MARY ORLANDO ..... APPELLANT; 1961 *Oct. 30

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT. 1962 Jan. 23

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Farm acquired as investment—Sales of topsoil—Whether adventure in the nature of trade—Whether profit in the course of trade or capital gain—Whether farming losses deductible—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6(1)(j), 27(1)(e), 139(1)(e).

In 1944, the appellant, who was a shareholder in a company operating a mushroom farm in Toronto and of which her husband was president and principal shareholder, purchased a 97-acre farm as an investment and as an alternative site for the company in the event that it had to move due to the growth of the city. The farming operations carried on by the appellant between 1944 and 1953 were minimal. However, in each year during that period, with the exception of 1949, she sold topsoil from a 37-acre portion of her farm to the mushroom company.

*PRESENT: Taschereau, Cartwright, Abbott, Judson and Ritchie JJ.

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In 1953, she sold the 37-acre parcel to a highway contractor for $120,000. The contract of sale required the purchaser to remove the topsoil and spread it on the remaining portion of the appellant's farm. The appellant then sold all that topsoil to the mushroom company for $18,500.

The Minister ruled that the amounts she received for the topsoil were income subject to tax. This decision was reversed by the Income Tax Appeal Board but was, in turn, restored by the Exchequer Court. It was argued for the Minister that the amount was taxable as income from a business or, in the alternative, taxable under s. 6(1)(*j*) as payments dependent upon use of or production from property. The appellant contended that the topsoil profit was a capital gain from the partial realization of an investment. She also argued that if these amounts were taxable she was entitled under s. 27(1)(*e*) of the Act to deduct the losses sustained by her in operating the farm in the five years preceding and in the year following 1953.

Held (Cartwright J. dissenting): The appeal should be allowed, but only to the extent necessary to permit a minor adjustment which the Minister admitted should be made.

Per Taschereau, Abbott, Judson and Ritchie J.: The sales of topsoil had no relation to any farming operations since the disposal of the topsoil, if carried to its ultimate conclusion, would have rendered any farming operation impossible. In disposing of the topsoil the appellant was engaged in a scheme of profit making or an adventure or concern in the nature of a trade and the profits therefrom were taxable income within the meaning of ss. 3, 4 and 139(1)(*e*) of the Act. The appellant had no right to deduct losses incurred in the five years immediately preceding and the year immediately following 1953 since these losses were not incurred from the business of selling topsoil. Under s. 27(1)(*e*) of the Act, the right to deduct from income losses sustained in other years does not extend to income from an activity other than the business in which the loss was sustained. There was no essential distinction between the sales made in 1953 and those made in earlier years.

Per Cartwright J., *dissenting*: The payments for the topsoil paid over the years, with the exception of the payment of $18,500 in 1953, were payments for the granting to the company of a licence, analagous to a profit à prendre, and constituted taxable income as being amounts received from the use of property but not as profits from a business. The evidence did not establish the right to make any deductions from these sums.

The $120,000 plus the topsoil delivered by the purchaser represented the total consideration on the sale of a portion of the farm and such entire sum, including the $18,500 into which the topsoil was promptly converted, was a capital receipt in the hands of the appellant and as such was not subject to tax.

APPEAL from a judgment of Fournier J. of the Exchequer Court of Canada[1], reversing a decision of the Income Tax Appeal Board. Appeal dismissed with a variation, Cartwright J. dissenting.

J. J. Robinette, Q.C., and *D. Andison*, for the appellant.

[1] [1960] Ex. C.R. 391, [1960] C.T.C. 58, 60 D.T.C. 1051.

D. S. Maxwell and *G. W. Ainslie,* for the respondent.

The judgment of Taschereau, Abbott, Judson and Ritchie JJ. was delivered by

ABBOTT J.:—The facts—as to which there is little or no dispute—are fully stated in the reasons of the learned trial judge and in those to be delivered by my brother Cartwright which I have had the advantage of considering.

