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BETWEEN:

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

AND

CLIFTON H. LANE ..... RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—Income or capital gain—Investment or speculation—Purchase and subsequent sale of large tract of undeveloped land—Secondary intention of purchaser.

The respondent was a member of the Mainshep Syndicate formed in April 1951, which acquired by deed dated April 13, 1951, a twenty acre parcel of undeveloped and unserviced land in the Township of North York, on the outskirts of Toronto, for $48,000, and, at the same time, obtained an option to purchase for $75,000, an additional twenty-three acre tract of land adjoining the first parcel. The purpose of the Syndicate, as revealed by the Syndicate agreement, was to acquire the said lands and erect thereon duplexes or other multiple dwellings, or to otherwise deal with the said lands. The deed to the second parcel of land was not taken up until April 1, 1954. Under a temporary holding by-law passed in January 1951, the said lands had been zoned industrial. The Syndicate retained an architect to make preliminary plans for the layout of a housing development on the lands, made inquiries of C.M.H.C. with regard to financing the project and enquired of a construction company if it would be interested in tendering on the proposed construction project. At an Ontario Municipal Board hearing on February 26, 1952,

with respect to the proposed North York Township zoning by-law under which the Syndicate's land, i e. the twenty acre parcel, was zoned for warehousing only and virtually all of the land under option to the Syndicate, i e. the twenty-three acre parcel, was zoned industrial or commercial, the Syndicate requested that the whole of its lands be zoned for manufacturing on the basis that if it could not get housing the land would sell better for manufacturing than for warehousing. In October 1954, the Syndicate sold 3 06 acres of its lands which had been zoned residential to a builder for $30,000 and in December 1956, it sold the balance of the said lands to the Ford Motor Company of Canada Limited for $306,360.

The respondent was also a member of the New Sheppard Syndicate formed in September 1952, for the purpose of acquiring land in the vicinity of the Mainshep Syndicate's property on which to develop a shopping centre to service the proposed Mainshep Syndicate housing development. The land acquired by this syndicate consisted of twenty-six acres for which it paid $34,000. Eleven acres of the said land were sold in January 1954 for $50,000 and the balance was sold in February 1955 for $60,000.

Held: That whatever alternative is taken by the taxpayer in the event his preferred intention becomes unrealizable can be taxable or not depending on whether the evidence discloses that this alternative is or is not an operation of trade, and the alternative or secondary intention can, on proper evidence, be inferred from such things as the circumstances surrounding the transaction, the state of development of the lands in the vicinity at the time, i e. whether they were speculative or not and the knowledge the taxpayer had of such development, the skills of the taxpayer, or any other fact or circumstance sufficient to indicate that the purchase of the land as a speculation looking to resale was or must have been contemplated in the event the preferred intention could not be carried out.

2. That the transaction under review was a venture in the nature of trade, this conclusion being supported by the following facts—the lands purchased and subsequently sold by the Syndicate were already in a speculative state when they were purchased; the skills and knowledge of the members of the Syndicate were such as to establish that the Syndicate knew that if the land could not be rezoned residential or the necessary financing arranged, it was good and profitable land for commercial purposes; Sec. 1 of the Syndicate agreement provided for "otherwise dealing with the said lands", indicating that the Syndicate had the possibility of profitable resale in mind; the proposed investment project was quickly and easily set aside and arrangements made to sell the land after the OMB hearing of February 26, 1952; the expected investment yield was very low when considered in relation to the commercial risk involved in the proposed rental project; even after the Syndicate knew the proposed residential development was impossible it extended its option to purchase the twenty-three acre parcel of land which it eventually purchased in 1954, although, had the option been allowed to expire, the loss to the Syndicate would not have exceeded $5,000 and might have been less.

