THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

1969
*Mar. 20
May 16

AND

EDGELEY FARMS LIMITED ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Company incorporated to acquire land—No definite intention as to exploitation or disposition—Long-term lease granted with option to buy—Profits from exercise of option and from expropriation—Whether business profits or capital gains—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

The appellant company was incorporated in December 1958 for the purpose of acquiring 350 acres of farm land in a rapidly developing urban area. There was no fixed plan as to what the company would do with the property. The farming operations were gradually brought to an end. In 1960, the company leased the property for 25 years to a lessee who was given the option to purchase the land in its entirety or in parcels of not less than 10 acres. In 1962, the lessee exercised his option on part of the land, and in 1963 an additional part was expropriated. The profits realized by the company on the sale and on the expropriation were assessed by the Minister as profits from a business. The assessments were set aside by the Exchequer Court on the ground that the company had committed itself to holding the land as income producing land for 25 years and that the option clause in no way constituted a dedication of the land to a trading operation. The Minister appealed to this Court.

Held: The appeal should be allowed.

The earlier indecision of the company was resolved when the company gave the lease and option. The option was all important. It was the method adopted by the company that put through its real estate transactions. The company was selling its lands in the course of the operation of a business for profit. Consequently, the profits in question were income.

*PRESENT: Cartwright C.J. and Abbott, Judson, Hall and Spence JJ.

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Revenu—Impôt sur le revenu—Compagnie formée pour acquérir une propriété—Intention d'exploiter ou de disposer non arrêtée—Bail à long terme accordé avec faculté d'achat—Profits provenant de l'exercice de l'option et de l'expropriation—S'agit-il de profits provenant d'une entreprise ou de gains en capital—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 3, 4, 139(1)(e).

La compagnie appelante a été constituée en corporation en décembre 1958 aux fins d'acquérir une ferme de 350 acres dans un endroit où le développement urbain allait en accélérant. La compagnie n'avait pas décidé ce qu'elle ferait de la propriété. Elle a graduellement mis fin à l'exploitation agricole. En 1960, la compagnie a loué la propriété pour 25 ans à un locataire à qui elle a donné la faculté d'acheter le terrain en totalité ou en parcelles de pas moins de 10 acres. En 1962, le locataire a opté pour l'achat d'une partie de la propriété, et en 1963 une partie additionnelle a été expropriée. Les profits réalisés par la compagnie de la vente et de l'expropriation ont été cotisés par le Ministre comme étant des profits provenant d'une entreprise. Les cotisations ont été mises de côté par la Cour de l'Échiquier pour le motif que la compagnie s'était engagée pour 25 ans à garder la propriété comme propriété produisant un revenu et que la clause d'option ne constituait pas une dédicace de la propriété comme opération commerciale. Le Ministre en appela à cette Cour.

Arrêt: L'appel doit être accueilli.

L'indécision que la compagnie a montrée au début est disparue lorsqu'elle a accordé le bail et l'option. L'option est de toute importance. C'est la méthode que la compagnie a adoptée pour faire ses transactions immobilières. La compagnie a vendu sa propriété dans le cours de l'exploitation d'une entreprise ayant pour but de faire des profits. Les profits en question étaient donc un revenu.

APPEL d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel accueilli.

APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada[1], in an income tax matter. Appeal allowed.

G. W. Ainslie, Q.C., and *J. Halley*, for the appellant.

W. D. Goodman, Q.C., for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—This is an appeal from a judgment of the Exchequer Court[1] which allowed an appeal from assessments made against Edgeley Farms Limited for its 1962 and 1963 taxation years. The 1962 assessment was on a

[1] [1968] 2 Ex. C.R. 375, [1968] C.T.C. 240, 68 D.T.C. 5174.

profit of $23,375 made by the company by selling part of an area of land which it purchased in 1959. The 1963 assessment was on a profit of $3,100 that the company had made as a result of an expropriation of another part of the same area of land. The assessments were set aside on the ground that the profits in question were not profits from a business. On this appeal the Minister contends that the assessments for the 1962 and 1963 taxation years were on such profits.