The farming operations carried on by appellant on her property during the period 1944 to 1953 appear to have been minimal, to say the least. The only revenues shown as having been derived from such operations during that period are two amounts of $200 from the sale of hay in each of the years 1945 and 1946. However, in each year during the said period—with the exception of 1949—appellant disposed of topsoil taken from the portion of her property lying to the north of the Canadian Pacific Railway Company right of way, and which portion was sold by her to Miller Paving Limited in 1953 for $120,000.

It is clear I think, that these sales of topsoil had no relation to any farming operations which appellant may have been conducting on her property, since such disposal of the topsoil, if carried to its ultimate conclusion, would have rendered any farming operation impossible.

The learned trial judge held on the facts that in disposing of topsoil, appellant was engaged in a scheme of profit-making or an adventure or concern in the nature of a trade, and that the profits derived therefrom were income within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act* and subject to tax. In my opinion, he was right in so holding. I am in substantial agreement with his reasons and conclusions on this point and there is little I can usefully add to them.

The learned trial judge did not deal with the alternative argument of appellant that if the amounts in question were held to be income, she was entitled to deduct her losses in operating the farm property in the five taxation years immediately preceding 1953 and in the taxation year 1955. He may have felt that it was not necessary for him to do so.

As I have stated, in my view appellant's dealings in topsoil had no relation to any farming operations she may have been carrying on. Under the provisions of s. 27(1)(*e*) of the

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Income Tax Act the right to deduct from income in any taxation year business losses sustained in the five taxation years immediately preceding and the taxation year immediately following that taxation year does not extend to income from an activity other than the business in which the loss was sustained. *The Minister of National Revenue v. Eastern Textiles Ltd.*[1]; *Utah Company of the Americas v. The Minister of National Revenue*[2]. The losses, if any, incurred by appellant in the five years immediately preceding and the year immediately following the taxation year 1953 were losses which were not incurred from the business of selling topsoil, and accordingly are not deductible from the profits arising from that activity.

In my opinion what the appellant did during a period extending from 1945 up to and including 1953 was to sell topsoil for an agreed price to Maple Leaf Mushroom Farm Ltd., a company of which her late husband was the principal shareholder and of which she herself was an officer and shareholder. It is true that the purchaser undertook to defray all the costs of stripping and processing the topsoil and of taking delivery, but I am unable to see what bearing that had upon the essential character of the transaction. Had appellant undertaken to perform these services, the price would no doubt have been higher and for tax purposes the cost of performing such services would have been deductible from the price as an expense. So far as the appellant's profit was concerned, the result would have been the same. Under s. 12(1)(*a*) of the *Income Tax Act* the only expenses which may be deducted in computing income are those made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of such taxpayer. In virtue of the arrangement made with the purchaser, appellant incurred no expense in connection with the sales of topsoil made by her.

I am unable to discern any essential distinction between the sales of topsoil made by appellant in 1953 and those made in earlier years. It is clear from appellant's own evidence, that prior to her selling the 37 acres to Miller Paving Limited, Maple Leaf Mushroom Farm Ltd. had offered to buy and she had agreed to sell the remaining topsoil on that portion of her property for a total sum of $18,500. In order

[1] [1957] C.T.C. 48, 57 D.T.C. 1070.
[2] [1960] Ex. C.R. 128, [1959] C.T.C. 496, 59 D.T.C. 1275.

to carry that agreement into effect, appellant when selling the 37 acre tract to Miller Paving Limited made the sale subject to a covenant whereby the purchaser undertook to remove the topsoil from the land purchased and spread it over the land retained by appellant. That covenant was implemented and in due course Maple Leaf Mushroom Farm Ltd. took delivery of the topsoil and paid the price agreed upon.

In his factum and at the hearing before us counsel for respondent conceded that the amount received by appellant in the year 1953 from the sale of topsoil was $19,235 and not $20,000 as set out in the re-assessment of appellant's income for that year.

