GEORGE W. ARGUE.....APPELLANT;

AND

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

1948

*Mar. 1
*June 25

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Revenue—Excess Profits—Income derived from personal investments—Whether subject to Excess Profits Tax—Carrying on business—Excess Profits Tax Act, 1940.

The appellant, for the taxation year 1940, derived his revenue from three sources: (*a*) from his fees as manager of the International Loan Company, a real estate mortgage loan company; (*b*) from a small fire insurance agency; (*c*) from personal real property mortgage investments and small loans. The Minister of National Revenue assessed the appellant under the *Excess Profits Tax Act* on the ground that the income received in respect of mortgages held by him constitutes part of the income derived from the carrying on of one or more businesses within the meaning of par. (*g*) of Section 2 of the *Excess Profits Tax Act*. The Court of Exchequer came to the conclusion that the appellant was carrying on a money lending business and therefore liable to the tax.

It is not disputed that the income from the insurance agency would be liable to excess profits taxation if sufficient in amount.

*PRESENT:—Kerwin, Taschereau, Rand, Estey and Locke JJ.

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Held: No indication can be found in the *Excess Profits Tax Act, 1940,* of an intention to classify as a business the investment of moneys by private individuals under the circumstances of this case and there is nothing in the evidence which justifies the conclusion that the appellant was carrying on business as a money lender or that he was trading in securities or buying and selling them with a view to profit.

As for the income derived from his managing duties, he was a paid servant or employee and therefore not carrying on business.

Robbins v. Inland Revenue Commissioners [1920] 2 K.B. 677; Smith v. Anderson [1880] 15 Ch. D. 247 and South Behar Ry. Co. *v.* Inland Revenue Commissioners [1925] A.C. 476, referred to.

APPEAL from the judgment of the Exchequer Court, Angers J. (1), affirming the decision of the Minister of National Revenue respecting the assessment of appellant under the *Excess Profits Tax Act* for the year 1940.

The material facts of the case and the questions at issue are stated in the above headnote and in the judgment now reported.

G. S. Thorvaldson K.C. for the appellant.

John L. Ross K.C. and *A. A. McGrory* for the respondent.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal from the judgment of Angers J. (1) dismissing an appeal from an assessment made upon the appellant under the provisions of the *Excise Profits Tax Act* in respect of his income for the taxation year 1940.

By an agreement in writing made between International Loan Company and the appellant dated May 31, 1921, the latter agreed "to act as the general agent and manager of the company, manage its business and represent it in all business transactions". His duties were defined as being to look after the investment of the company's funds and the collection of all moneys owing to it on shares, investments, rentals or otherwise, and he was given the exclusive right of selling the company's shares and properties and of acting as its rental and insurance agent. The appellant agreed to provide at his own expense adequate office accommodation and such clerical or other assistance as should from time to time be necessary to carry on the com-

(1) [1947] Ex. C.R. 192.

pany's business: the company on its part agreed to supply the necessary office furniture, stationery and advertising and to pay all business taxes or assessments, auditors' fees, legal fees, remuneration to directors, commissions to brokers or sub-agents for procuring loans, the expense of calling meetings of the shareholders, the cost of any bonds which the company might require from the manager or any person employed by him or by it in the conduct of its business and any expense which might be incurred by reason of the company taking deposits under the provisions of *The Loan Companies Act, 1914*. By a further term it was provided that the directors should pass upon all loans, investments or sales by the manager and that none such should be made without the authority of the Board and that all moneys realized from any of the company's activities should be deposited to the credit of the company in a chartered bank, as required by its by-laws. As remuneration for the sale of shares of the company and of its properties and for the collection of rentals the appellant was to receive stipulated rates of commission, and for all other services to be rendered by him under the agreement commission at an agreed rate upon the invested capital of the company. The agreement also contained the following provisions:—

> The Manager covenants and agrees to faithfully, honestly and diligently perform all the services required by this contract, and that he will not during the currency of this agreement, engage in or be party to the promotion of any other Company or Companies, doing business along the same lines as this Company, and that he will not engage in any business of any nature or kind whatsoever which will conflict with or be detrimental to the Company's business.

