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*Mar. 22
Jun. 24

HILL-CLARK-FRANCIS LIMITED .....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Lumber dealer—Option to buy shares of supplier with intent to make it a subsidiary—Exercise of option and resale of shares at profit—Whether income or capital gain—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

The appellant company carried on business as a general contractor and as a wholesaler and retailer in lumber. One of its major sources of supply of lumber had been for some years one P Co. In 1952, P Co. was in financial difficulties. The appellant, with the intention of making P Co. a subsidiary as it had done with two other companies in 1943 and 1944, and thus assuring itself of not losing this source of supply, obtained an option to purchase all the issued shares of

*PRESENT: Taschereau, Cartwright, Martland, Judson and Hall JJ.

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P Co. for $50,000. Some two months later, the appellant received an offer of $160,000 for those shares from a third party. The option was then exercised and the shares were resold to the third party for $160,000 and other stated considerations. The Minister treated the profit made on the resale as income. The appellant contended that the option to purchase the shares was a capital asset and that the sale of the shares was a realization of that capital asset. The assessment was affirmed by the Exchequer Court, and the taxpayer appealed to this Court.

Held: The appeal should be dismissed.

This was not a simple purchase and sale of shares. The appellant, having only an option on shares, did not carry out its plan to make the supplier a subsidiary. It exercised the option and sold the shares for cash and other considerations, and this gave both the purchase and sale of the shares a trading character rather than acquisition and realization of a capital asset. The profit was therefore a profit from a business.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], affirming the Minister's assessment. Appeal dismissed.

P. N. Thorsteinsson and *D. J. Johnston,* for the appellant.

T. J. Cross and *D. C. H. Bowman,* for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—Hill-Clark-Francis Limited appeals from a judgment of the Exchequer Court[1] which held that a profit made on the sale of certain shares in the year 1952 was income and not a capital gain.

The appellant was incorporated in 1913 and carries on business in Northern Ontario on a large scale as a general contractor and as a wholesaler and retailer in lumber. It buys and manufactures lumber, some of which it uses in its construction business; some it sells through its retail outlets, and some it sells in wholesale lots.

A major supplier of lumber to the appellant in 1952 was a company called Poitras Frères Inc. The appellant had contracted in each year since 1943 to purchase the whole annual production of lumber of this company. In the year 1952, Poitras Frères was producing about one-third of the appellant's lumber requirements. To enable Poitras Frères to produce the logs and manufacture the lumber, the appellant made advances from time to time which were to be

[1] [1961] Ex. C.R. 110, [1960] C.T.C. 303, 60 D.T.C. 1245.

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considered as payments on account of the purchase price of the products.

In the winter of 1951-52, Poitras Frères Inc. was in financial difficulties, and in May 1952, the appellant approached the principal shareholder with a view to purchasing all the issued shares of that company. This was done because the appellant feared that if Poitras Frères went out of business, it would lose one of its major sources of supply.

In June 1952, the appellant obtained for $100 from Roger Poitras, the principal shareholder, an option exercisable at any time up to November 20, 1952, to purchase all the issued shares of the company for $50,000. The appellant took an option rather than make an outright purchase of the shares at that time because it was temporarily short of cash on account of the seasonal nature of its business.

In 1943 and 1944, the appellant had acquired control through the purchase of shares of two other lumber companies. In each case its object in making these purchases was to ensure continuing sources of supply. The appellant still controls these subsidiary companies through share ownership and they continue to supply lumber to the appellant.

I am prepared to accept the appellant's submission that in purchasing the shares of Poitras Frères Inc., it was intending to make this company its subsidiary just as it had done with the two companies purchased in 1943 and 1944. But, in late August 1952, a Mr. Horace Strong, who was the majority shareholder in Haileybury Lumber Company, began to negotiate with the appellant for the purchase of the Poitras shares and, in September 1952, the appellant accepted his offer of $160,000 for these shares. The appellant then exercised its option and paid the option price of $50,000 to Roger Poitras, took delivery of the shares and then sold them to Mr. Strong for $160,000.

The agreement of purchase and sale also provided for:

(a) the cancellation of all contracts between the appellant and Poitras. This means that the appellant gave up its right to receive the lumber it had contracted for;

(b) the payment by the appellant of a sum sufficient to reduce the Poitras bank loan to $60,000;

(c) repayment of the appellant's advances to Poitras amounting to approximately $280,0000;

(d) cancellation of the appellant's guarantee of the Poitras bank loan when it was reduced to $60,000.

It is apparent from this outline that this was not a simple purchase and sale of shares. On these facts, the conclusions of the learned trial judge, in my respectful opinion, are correct and unassailable. He found that the appellant, having only an option on shares, did not carry out its plan to make Poitras a subsidiary. It exercised the option and sold the shares for cash and the other stated consideration, and this gave both the purchase and sale of the shares a trading character rather than acquisition and realization of a capital asset. He therefore correctly held that the profit so realized was a profit from a business within the meaning of s. 3(*c*) of the *Income Tax Act* as defined by s. 139(1)(*e*), and was properly treated as income.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Stikeman & Elliott, Montreal.

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