The appeal in respect of the assessment for the 1953 taxation year should be allowed in part and the re-assessment referred back for further re-assessment so as to include in appellant's income for that year the sum of $19,235 instead of $20,000, but otherwise the re-assessment should be affirmed. The appeal in respect of the re-assessment for the 1954 taxation period should be dismissed.

The respondent is entitled to his costs in this Court.

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Exchequer Court[1] whereby an appeal by the Minister from a decision of the Income Tax Appeal Board was allowed.

The questions raised are whether the sums of $19,235 and $1,500 received by the appellant in the taxation years 1953 and 1954 as a result of transactions having to do with topsoil were part of her income and if so whether in the computation of her taxable income she was entitled to make certain deductions.

The appellant is the widow of Anthony Orlando who died in 1958 and who from 1944 until the date of his death was the president and principal shareholder of Maple Leaf Mushroom Farm Ltd. The appellant was a partner in a wholesale fruit business known as Scorsone Fruit Company and was also a shareholder and the secretary of Maple Leaf Mushroom Farm Ltd. She looked after the office records of that company.

[1] [1960] Ex. C.R. 391, [1960] C.T.C. 58, 60 D.T.C. 1051.

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The plant for growing mushrooms owned and operated by Maple Leaf Mushroom Farm Ltd. was located in a part of the metropolitan area of the city of Toronto which was developing rapidly into a residential, commercial and shopping centre district, and the appellant was of the opinion that the company might at some future time be obliged to move its plant. In June of 1944 the appellant purchased a farm property in the Township of Scarborough which was situate about four and one-half miles northeast from the plant of Maple Leaf Mushroom Farm Ltd. This property consisted of ninety-seven acres and the price was $18,000. The appellant bought this property as an investment having in view the possibility of reselling it to Maple Leaf Mushroom Farm Ltd. or allowing that company to use it in the event that it either needed additional land for the expansion of its plant or was forced to move its plant from its present location.

The farm purchased by the appellant was divided into two parcels by a right of way of the Canadian Pacific Railway running from east to west. The northerly parcel contained about 37 acres and the southerly parcel about 60 acres.

Shortly after she had purchased the farm, the appellant received a request from her husband, on behalf of Maple Leaf Mushroom Farm Limited that he be permitted to test some of the topsoil from the farm in the growing of mushrooms. The appellant consented and the soil proved to be suitable. As a result Maple Leaf Mushroom Farm Limited proceeded to take topsoil from the appellant's farm each year from 1945 to 1952 inclusive, but excluding 1949. There appears to have been no written agreement between the appellant and Maple Leaf Mushroom Farm Ltd. as to the taking of topsoil but the arrangements under which it was taken in those years were as follows. Appellant designated the area on the farm from which the topsoil could be taken; agents of Maple Leaf Mushroom Farm Limited then came on the property with their own equipment, conditioned the topsoil to their own satisfaction and then loaded and transported it off the property in their own vehicles. The appellant was paid at the rate of $2 per cubic yard for the topsoil so taken. At no time did the appellant supervise or cause to be supervised the removal of the topsoil and she relied upon the calculations of Maple Leaf Mushroom Farm Limited as

to the amounts taken. As a result of these arrangements the appellant received from Maple Leaf Mushroom Farm Limited the following amounts in the years 1945 to 1952.

Year	*Amount Received*
1945	$1,142.00
1946	1,620.00
1947	1,240.00
1948	1,575.00
1949	nil
1950	2,600.00
1951	1,350.00
1952	1,080.00

All of the topsoil taken in these years and in respect of which the said amounts were received by the appellant, was taken from the thirty-seven acre parcel of the appellant's property situated to the north of the Canadian Pacific Railway right-of-way.