The term of the contract was twenty years and it was shown that it had been renewed for a further period.

The appellant filed with his return for the year 1940 a so-called balance sheet showing, inter alia, his income for the year in question and this disclosed that he had received as commission under his contract with the company (after deducting an amount paid to sub-agents) the sum of $18,085.45: as insurance commissions $1,308.89, as interest earned upon moneys of his own loaned upon the security of mortgages of real estate, clear title agreements of sale and promissory notes $6,378.59 and as discounts and bonuses $203.50. Under the heading "Expenses" expendi-

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tures totalling $12,119.28 were shown and the balance of $13,856.95 was classed as "Operating Income". The statement did not indicate to what extent the expenses were attributable to the earning of the insurance commissions but as to these the appellant filed with his income tax return a statement under the *Excess Profits Tax Act,* in which the nature of the business was described as "Insurance Agency" and profits of $903.94 were shown, presumably, therefore, the difference between this figure and the amount of $1,308.89 shown in the auditor's statement represented expenses attributable to that business. The appellant paid the amount of the tax as estimated by him as payable for income tax upon the remainder of his income, including surtax on his investment income and upon the item shown as discounts and bonuses earned, and the excess profit tax as computed by him on the profits of the insurance agency. The assessment made, however, in addition to imposing income tax, assessed the net amount shown by the auditors as having been received from the various activities of the appellant for excess profit tax on the footing that these amounts were the profit of one or more businesses within the meaning of sec. 2(*g*) of the *Excess Profits Tax Act 1940* and, after deducting a salary allowance of $5,000 a tax of 12 per cent was imposed upon the balance.

By the Notice of Dissatisfaction the appellant contended that the income from the mortgage investments was not taxable under the *Excess Profits Tax Act.* Subsequently, by consent, pleadings were filed and the appellant then contended that no part of his income was derived from being in business or from a business, and to this the Minister pleaded without raising the ground that the objection raised by the Notice of Dissatisfaction was limited to the interest from the mortgages alone, and at the trial the matters in issue were treated as defined by the pleadings.

As to the income derived by the appellant from commissions on insurance written by him, there appears to be no dispute. That income was apparently received from an insurance company represented by the appellant and with which he effected insurance not only of property upon which loans were made by International Loan Company

but that of other persons including some of those who had paid off their loans from the company but continued the insurance with him. Considering this aspect of the matter alone and divorced from the appellant's other activities, no question for determination arises since sec. 7(*c*) of *cap. 32, Statutes of Canada 1940,* exempted from taxation the profits of taxpayers whose profits in the taxation year did not exceed $5,000, and it would appear that the payment made under the *Act* in respect of these profits was paid under a misapprehension. The fact, however, that the appellant did act as an insurance agent may have some bearing on the question of his liability to tax in respect of his other income. If the expenses as shown in the auditor's statement, other than the amounts expended in connection with the insurance business, were properly attributable to the services rendered to International Loan Company, the net commissions received by the appellant for managing the affairs of the company and for any sales of shares of real estate and for the collection of rentals approximated some $6,500, so that if this amount is taxable and be added to the amount received as commissions on insurance written some taxation under the *Excess Profits Tax Act* would be involved. Under sec. 2(*g*) of the statute, as enacted in 1940, "profits" means the income of the taxpayer derived from the carrying on of one or more businesses, as defined by sec. 3 of the *Income War Tax Act,* and before any deductions are made therefrom under any other provisions of that *Act.* Sec. 7 provides for certain exemptions and subsec. (*b*) thereof, as made applicable to the taxation year 1940 by sec. 7 of *cap. 26, Statutes of Canada, 1942,* provided that the following profits should not be liable to taxation under the Act:—

(*b*) the profits of a profession carried on by an individual or by individuals in partnership if the profits of the profession are dependent wholly or mainly upon his or their personal qualifications and if in the opinion of the Minister little or no capital is employed: Provided that this exemption shall not extend to the profits of a commission agent or person any part of whose business consists in the making of contracts on behalf of others or the giving to other persons of advice of a commercial nature in connection with the making of contracts unless the Minister is satisfied that such agent is virtually in the position of an employee of one employer in which case this exemption shall apply and in any case the decision of the Minister shall be final and conclusive.

