company.

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[1] [1967] 2 Ex. C.R. 217, [1966] C.T.C. 738, 66 D.T.C. 5482.

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It is common ground that the farm lands which the late John and Minnie LePage transferred to the appellant in 1955 were capital assets in their hands. On the whole evidence the conclusion appears to me to be inescapable that the LePages decided to dispose of these assets as follows: (i) to have them sold in an orderly manner; (ii) out of the proceeds to retain for themselves $144,000 and (iii) to divide the balance of the proceeds among members of their family and certain charities. Had they carried out this intention without the intervention of the appellant there would be no basis for the suggestion that income tax would be payable. We are not concerned with the question whether the transactions would have attracted succession duty or gift tax. This, of course, does not dispose of the question. It is necessary to consider what the operations of the appellant in fact were.

If one looks at the Letters Patent the object of the appellant was to carry on the business of farming. If that were so the sale of its farm or farms would be the realization of a capital asset and would not attract income tax. However, the evidence makes it clear that it was intended to carry on farming operations for such a period only as would permit the orderly and advantageous sale of the farms. The mere fact that the sale of what is admittedly a capital asset is delayed in the expectation of obtaining a better price does not cause it to be transformed from an item of capital to one of inventory.

In *Commissioner of Taxes v. Melbourne Trust Limited*[2], Lord Dunedin said:

> . . . The argument for the respondents can be stated in a single sentence. They say they were not a trading company but a realization company; that the realization was truly for the benefit of the original creditors of the three banks; that all shareholders in the company are either such original creditors or the assignees of such original creditors. If that is the true view of the situation their Lordships do not doubt that the argument must prevail.

This passage may, I think, be adapted to the circumstances of the case at bar as follows:

> The appellant says that it is not a trading company but a realization company; that the realization was truly for the benefit of the LePages and the relatives and charities who were the objects of their bounty; that all shares in the company are held in trust for those relatives and charities.

[2] [1914] A.C. 1001 at 1009.

The argument so put is, in my view, in accordance with the evidence and is entitled to prevail. I do not find anything in the method used to give effect to the LePages' intention which requires or permits the Court to hold that the appellant was a company trading in lands.

I am unable to distinguish the case at bar from that of *C. H. Rand v. The Alberni Land Company, Limited*[3], in which, at p. 638, Rowlatt J. stated the question there raised as follows:

> Now the question is whether this Company has really only realised some property held as capital by those who became its shareholders, namely, the people entitled under the trust, or who started or founded the trust, or whether it has got to the point of embarking in a trade or business of which these receipts are the resulting profits.

The answer to such a question must depend on the facts of the particular case in which it arises. In the case at bar on the evidence taken as a whole it appears to me that it must be answered in favour of the appellant. The real function of the appellant was simply to dispose of capital assets and distribute the proceeds in accordance with the irrevocable direction of the original owners of those assets.

I would allow the appeal with costs in this Court and in the Exchequer Court and refer the assessments for the years in question to the respondent to be dealt with in accordance with these reasons.

The judgment of Martland, Judson, Ritchie and Hall JJ. was delivered by

JUDSON J.:—The issue in this appeal is whether the appellant, Balstone Farms Ltd., as a result of its sale of land and the granting and forfeiture of certain options for the sale of land, had taxable profits or whether the receipts were capital gains. The Exchequer Court[4] has held that the transactions give rise to taxable gains.

I begin with the statement of the acquisition of certain lands by an elderly couple, John and Minnie LePage, from the year 1944 to 1953. These lands were acquired in five

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[3] (1920), 7 T.C. 629.

[4] [1967] 2 Ex. C.R. 217, [1966] C.T.C. 738, 66 D.T.C. 5482.

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large parcels and they are just beyond the municipal boundary of the City of Winnipeg:

Date	*Acreage*	*Price*	*Location*	*Purchaser*
I. June 9, 1944	106	$ 4,500.00	Mun. of Assiniboia	John LePage
II. Dec. 14, 1944	154	$ 2,988.20	North Kildonan	John LePage
III. May 9, 1945	149.7	$ 6,680.00	Assiniboia	Minnie LePage
IV. Nov. 19, 1950	403	$12,896.00	North Kildonan	John LePage
V. Aug. 13, 1953	218	$15,000.00	Assiniboia	Minnie LePage
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John LePage had been a broker and dealer in pulpwood. In 1954 he was 76 years of age and his wife was 77. In May of 1955, they incorporated Balstone Farms Ltd. Its objects as set out in Letters Patent were "to carry on in any capacity the business of farming and raising animals for any purpose". It is clear on the evidence that the real purpose was not to carry on the business of farming but to acquire these farm lands purchased by Mr. and Mrs. LePage with a view to selling them.

Immediately after incorporation, the company entered into an agreement with Mr. and Mrs. LePage to purchase the above listed land. The consideration received by John LePage was $83,000, made up of eight debentures of $10,000 each and a promissory note for $3,000. The consideration received by Minnie LePage was $61,000, made up of six debentures of $10,000 each and a promissory note for $1,000. To round out the acreage included in Parcel III above, the company purchased an additional 21.62 acres.