The company was incorporated on December 31, 1958, to acquire the rights of a syndicate which had an agreement to buy lots 6, 7 and 8, Concession 5, Township of Vaughan, containing approximately 350 acres, for the sum of $497,000. The sale was closed on the payment of $150,000 cash and by giving back two mortgages, one for $150,000 and the other for $197,000. The mortgage given back provided for the repayment of principal at the rate of $5,000 per annum on each mortgage and also gave the company the privilege of obtaining a partial discharge on 5 acre lots upon paying the proportionate amount of principal.

At the time when the company bought the lands they were being operated as a farm by two estates. The company gradually brought the farming operations to an end and by 1960 had disposed of all the livestock and farm machinery. On May 18, 1960, the company leased the lands to one Samuel Z. Donnenfield. The lease provided for a term of 25 years at an annual rent of $52,800, and gave the lessee the following rights:

(a) to remove anything on the property and to change grades, remove trees, etc., in connection with the development of the property;

(b) to purchase the property at any time up until 31 December, 1967, for $875,000;

(c) to renew the option to purchase for a further eight years provided he arranged for the respondent a new first mortgage for at least $300,000 bearing interest at 7 per cent per annum;

(d) to exercise the option to purchase from time to time with regard to various parcels of not less than 10 acres, on the basis of paying $2,500 per acre and the rent under the lease being reduced by $150.00 for each acre purchase.

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Judson J.

The evidence was that in 1962, the company sold 21.25 acres; in 1963 had 2.3 acres expropriated; in 1965 had 2.1 acres expropriated; in 1968 sold 42 acres, and in 1969 had received notice of the exercise of the option to purchase a further 43 acres. Both completed sales were made pursuant to the exercise of the option.

The findings of fact of the learned President are contained in the following extracts from his reasons:

> No attempt was made before me to support the contention put forward at earlier stages of the matter, and suggested in the Notice of Appeal to this Court, that the property was acquired for the purpose of continuing the farming business carried on on the land by the previous owners.
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> Clearly, as I have said, the land was acquired because it was a good "buy". Its potential value was obvious. What the appellant would do with it was not decided at the time of acquisition. The incorporators were well to do and could afford to bide their time. What the appellant would do with the land would depend on what opportunities presented themselves. I have no doubt that, if the guiding mind of the appellant were to have frankly answered questions at the time of acquisition, he would have agreed that the appellant might itself, at an appropriate time, erect on the land buildings suitable for the developing neighbourhood, with a view to renting them or selling them; he would also have agreed that, if the right opportunity or opportunities arose, the appellant might sell some or all of the property, and he would also have agreed that a really attractive bare land leasing proposal would receive careful consideration by the appellant. In other words, the land was not dedicated at the time of acquisition to any particular use. It might end up as stock-in-trade of a trading business or as the subject of a venture in the nature of trade. It might end up as the site for an income-producing building. It might end up as revenue-producing bare land.
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> In those circumstances, had the acquisition merely been followed by the 1962 sale, I should have had no doubt that the resultant profit was a profit from a business within the extended meaning of that word as used in the *Income Tax Act*. In effect, the appellant would have dedicated the land, or at least that part of it that it sold, to the carrying on of a trading business or a venture in the nature of trade.

The ratio of the judgment under appeal is that the company had committed itself to holding the land as income producing land for 25 years and that the option clause in no way constituted a dedication of the land to a trading operation. Here, I think, there is error.

When the company gave this lease and option its earlier indecision was resolved. This is not the "bare land leasing proposal" referred to in the quoted reasons for judgment. The option, in my opinion, is all important. It was the method which the company adopted in putting through its real estate transactions. The property was in a rapidly developing area. The mortgages given back when the

property was purchased provided for partial discharges on 5 acre lots. The option was granted within 17 months from the date of acquisition of the property and provided for the purchase of 10 acre parcels. The issue in this appeal is whether the company was selling its lands in the course of the operation of a business for profit. It undoubtedly was and the gains in question are income.

The appeal should be allowed with costs, and the assessments for the company's 1962 and 1963 taxation years restored.

Appeal allowed with costs.

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

Solicitors for the respondent: Goodman & Carr, Toronto.