

1966  
\*Dec. 8  
1967  
Feb. 13

THE MINISTER OF NATIONAL } APPELLANT;  
REVENUE ..... }  
  
AND  
  
HARRY GRAVES CURLETT ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Taxation—Income tax—Second mortgage loan—Money lending business—Sale of entire portfolio of second mortgages—Whether sale of inventory—Whether profit taxable—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 85E(1), 139(1)(e), (w).*

The respondent was the controlling shareholder of a company which made first mortgage loans on real estate. In order to provide the borrowers with additional funds, the respondent advanced them his own money at a discount, on second mortgages. The profits from these transactions were held to be a part of the respondent's income. In 1961, the respondent sold his entire portfolio of second mortgages to the company of which he was the controlling shareholder. The purchase price paid to him exceeded the amount owing to him on the mortgages by the sum of \$28,896.71. The Minister taxed this profit as income. The Exchequer Court held that immediately before and at the time of the sale in question the respondent patently was in the money lending business, and that the profit realized from the sale was a capital profit and not subject to tax. The Minister appealed to this Court.

*Held:* The Minister's appeal should be allowed.

As the profits which were derived from the second mortgages were taxable, it appears that their cost or value was relevant in computing the taxpayer's income from his loan business, and that they therefore constituted inventory within the meaning of s. 139(1) of the *Income Tax Act*. Section 85E(1) of the Act was therefore applicable and the sale was deemed to have been made in the course of carrying on the money lending business. The profit was therefore taxable.

*Revenu—Impôt sur le revenu—Prêt sur seconde hypothèque—Entreprise de bailleur de fonds—Vente du portefeuille de secondes hypothèques—Vente d'inventaire—Profit sujet à la taxe—Loi de l'Impôt sur le Revenu, S.R.C. 1952, c. 148, arts. 3, 4, 85E(1), 139(1)(e), (w).*

Le contribuable était l'actionnaire ayant le contrôle d'une compagnie qui prêtait sur hypothèque. Dans le but de fournir aux emprunteurs des fonds additionnels, le contribuable avançait de son propre argent, avec escompte, sur des secondes hypothèques. Il a été jugé que les profits provenant de ces transactions faisaient partie des revenus du contribuable. En 1961, le contribuable a vendu tout son portefeuille de secondes hypothèques à la compagnie dont il avait le contrôle. Le prix d'achat excédait par la somme de \$28,896.71 le montant qui lui était dû sur les hypothèques. Le Ministre a cotisé ce profit comme

\*PRESENT: Fauteux, Abbott, Martland, Ritchie and Spence JJ.

étant un revenu. La Cour de l'Échiquier a jugé qu'immédiatement avant et au temps même de la vente, le contribuable exploitait une entreprise de bailleur de fonds, et que le profit réalisé par la vente était un profit de capital et non sujet à la taxe. Le Ministre en appela devant cette Cour.

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*Arrêt*: L'appel du Ministre doit être maintenu.

Comme les profits provenant des secondes hypothèques étaient sujets à la taxe, il semble que leur coût ou valeur avait une pertinence dans la computation des revenus du contribuable provenant de son entreprise de prêteur, et qu'en conséquence ils constituaient un inventaire dans le sens de l'art. 139(1) de la *Loi de l'impôt sur le Revenu*. L'article 85E(1) de la loi était donc applicable et la vente était censée avoir été faite dans le cours de l'exploitation de l'entreprise de bailleur de fonds. Le profit était donc sujet à la taxe.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada<sup>1</sup>, en matière d'impôt sur le revenu. Appel maintenu.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada<sup>1</sup>, in an income tax matter. Appeal allowed.

*G. W. Ainslie*, for the appellant.

*Arnold F. Moir, Q.C.*, for the respondent.

The judgment of the Court was delivered by

ITCHIE J.:—This is an appeal from the judgment of Gibson J. of the Exchequer Court of Canada<sup>1</sup> allowing an appeal from the respondent's income tax assessment for the year 1962 and holding that the profit which the respondent realized from the sale in 1961 of all the second mortgages which he then held to Associated Investors of Canada Ltd. (hereinafter called "Associated"), a company of which he was for all practical purposes the sole shareholder, was a capital profit and therefore not subject to tax under the provisions of the *Income Tax Act*, R.S.C. 1952, c. 148.

The learned trial judge has found that immediately before and at the time when the sale in question was concluded the respondent "patently was in the money lending business" and that the bonuses received from second mortgages held by him were taxable as income. The ques-

<sup>1</sup> [1966] Ex. C.R. 955, [1966] C.T.C. 243, 66 D.T.C. 5200.