In 1953 the appellant received a letter from the Department of Highways of the Province of Ontario advising her that the northerly thirty-seven acre parcel of her farm was required for departmental use. The letter contained an offer of $1,500 per acre for the land and threatened expropriation proceedings if the offer was not accepted. The appellant was then approached by Miller Paving Limited, a company which held a contract for the construction of a portion of Highway 401 in the vicinity of the appellant's farm and received an offer from that company for the purchase of the northerly thirty-seven acre parcel of her farm. Miller Paving Limited advised the appellant that they wanted the land for fill. The appellant was also approached by Maple Leaf Mushroom Farm Limited and received an offer from that company to purchase from her all of the topsoil from the same thirty-seven acre parcel.

The appellant accepted the offer of Miller Paving Limited but caused the following terms to be included in the agreement:

> PROVIDED that the purchaser before making use of the said lands for its purposes or otherwise shall remove at its own expense the topsoil from the said lands to a maximum depth of six inches (6"); the said topsoil to be removed across the Canadian Pacific Railway right of way and spread on the northerly limit of other lands of the vendors in close proximity to the said railway right of way, the other lands of the vendors hereinbefore referred to being part of Lot 31 in Concession 2 of the Township of Scarborough.

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And it is further mutually agreed by and between the parties hereto that if the purchaser shall not have removed the topsoil from the said lands or from any of the said lands in accordance with the terms of this agreement by the date of closing of this transaction, the purchaser shall remove the topsoil at his own expense to a maximum depth of six inches (6") and stock-pile the same as provided in this agreement within a reasonable time after the date of closing, and will deliver to the vendor on or before closing his covenant under seal so to remove and spread the topsoil.

At the time the sale to Miller Paving Limited was closed, the topsoil had not been removed from the thirty-seven acres and an agreement was executed between the parties extending the time for its removal.

The appellant also accepted the offer of Maple Leaf Mushroom Farm Limited, thereby agreeing to sell them the topsoil from the thirty-seven acres.

The price in money which Miller Paving Limited agreed to pay for the thirty-seven acres of land was $120,000, i.e., approximately $3,300 per acre. The price which Maple Leaf Mushroom Farm Limited agreed to pay for the thirty-seven acres of topsoil was at the rate of $500 per acre, i.e., $18,500.

The sale of the topsoil from the thirty-seven acres was closed in 1953 and the $18,500 consideration was received by the appellant in December of that year.

In 1954 the appellant received $1,500 from Maple Leaf Mushroom Farm Limited. This was paid to her as consideration for topsoil taken from her farm in 1953 but prior to the time of the sale of the topsoil from the thirty-seven acres.

The appellant made no sales of topsoil after the year 1953. She has never sold topsoil to anyone other than Maple Leaf Mushroom Farm Limited nor has she ever offered topsoil for sale generally. She did no advertising. She was approached from time to time by gardeners and landscapers who sought to buy topsoil from her but in all cases she refused. She had no equipment for the removal of topsoil. She has never at any time been engaged in the business of buying and selling or trading in real estate.

At the trial, a chartered accountant called as a witness for the appellant, produced a statement which was filed as ex. 3 showing that even on the basis of treating all the amounts received for topsoil as an income receipt from the operation of the appellant's farm that operation had resulted in a loss

in every year from 1944 to 1954, inclusive, except the years 1946 and 1953, in which there was, on the basis stated, a profit of $163.22 in 1946 and of $17,800.09 in 1953.

In making her returns of income for the years 1944 to 1954 inclusive and in computing her income for each of those years the appellant did not include any receipts derived from the farm property either in relation to topsoil or otherwise and did not deduct any expenses incurred in relation thereto.

By notices of reassessment mailed on January 23, 1957, the respondent gave notice to the appellant that he had re-assessed her for the taxation years 1953 and 1954 to add to her income for those years amounts of $20,000 and $1,500 respectively in respect of the sale of topsoil to Maple Leaf Mushroom Farm Limited. Counsel for the respondent informed us that on the basis of his argument being accepted in its entirety the figure of $20,000 should be changed to read $19,235.