Mr. and Mrs. LePage received no shares in the company for the transfer of these lands. The sole consideration received by them was as above. They directed the shares of the company to be issued to four individuals in trust for members of the family and certain charities. The total share capital issued consisted of 100 fully paid common shares without par value. We are not concerned with the execution of these trusts. They were validly constituted and they do not affect the problem here.

Mr. and Mrs. LePage had no interest whatever in these shares either legal or equitable. They had parted with their land at an appraised value of $144,000 and they had no further interest in the company except as creditors for this amount. The cost of acquisition to the company was $144,000. The company continued the policy of Mr. and Mrs. LePage by having the lands farmed under crop leases.

In March of 1956 the company decided to sell sufficient land to pay off the debentures and promissory notes. In the same month it advertised for sale 496 acres in one district and 557 acres in another. The following is a list of the transactions in relation to these lands which give rise to this appeal:

(1) On April 13, 1956, it granted an option on 277 acres at $1,250 per acre. This option expired May 1, 1957 and the option payment of $15,000 was forfeited.

(2) On January 3, 1957, it granted an option on 557 acres at $1,250 per acre. The option expired on December 1, 1958, and the option payment of $5,000 was forfeited.

(3) On June 25, 1958, it entered into an agreement for the sale of 171 acres at a price of $1,700 per acre with a deposit of $5,000. The sale was not completed. Litigation followed and was eventually settled. As part of the settlement the company retained the deposit of $5,000.

(4) On June 30, 1959, it granted an option on 106 acres at $2,000 per acre with a deposit of $10,000. The option was renewed on January 2, 1960, with a further deposit of $5,000. This option expired on May 31, 1960. The two option payments of $10,000 and $5,000 were forfeited.

(5) On July 15, 1959, it granted an option to purchase 171 acres at $2,100 per acre. This option was exercised on May 30, 1960 and the purchase completed. The company realized a profit of $93,312.88 on this sale.

On reassessment, the Minister added Item I to the company's income for the 1957 taxation year; Items II and III to income for the 1958 taxation year; Items IV and V to income for the 1960 taxation year.

The first payments by the company to Mr. and Mrs. LePage on account of the debentures were made in September 1959 from the funds obtained from the forfeiture of the option payments above mentioned. The balance was paid in June 1961.

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The finding of the learned trial judge on these facts was as follows:

> Here the lands were purchased by the appellant with a view to their resale and any income received during the interval prior to their sale was incidental to that principal and acknowledged purpose. The lands in the hands of the appellant were its inventory rather than capital assets which is the direct opposite to the facts as found in the Glasgow Heritable Trust case.

The company's submission before the Exchequer Court and on appeal to this Court was that the lands were acquired as a capital asset for the ultimate purpose of orderly and advantageous liquidation and that the receipts were capital gains. The Minister submitted that the company's profits from the above mentioned transactions were profits from business and therefore income within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148.

The appellant founded its argument essentially on three cases: *Rand v. The Alberni Land Company, Limited*[5]; *Glasgow Heritable Trust, Ltd. v. Commissioners of Inland Revenue*[6]; and *Commissioner of Taxes v. British Australia Wool Realization Association*[7]. These cases were concerned with the realization of assets and the incorporation of a company to serve as machinery for this purpose. Their ratio is to be found in the statement of Rowlatt J. in *Rand v. The Alberni Land Company Limited,* at p. 639:

> I think that in this case the company has done no more than provide the machinery by which the private landowners were enabled, under the peculiar circumstances of their divided title, to properly realise the capital of the property they held in the lands in question, and that is not income or proceeds of trade, . . .

In none of these realization cases was there an out and out transfer by former owners for a cash consideration. When this company was formed, Mr. and Mrs. LePage transferred properties which had cost them approximately $42,000 for a consideration of $144,000. At that point they made a profit of $102,000 and their interest in the land ceased. The company was not "realizing" or selling these properties for the benefit of prior owners or the creditors of prior owners. The facts speak for themselves and fully

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[5] (1920), 7 T.C. 629.

[6] (1954), 35 T.C. 196.

[7] [1931] A.C. 224, 100 L.J.P.C. 28.

justify the finding of fact of the learned trial judge. The company was selling on its own behalf to make a profit and it is quite obvious from the facts and figures above quoted that the profit was there to be made. The only way the company could produce anything for those who were beneficially interested in the shares, i.e., the members of the family (excluding Mr. and Mrs. LePage) and charities, was to produce a profit. The company was in business for this purpose and the profits were correctly taxed by the Minister.

I attach no importance to the fact that this company was incorporated by Letters Patent. A company incorporated by Memorandum of Association would be in exactly the same position if it did what this company did.

I would dismiss the appeal with costs.

Appeal dismissed with costs, Cartwright C.J. dissenting.

Solicitors for the appellant: Newman & McLean, Winnipeg.

Solicitor for the respondent: D. S. Maxwell, Ottawa.