3. That it is clear that the purchases of land made by the New Sheppard Syndicate were commercial purchases looking to resale and as such were adventures or concerns in the nature of trade, since this Syndicate was not even formed until long after the proposed residential development of the Mainshep Syndicate had been given up and no attempt

1964

MINISTER OF NATIONAL REVENUE v. CLIFTON H. LANE

had been made to build anything on the New Sheppard Syndicate lands before they were sold.

4. Appeal allowed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Noël at Toronto.

G. D. Watson, Q.C. and *John Gamble* for appellant.

W. Z. Estey, Q.C. for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

NOËL J. now (February 26, 1964) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Tax Appeal Board[1] setting aside the taxes levied against the respondent in the sum of $4,541.23 for the taxation year 1954; $9,174.08 and $241.25 for the year 1955; $16,176.81 for the year 1956 and $11,624.03 for the year 1957, on the basis that the amounts received by the taxpayer in the above mentioned years, which were his share of the profits from a number of real estate transactions upon the winding up and liquidation of a syndicate or partnership, of which he was a member, were in fact capital receipts and not subject to income tax.

According to the respondent, the transactions, in respect of which these proceedings have arisen, relate to the creation of real estate investments which were frustrated and sold off and the difference between the land purchase price and the land proceeds of sale was of a capital nature and therefore not assessable.

This appeal was heard at the same time as eight others (one of which Mrs. Kathleen DeMara, who did not appear and whose solicitors stated she did not wish to appear in this appeal) involving members of two syndicates, Mainshep and Newshep, of which some were involved in the Mainshep Syndicate only and others in both the Mainshep and Newshep Syndicates. Counsel for H. A. Smith, John Van Nostrand, Mrs. A. Mulholland, C. Mulholland and W. Z. Estey, submitted that the latter, being involved in

[1] 26 Tax A.B.C. 129.

one venture only, their position was different from the three others, C. H. Lane, the respondent, Norman S. Robertson and F. D. Turville, who, in addition were also involved in another venture at approximately the same time in the same area and consequently the appeals of these nine taxpayers should not be heard at the same time. This request, however, was not granted it being decided and agreed by counsel for the parties that the evidence with respect to all the respondents would be submitted now and that the Court would make a proper segregation of the evidence produced and safeguard thereby the rights of the different respondents.

It was on this basis that the evidence was adduced and the appeals were heard.

The respondent, a Toronto lawyer, became a member of the Mainshep Syndicate in 1951. The latter had been set up upon the instigation and suggestion of a real estate broker, C. DeMara, who at the time, acting for the T. Eaton Co. Ltd., had obtained options of lands in the vicinity of Sheppard Avenue and the CPR tracks in the Township of North York, in the outskirts of the City of Toronto. The T. Eaton Co. Ltd. had decided to exercise its option on part of the lands only where they intended to build a twelve million dollar warehouse, and authorized their broker, Demara, to make whatever use he desired of their option on the adjacent balance of the lands, a 20 acre portion referred to as Parcel A. DeMara then obtained an option to purchase an additional 23 acres called Parcel B immediately adjoining Parcel A on the south. At the time the above acreage was undivided farm land lying along the CPR line and was remote from current development. On the south side of Sheppard Avenue there were scattered houses, one a farm purchased under the *Veterans' Land Act* presumably to be farmed, and a few small cottages. There were no stores, factories or warehouses, nor sewer facilities within at least one-half mile. Part of this land faced on Main Street and the latter extended southerly into Weston which is now a part of Metropolitan Toronto.

Mr. DeMara, who was a friend and a client of the respondent, approached the latter and proposed that a syndicate be formed to acquire the property under option. Mr. Lane then approached his partner, Mr. Norman

1964

MINISTER OF NATIONAL REVENUE v. CLIFTON H. LANE

Noël J.