The respondent has not at any time sought to include in the appellant's income any amount in respect of the gain realized by her on the receipt of the sale price of $120,000 paid for the 37 acres by Miller Paving Limited. The learned trial judge expressed the opinion that this was properly treated as a capital gain. This was in accordance with the position taken by counsel for the Minister at the trial who said in part:

> It is not the original purchase we are concerned about. We are not disputing that it was bought for an investment purpose. What we are saying is after she bought the farm she came into the business of selling topsoil.

At the trial it was contended on behalf of the Minister:

(*a*) that the amounts received by the appellant were income from a business within the meaning of sections 3, 4 and 139(1)(*e*) of the Income Tax Act; or

(*b*) in the alternative, that the amounts received were dependent upon use of or production from property and were therefore income within the meaning of section 6(*j*) of the Act.

It was contended on behalf of the appellant:

(*a*) that she had not carried on business or engaged in an adventure or concern in the nature of trade in respect of any topsoil and that the amounts in question were received by her on the realization of a portion of her capital and were therefore capital gains; or

(*b*) in the alternative that, if the amounts in question were income from a business within the meaning of the Income Tax Act, the appellant—

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(i) in computing her income from that business for the taxation years under appeal was entitled to deduct the expenses of operating the farm property in those years; and

(ii) in computing her taxable income from that business for those years, was entitled to deduct, pursuant to the provisions of section 27(1)(*e*) of the Act, the losses sustained by her in operating the farm property in the five taxation years immediately preceding 1953 and in the taxation year 1955.

It was further contended on behalf of the appellant that the amounts received were not income within the meaning of s. 6(*j*) of the Act because the amounts received were payments for a specified portion of the lands sold and were not dependent upon the use of or production from property.

The learned trial judge in his reasons stressed the fact that the appellant had been disposing of topsoil for money for a number of years and went on to hold that the sale for $18,500 in 1953 was a transaction of the same sort as those of earlier years. He said in conclusion:

> In the final analysis, the respondent, when dealing with the Maple Leaf Mushroom Farm Limited in 1953, was not disposing of her land but was dealing with a commodity which had been deposited on her property and which was delivered, carted away and paid for by the buyers. As this transaction was preceded by many other sales during a long period of time and at a price and in a manner which could produce a profit, it cannot be said that the profit realized from the sale was a casual profit made on an isolated sale. The respondent incurred no expense nor made any outlay in these trading operations. The 1953 sale was one of many which from the moment when merged with all the others, in my view, clearly indicates that the respondent had embarked on a scheme for profit making, the profits of which are subject to taxation.
>
> My conclusion is that the sums of $18,500 and $1,500 received by the respondent in the taxation years 1953 and 1954 were profits derived from an adventure or concern in the nature of a trade and not capital gains. They were income within the meaning of ss. 3, 4 and 139(1)(*e*) of the Income Tax Act and subject to taxation.

The learned trial judge did not deal with the alternative argument of the appellant that if the amounts in question were held to be income she was entitled to deduct her losses in operating the farm property in the five taxation years immediately preceding 1953 and in the taxation year 1955.

Before this Court counsel for the appellant argued that the learned trial judge was in error in finding that the appellant was engaged at any time in the business of selling topsoil; he contended that all payments received for topsoil other than the $18,500 were the consideration paid to the appellant for the granting to Maple Leaf Mushroom Farm

Limited of a profit a prendre enforceable in equity (or a right analogous thereto) and that these sums were income liable to tax (subject to his argument as to the right to deduct expenses and losses) not as profits from a business but as income from property.

In my opinion the payments of $2 per cubic yard of topsoil paid over the years by the Maple Leaf Mushroom Farm Limited to the appellant were payments for the granting to the company of a licence, analogous to a profit a prendre, permitting it to enter the lands of the appellant and take therefrom for its use a portion of the soil subject to payment therefor at the price agreed; from this it follows that the amounts so paid constituted taxable income of the appellant as being amounts received by her from the use of her property but not as profits from a business.