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The contention made on behalf of the Minister is that in acting as the general agent and manager of International Loan Company, in carrying on the business of a insurance agent and in investing his own moneys, the appellant was carrying on one business and alternatively that each of these three activities should be classified as the carrying on of a business. While the question as to the liability of the appellant's remuneration under the contract of International Loan Company to excess profits tax was placed in issue by the pleadings, the learned trial Judge (1) did not deal with the matter apparently interpreting the arguments addressed to him as treating the sole matter in dispute as being the liability of the income from the investments to such taxation. It cannot be decisive of the question as to whether or not the services rendered to the company by the appellant, under the terms of the contract, constituted a carrying on of business within the meaning of sec. 2(*g*) that he was remunerated by a commission rather than by a salary. The activities of the company consisted of the loaning of moneys upon mortgage, the sale of land acquired by it (presumably by foreclosures) the rental of properties so acquired, the purchase of Dominion Government bonds and the sale of its treasury shares. The agreement provided that the Board of Directors should pass upon all loans, investments or sales and that "no loan, investment or sale of property of any nature whatsoever should be made by the manager without the approval or authority of the Board", and all business was transacted in its name and on its behalf. The services rendered by the appellant to the company were, in my opinion, rendered qua servant and the remuneration received by him was for services rendered in that capacity. The business carried on was the company's business and not his and the rendering of services of this nature in the capacity of a paid servant or employee of a company is not carrying on business (*Robbins* v. *Inland Revenue Commissioners* (2)). The appellant had but one employer, International Loan Company: the covenant that he would not engage in any business of any nature or kind whatsoever which would conflict with or be detrimental to the company's business was apparently interpreted by the parties as requiring him

(1) [1947] Ex. C.R. 192.

(2) [1920] 2 K.B. 677 at 683.

to devote all his time to the company's services, other than such small portion thereof as would be taken up by his activities as an insurance agent, and this the contract authorized, and the undisputed evidence is that he did so. Sec. 7(*b*) which excludes from the exemption the profits of a commission agent or person, any part of whose business consists in the making of contracts on behalf of others, does not apply to the activities of the appellant under his contract, in my opinion, other than to that of the insurance agency which he was permitted to carry on and as to which there is no dispute.

There remains the question as to the liability of the appellant to tax in respect of the income received upon his investments. While the appeal to the learned trial Judge (1) concerned the tax imposed upon the appellant in regard to all three of his activities and the appeal was dismissed, the reasons for judgment make it clear that in coming to the conclusion that the appellant was carrying on a business he had considered only the activities of the appellant in connection with the investment of his moneys. The appellant gave evidence that in 1925 or 1926 he had commenced to loan moneys, which represented his personal savings on long term mortgages of real estate. The auditor's report disclosed that as of December 31, 1940, the appellant had a sum of $102,379.24 invested in first mortgages on real property and in what were described in the schedule as clear title agreements, which I understand as meaning that the appellant had acquired by purchase the vendor's interest in certain agreements for sale and clear title to the property sold, or that he had sold real estate to which he had obtained title by foreclosure under agreements for sale. All the mortgages, with one exception, were first charges upon real estate; the exception was a small second mortgage: in addition he had loaned over a period of years a small amount to two persons taking their promissory notes, and about $2,200 to twelve other persons from whom he had taken promissory notes secured collaterally by shares of International Loan Company. The mortgages, agreements for sale and promissory notes all bore interest and this is the source of the amount of $6,378.59 shown as interest earned under the heading of "Revenue" in the auditor's report.