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tion raised by this appeal, however, is whether the profit which he realized on the sale of all the second mortgages which were then in his investment portfolio was a profit from the sale of his second mortgage business as a going concern, or whether it was simply a profit from the sale in bulk of his then existing inventory of second mortgages.

In conducting his mortgage loan business between 1949 and 1952, it was the respondent's usual practice to advance to the borrowers 85 per cent of the face value of the mortgages and to then assign and sell the mortgages at their face value to Associated. The profits from these transactions were held to be a part of the respondent's income in the case of *Curlett v. Minister of National Revenue*<sup>1</sup>.

Before concluding the transaction which gave rise to the profit, the character of which is now in dispute, the respondent had changed his method of doing business so that the security given by the borrower was a first mortgage in the name of Associated and a second mortgage in the respondent's own name, it being understood that the discount to be received by the respondent was to be calculated on the basis of the amount advanced by both Associated and himself, although Associated was not entitled to any part of the discount. All the mortgages that were sold to Associated in 1961 were of this latter type and the net result of the sale was that the purchase price paid to the respondent exceeded the amount owing to him on the mortgages by the sum of \$28,896.71, and it is this profit which was not received by the respondent until 1962 which the Minister of National Revenue claims to be taxable as income.

At the outset it appears to me to be convenient to reproduce the following relevant sections of the *Income Tax Act*:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

- (a) businesses,
- (b) property, and
- (c) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

<sup>1</sup> [1961] Ex. C.R. 427, [1961] C.T.C. 339, 61 D.T.C. 1210; [1962] S.C.R. VII.

85E.(1) Where, upon or after disposing of or ceasing to carry on a business or a part of a business, a taxpayer has sold all or any part of the property that was included in the inventory of the business, the property so sold shall, for the purposes of this Part, be deemed to have been sold by him

- (a) during the last taxation year in which he carried on the business or the part of the business, and
- (b) in the course of carrying on the business.

139. (1) In this Act, . . .

- (w) "inventory" means a description of property the cost or value of which is relevant in computing a taxpayer's income from a business for a taxation year; . . .

I agree with the finding of the learned trial judge to which I have referred that at the time when the sale of these second mortgages was concluded the respondent "patently was in the money lending business" and as the profits which he derived from his second mortgages were taxable it appears to me that their "cost or value" was relevant in computing the taxpayer's income from his loan business, and that they therefore constituted "inventory" within the meaning of s. 139(1) of the *Income Tax Act*.

It is noted by Martland J. in *Frankel Corporation Limited v. Minister of National Revenue*<sup>1</sup> that s. 85E of the Act had no application to that case because it only became effective in respect of sales made after April 5, 1955. That section, however, undoubtedly, applies to the present case and I am unable to escape the conclusion that in making the sale to Associated Mr. Curlett was disposing of at least a part of his money lending business and that the sale which he made was a sale of property which was included in the inventory of that business. I am, therefore, of the opinion that it was a sale made "in the course of carrying on the business" and was income from that business within the meaning of s. 3 of the *Income Tax Act*.

In holding that the profit made by Mr. Curlett on his sale to Associated was not to be related to the sale of the mortgages but was rather to be treated as the amount paid for his "substantial money lending business as a going concern", the learned trial judge said:

On the facts of this case, I am of opinion that the said sum of \$28,896.71 was not a receipt by the appellant of any part of the discounts or bonuses incorporated in the principal sums payable under these said

<sup>1</sup> [1959] S.C.R. 713 at 723, [1959] C.T.C. 244, 59 D.T.C. 1161, 19 D.L.R. (2d) 497.

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second mortgages. Instead, it was part of the purchase monies received by him in a bona fide realization sale to Associated Investors of Canada Limited of all the assets of his substantial money-lending business as a going concern.

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With the greatest respect, I am unable to attach any reality to the conception of "going concern" value as an element in a transaction whereby Mr. Curlett sold his inventory of second mortgages to the company which already held all the first mortgages and of which he was, for all practical purposes, the only shareholder.

For these reasons, I would allow this appeal and restore the assessment made by the Minister of National Revenue in respect of the profit of \$28,896.71 realized by the respondent in the year 1962 from the sale of his second mortgages to Associated. The appellant will have his costs in this Court and in the Exchequer Court of Canada.

No appeal has been asserted in relation to the other questions which were determined by the judgment of the learned trial judge.

*Appeal allowed with costs.*

*Solicitor for the appellant: E. A. Driedger, Ottawa.*

*Solicitors for the respondent: Wood, Moir, Hyde & Ross, Edmonton.*

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