Different considerations apply to the payment of the $18,500. In 1953, faced with the probability of expropriation the appellant decided to sell the northerly parcel of her farm consisting of 37 acres. The consideration offered by Miller Paving Limited for this parcel was not merely $120,000; it was that sum plus its covenant to remove the topsoil from the 37 acres to a maximum depth of 6 inches and to deposit the soil so removed on the southerly parcel retained by the appellant. The agreement of the appellant to sell this topsoil to Maple Leaf Mushroom Farm Limited appears to have been made contemporaneously with her agreement to sell the northerly parcel to Miller Paving Limited and in the result the consideration which she was to receive from Miller Paving Limited was substantially the equivalent of $138,500, that is about $3,740 per acre. The uncontradicted evidence of the appellant was that at the time of the sale the prevailing price for farm land in the vicinity of her farm was $4,000 per acre.

In my opinion the $120,000 plus the topsoil delivered by Miller Paving Limited represented the total consideration received by the appellant on the sale of a portion of her farm; all of this in her hands was a capital receipt; this applies no less to the $18,500 into which the topsoil was promptly converted than to the $120,000. The situation is, in principle, the same as if the appellant had received for the 37 acres, $120,000 plus some bonds or other securities which she had at once sold for $18,500. I conclude that the $18,500 was a capital receipt and is not subject to tax.

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If the view which I have just expressed fell to be rejected, it would be necessary to consider what other views might be taken of the transaction. It is, I think, obvious that the $18,500 could not be regarded as a payment for a licence analogous to a profit a prendre. The topsoil from the 37 acres placed on the appellant's property south of the railway did not thereby become part of her land. It was a commodity stockpiled there awaiting its removal by the purchaser Maple Leaf Mushroom Farm Limited.

A possible alternative view would be that the appellant acquired this topsoil as part of her stock-in-trade in the business of selling topsoil. But if this, contrary to my opinion, be the right view it seems clear that before she could be said to have made any profit on disposing of the topsoil some figure representing the cost of the soil would have to be entered in the accounts of the business. The judgment of the House of Lords in *Sharkey v. Wernher*[1] appears to me to make it clear that the figure to be entered would not, in the circumstances of the case at bar, be less than the market value of the topsoil delivered to the appellant.

What then was the market value of the topsoil delivered to the appellant in pursuance of the covenant of Miller Paving Limited? The evidence does not disclose the precise quantity delivered. If it be assumed that an average depth of only 3 inches, instead of the maximum of 6 inches provided in the covenant, was delivered, a simple arithmetical calculation shows the quantity to have been approximately 15,000 cubic yards. The uncontradicted evidence was that the current market price of topsoil at the time was not less than $2 per cubic yard. Consequently the figure to be entered in the accounts as the cost of the topsoil would be more than the $18,500 for which the appellant sold it and the accounts would shew no profit.

For the above reasons I am of opinion that the respondent erred in adding the sum of $18,500 to the appellant's income for the taxation year 1953.

It remains to consider the sum of $735 (the difference between the said sum of $18,500 and the sum of $19,235, the total amount received in payment for topsoil in 1953) and the sum of $1,500 received in payment for topsoil in 1954.

[1] [1955] 3 All E.R. 493.

In my opinion these two sums represent payments of the same sort as those made for topsoil prior to the year 1953, that is to say they were received by the appellant for a licence analogous to a profit a prendre granted to Maple Leaf Mushroom Farm Limited and are properly regarded as taxable income received by her from the use of her property. I do not think that the evidence established the right to make any deductions from these sums.

I would allow the appeal in part and direct that the assessment of the appellant for the taxation year 1953 be referred back to the respondent to be amended in accordance with these reasons, that is to say, by adding to the appellant's income for that year the sum of $735 instead of the sum of $20,000.

The appeal having succeeded to the extent of $18,500, although not as to the items of $735 and $1,500, I would direct that the appellant be entitled to her costs throughout.

Appeal dismissed with variation, CARTWRIGHT J. *dissenting.*

Solicitors for the appellant: McCarthy & McCarthy, Toronto.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.