Robertson, Q.C., who, he claims, immediately suggested that the property be used for the purpose of erecting thereon multiple dwelling houses as at the time there was a great shortage of housing in the area, and that the money necessary for this project be borrowed from Central Mortgage and Housing Corporation which, according to Mr. Robertson, would make, on a guaranteed rental system, very high mortgage advances, up to 85 per cent or even higher. The latter stated that at the time he knew of a builder of housing units by the name of Salter, who obtained from a company he knew, insured under the National Housing Plan, a loan so large that the whole board of directors went up to see the site and the plant and this, he said, had something to do with the decision to go ahead with the housing development of the Mainshep Syndicate.

I might add here that Mr. Robertson had received information also from a different source of the imminence of the Eaton development, as well as of an additional nearby large development of Murray Printing Company, and the housing development proposed was for the purpose of supplying housing facilities to the numerous families of the future employees of the Eaton warehouse and the printing company.

Eight others then joined with C. DeMara, C. H. Lane, the respondent, and N. Robertson and a Syndicate agreement, Ex. "A", was drawn up and signed some time prior to April 13, 1951. The Syndicate consisted of 1,500 units of $100 each, of which $130,000 were subscribed and $58,500 paid in. According to Schedule "C" attached to the agreement, the following amounts of cash were advanced: J. Van Nostrand, $2,025; C. R. DeMara, $18,900, F. D. Turville, $4,950, N. S. Robertson, $5,850, C. H. Lane, $2,025. The balance of $24,755 was subscribed by others who are not parties to these appeals. The agreement contained a number of terms dealing with the transferability of the units, the election of an executive committee, a prohibition against expenditure of capital for construction without unanimous approval of Syndicate members, and the appointment of Mr. Cyril R. DeMara & Co. Limited as real estate agent on an established scale of fees.

The purpose of the Syndicate is recited on p. 2 of the agreement document as follows:

> A syndicate is hereby formed for the purpose of acquiring the lands described in Schedules "A" and "B" hereto respectively situate in the Township of North York, in the County of York, in the Province of Ontario, with a view to erecting duplexes or other multiple dwellings thereon, preferably on the plan commonly referred to as "the guaranteed rental plan" sponsored by the Government of Canada, and holding the same until mortgages intended to be placed thereon for the purpose of financing the buildings have been fully satisfied, all upon the terms and conditions herein mentioned.

Section 1 of the agreement also provides *inter alia* that the lands were required for the purpose "of constructing duplexes or other multiple dwellings upon the same or otherwise dealing with the said lands."

Messrs. Norman Robertson, Cyril DeMara, F. D. Turville and C. H. Lane, the respondent, were appointed members of the executive or managing committee of the Mainshep Syndicate, which ultimately expanded to twenty-three members and comprised, in addition to DeMara who is a realtor, a surveyor, four lawyers, a number of businessmen, and the wives of some of the participants.

The Mainshep Syndicate acquired Parcel A by deed, dated April 13, 1951, at a price of $48,000, and obtained an option to acquire Parcel B at a price of $75,000 which had to be exercised on or before April 15, 1952. On March 11, 1952, an extension of the exercise of this option was obtained for one year upon payment of the sum of $5,000 and the deed for Parcel B was finally taken up on April 1, 1954.

The Syndicate, immediately after its formation around the end of April or beginning of May, 1951, obtained the services of a Toronto architect, a Mr. Hoare, who, after walking over the property, expressed his satisfaction with the location and thought "it was a very good piece of land and suited both the topography and the location" for the erection of multiple dwelling houses for the families of the men who would work in the Eaton and printing plants to be built in the area. He had designed a similar project for a Mr. Salter on Sheppard Avenue shortly before that (to which Mr. Robertson had also referred), as well as for several others, and confirmed that there was a housing shortage at that time. On May 15, 1951, Mr. Hoare

1964

MINISTER OF NATIONAL REVENUE v. CLIFTON H. LANE

Noël J.

made investigations as to the zoning of the area and the possibility of installing sewage and water mains and prepared a number of plans illustrating how the fifty-two housing units contemplated might be laid out on this property. The plans included a general property plan, a floor plan of a typical building, perspective elevation of a typical building, and a perspective drawing showing a whole development. He then estimated the cost of each building at $70,000 which, with the estimated cost for sewage and water mains at $150,000, involved a total expenditure for the whole project of approximately $3,790,000.

