

1967
*May 1, 2
Oct. 3

H. RICHARD WHITTALL

APPELLANT;

AND

THE MINISTER OF NATIONAL
REVENUE

RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Capital gain or income—Stock-broker—Acquisition and sale of shares—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada¹ in a case of income tax in which the facts and the circumstances surrounding the profit making transactions were substantially the same as those in the case of *Norman R. Whittall v. M.N.R.*, [1968] S.C.R. 413, the judgment of which was rendered at the same time as the present judgment.

Revenu—Impôt sur le revenu—Gain en capital ou revenu imposable—Courtier—Achat et vente d'actions—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, arts. 3, 4, 139(1)(e).

*PRESENT: Cartwright, Martland, Ritchie, Hall and Spence JJ.
¹ [1965] 1 Ex. C.R. 367, [1964] C.T.C. 440, 64 D.T.C. 5279.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada¹ dans une cause d'impôt sur le revenu où les faits et les circonstances se rapportant aux opérations qui ont permis au contribuable de réaliser un profit étaient substantiellement les mêmes que ceux que l'on trouve dans la cause de *Norman R. Whittall v. M.N.R.*, [1968] R.C.S. 413, dont le jugement a été rendu en même temps que le jugement actuel.

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Douglas McK. Brown, Q.C., for the appellant.

G. W. Ainslie and P. Cumyn, for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from judgments of the Exchequer Court of Canada¹, which dismissed the appellant's appeal from re-assessments, for income tax purposes, of his income in the taxation years 1952, 1953 and 1954.

The appeal to this Court was heard jointly with the appeal of *Norman R. Whittall*, the father of the appellant.

The issue for determination in this case is the same as in the case of *Norman R. Whittall*², that is as to whether profits realized by the appellant, in this case, a total of \$88,128.08, on the acquisition and sale of units of the St. John's Trust, and of shares of Inland Natural Gas Co. Ltd., Yankee Princess Oils Ltd., and Canadian Collieries (Dunsmuir) Ltd., were income from a business within the meaning of ss. 3 and 4 and para. (e) of subs. (1) of s. 139 of the *Income Tax Act*, R.S.C. 1952, c. 148, or represented a realization upon the disposition of an investment so as to constitute a capital gain.

The essential facts of this case are substantially similar to those of the case of *Norman R. Whittall*, but the amounts involved are less. Also the appellant in this case was a director and officer of St. John Oil & Gas Co. Ltd. and of Yankee Princess Oils Ltd., but was not a director of the other companies of which his father was a director and which are referred to in my reasons in the *Norman R. Whittall* case.

The appellant was a shareholder and officer of Ross Whittall Limited from 1950 to 1954, when it was wound up, and

¹ [1965] 1 Ex. C.R. 367, [1964] C.T.C. 440, 64 D.T.C. 5279.

² [1968] S.C.R. 413, [1967] C.T.C. 377, 67 D.T.C. 5264.

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thereafter was an officer and director of Norman R. Whittall Limited, the successor company. He owned about 20 per cent of the equity capital of Ross Whittall Limited.

The development and acquisition of the appellant's interest in the St. John's Trust, Inland Natural Gas Co. Ltd., Yankee Princess Oils Ltd. and Canadian Collieries (Dunsmuir) Ltd. were similar to those detailed in my reasons in the *Norman R. Whittall* case.

The conclusions of the learned trial judge in this case were as follows:

For the reasons given in the case of *Norman R. Whittall v. The Minister of National Revenue*, the general finding that these transactions were trading operations as part of the business is applicable in this case, and also because of the particular fiduciary relationships of the appellant with certain of these companies and their shareholders in his capacity as director thereof, I find that these transactions in these securities did not constitute "ordinary" investments, and therefore, I am of opinion that the profits realized from the sales of the securities more particularly set out in the reassessment notices for 1952, 1953 and 1954 were profits from a business within the meaning of section 3 of the *Income Tax Act*, and that the Minister was right in including it in the assessment.

What I said in the *Norman R. Whittall*² case regarding the ground based upon the appellant's fiduciary relationship to the companies of which he was a director applies also in this case. There is no evidence of any breach of the duty owed by the appellant as a director of those companies. There was, however, ample evidence to justify the conclusion that the transactions involved were trading operations as part of a business, within s. 139(1)(e) of the Act.

For that reason, in my opinion, this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Russell & Dumoulin, Vancouver.

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