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The appellant said that he had no short term mortgages and as to the loans made upon promissory notes he said that these had been made, with the exception of the small amount loaned on two unsecured notes, for the accomodation of "clients", apparently referring to shareholders of the Loan Company with whom he had done business on its behalf. According to the appellant he devoted his entire time and energy to the business of International Loan Company and was frequently absent from Winnipeg for two months at a time on its business and a paid secretary looked after any matter requiring attention in connection with his personal investments during his absence. Only the balance owing upon the respective loans is shown in the auditor's statement and such balances varied considerably, the largest being an amount of $7,329.64 and the smallest an amount of $84.16, being presumably the amount remaining unpaid on a larger loan: the average of the balances owing approximated $1,300. In the course of his evidence the appellant had said that he thought he had made only five new loans during the taxation year 1940, whereas in fact there had been fourteen of such loans, an error which was explained in a statement by his counsel at the conclusion of the evidence as having resulted from a mistake made by the secretary in giving the figures to the appellant. Counsel for the Crown accepted the explanation, agreeing that there had not been any intention to mislead the Court, and there is no finding against the veracity of the appellant in the reasons for judgment. It might be pointed out that the learned trial Judge was in error in stating that according to the evidence 18 mortgages or agreements for sale had matured in 1940: the correct number is 14, and this error would nullify the calculation subsequently made in the judgment appealed from. The learned trial Judge, after reviewing the evidence, said:

> Can it be said that the appellant in investing his money in mortgages, agreements for sale, drawing the interest thereon when it became exigible, receiving the capital of his investments when they came to maturity, re-investing his capital in mortgages or agreements for sale constitute a business? If the appellant's activities were limited to that, I would feel inclined to answer the question negatively. Were they so limited? The problem we have to solve narrows down to this question, as I think.

and again, after commenting on the fact that Argue was "generally ignorant of his personal affairs" and that it was

strange that his secretary had not been called as a witness so that she might have given evidence as to the amounts of the securities renewed or replaced in 1940 and that so high a proportion of appellant's securities should have come to maturity in that year, said:—

> Needless to say, if evidence had been adduced regarding the quantity and the value of the securities required in say the two or three years preceding and the two or three years following 1940, the Court would have been in a better position to determine whether the appellant was merely reinvesting his capital as its investments were naturally realized on their respective dates of maturity or whether he was carrying on an investment business, selling securities at a profit and replacing them by others at lower prices in the hope of disposing of them later at increased prices and drawing a benefit therefrom. Perhaps the figures for the years immediately preceding and following 1940 were not favourable to appellant's contention; that may be the reason why no evidence was adduced in relation thereto. In the circumstances, I must rely on the figures for the year 1940 only.

From this I infer that the learned trial Judge considered that the failure of the appellant to produce further evidence as to the manner in which he had carried on these activities in two or three of the years preceding and following 1940 justified the inference that he was selling securities at a profit and replacing them by others at lower prices, in the hope of disposing of them later at a profit, and that accordingly he was not merely investing his moneys in the manner indicated in the passage first above quoted. With respect I am unable to agree with this conclusion. The appellant had in his Statement of Claim alleged that his income for the year 1940 amounted to $12,666.95 and that this was made up of "salary received from International Loan Company, insurance commissions, dividends and interest earned on his real estate mortgages and agreements" and this had been expressly admitted in the Statement of Defence. The respondent did in fact plead that the profits assessed for excess profits tax constituted the income derived by the appellant from the carrying on of one or more businesses but this did not detract from the effect of the admission made. Having this admission in the pleadings counsel for the appellant apparently considered that there were no further facts to be proven by him and in calling the appellant he stated that he did so mainly so that counsel for the Minister might have an opportunity of cross-examining him: as to the failure to call the secretary

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at the conclusion of the other evidence, counsel stated that the secretary was available to give evidence if further particulars were required, apparently considering that he had discharged whatever onus of proof rested on the appellant. Under these circumstances, it can scarcely be suggested that the appellant intentionally held back any facts from the Court: if particulars of the investments made in these other years had been considered of importance the information could readily have been obtained on the cross-examination of the appellant. Where, as in the present case, the appellant had asserted that that portion of his income with which we are concerned was "interest earned on his real estate mortgages and agreements" and this had been expressly admitted on behalf of the Minister, and where as was done here the appellant supplemented this unqualified admission by evidence that this was, with a negligible exception in the case of moneys loaned on promissory notes, interest on long term mortgages and agreements for sale in which he had invested his savings for the purpose of earning income, it was not incumbent upon him further to negative the contention that in investing these said moneys he was carrying on the business of a money lender, which is in effect what the contention of the Crown amounted to. The argument on behalf of the Minister is that the appellant was carrying on a money lending business of a similar character to that carried on by International Loan Company. Neither the word "business" or the expression "carrying on business" are defined in the *Excess Profits Tax Act*. In *Smith* v. *Anderson* (1), Jessel, M.R., in deciding the meaning to be assigned to the word "business" in the *Companies Act, 1862*, s. 4, said that it was a word of extensive use and indefinite signification and one that had a more extensive meaning than "trade". In discussing the subject he said in part (p. 261):—

> So in the ordinary case of investments, a man who has money to invest, invests his money and he may occasionally sell the investments and buy others, but he is not carrying on a business.

While the judgment in this case was reversed on appeal, nothing in the judgments of the Court of Appeal cast any doubt upon the accuracy of this statement. James, L.J., in considering the position of the trustees under the trust agreement in question in the action, said in part (p. 276):—

(1) [1880] 15 Ch. D. 247.

In my opinion, nothing that is to be done under this deed by the trustees comes within the ordinary meaning of "business", any more than what is done by the trustees of a marriage settlement who have large properties vested in them, and who have very extensive powers of disposing of the investments, changing the investments, and selling them and reinvesting in other investments, according to their discretion and judgment, with or without the consent of their cestuis que trust. That is not a business.

and see *South Behar Ry. Co.* v. *Inland Revenue Commissioners* (1), Lord Sumner at 485. It may be noted that the *Excess Profits Tax Act, 1940,* by para. (*d*) of sec. 7 expressly exempted from the tax the profits of a personal corporation within the meaning of para. (i) of sec. 2 of the *Income War Tax Act,* provided that the income of such corporation is derived solely from the holding of investments, and by para. (*e*) of sec. 7 the profits of a Non-Resident Owned Investment Corporation within the meaning of para. (*p*) of sec. 2 of the *Income War Tax Act* which elects to be assessed as such under the said Act. I think it cannot have been the intention of Parliament that income of like nature resulting from investments made by an individual of his personal savings should be subjected to the tax, when the income of such companies carrying on the business of making investments was exempt. I find nothing in the evidence in this case which, in my opinion, justifies the conclusion that the appellant was carrying on business as a money lender, or that he was trading in securities or buying and selling them with a view to profit. In *Ormond Investment Co.* v. *Betts* (2), *Lord Atkinson,* dealing with the construction of a section of the *Income Tax Act 1918,* said in part:

> It is well established that one is bound, in construing Revenue Acts, to give a fair and reasonable construction to their language without leaning to one side or the other, that no tax can be imposed on a subject by an Act of Parliament without words in it clearly showing an intention to lay the burden upon him, that the words of the statute must be adhered to, and that so called equitable constructions of them are not permissible.

All questions of this nature must of necessity be decided upon the facts of the particular case under consideration. I find no indication in the *Excess Profits Tax Act, 1940,* of an intention to classify as a business the investment of moneys by private individuals under the circumstances of this case or to subject the income from such investments to excess profits tax.

(1) [1925] A.C. 476. (2) [1928] A.C. 143.

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The appeal should be allowed with costs and the assessment made upon the appellant for excess profits tax set aside: the appellant should have his costs of the proceedings in the Exchequer Court.

Appeal allowed with costs.

Solicitors for the appellant: *Andrews, Andrews, Thorvaldson and Eggertson.*

Solicitors for the respondent: *John L. Ross and A. A. McGrory.*