At this time the Township of North York, where the Syndicate lands were situated, did not have a general zoning by-law covering the whole township and large areas were agricultural lands and not zoned at all. It would seem, however, that the lands of the Syndicate at that time had been zoned industrial under the then current temporary by-law 7071 passed on January 1, 1951, and a planning committee set up to zone the whole township was still in the process of preparing a definite zoning by-law.

On June 25, 1951, the respondent wrote to a Dalton Engineering and Construction firm to inquire if it would be interested in tendering on the construction project and this firm, in another letter, expressed its desire to do so.

On September 18, 1951, the Syndicate itself applied to Central Mortgage and Housing for the desired loan and forwarded Mr. Hoare's plans along with the application. On October 10, 1951, Mr. Lane received a reply stating that the Syndicate's letter of development had been under review, but that because the mortgage situation "as affected by new Government policy is in a state of flux, it is difficult to talk financing until this office is aware of how Government policy is to be implemented", and suggesting that as they were dubious about the site being quite a distance away from existing new building, the matter should be postponed until sometime after October 15.

Mr. Lane, on October 15, 1951, answered some of the points raised in the above Central Mortgage letter, particularly with regard to the matter of the site being far from existing new building, stating:

> That is true enough, but there has been a great deal of activity in the subdivision and sale of real estate in that vicinity in the last year and our clients felt that a rapid development of the area is now imminent.

On January 31, 1952, the Syndicate received notice of the North York zoning by-law 7625 under which only a negligible part of the 23 acre parcel was zoned residential, the balance being zoned industrial or commercial, and as for the lands belonging to the Syndicate, they were zoned for warehousing only and precluded the building of any residential houses. Tuesday, February 26, 1952, was set down for the hearing of all parties interested in support of or in opposing this by-law.

On February 12, 1952, Mr. Lane wrote Central Mortgage and Housing Corporation, informing them that the matter had to be further delayed because "now that the North York zoning by-law is published we find that dwellings would not be permitted on the lands in question", adding that the Syndicate Committee intended to make representations to the Municipal Board with respect to the restrictive by-law. On February 15, 1952, a reply was received from Central Mortgage and Housing, stating:

> In view of the efforts which you are about to make, we regret to advise you that this Corporation is not disposed to consider favourably any application for financing in respect to rental units at the location as indicated by you in previous correspondence. This conclusion has been reached after giving careful consideration to the proposal.

To this the Syndicate answered on February 18:

> We are sorry to hear of the view expressed by your Corporation. There is not much we can say at the moment until the zoning by-law of the Township of North York is finally passed. In the meantime, however, we would be obliged if you would consider the matter open for us to make further representations.

The Syndicate then gave up their multiple dwelling development project, because before the Ontario Municipal Board, on February 26, 1952, it requested that the area be zoned for manufacturing on the basis that if it could not get housing it would sell better for manufacturing than for warehousing.

On July 22, 1952, the Syndicate wrote to Mr. J. E. Hoare, the architect, the following:

> As you may have observed, under a new by-law of the township much of the land in the vicinity of our client's property near Sheppard Avenue and Main Street has been zoned for manufacturing or warehousing, etc., so that it becomes impractical to go on with our client's proposal to build multiple dwelling houses on the said lands. Part of our client's lands along Main Street have been zoned for single family dwellings and our client may try to salvage something of the original plans by building houses on

1964

MINISTER OF NATIONAL REVENUE v. CLIFTON H. LANE

Noël J.

the Main Street frontage. However, it is plain it cannot go on with the plans you prepared and we suggest, therefore, that you submit your account to date.

As the architect had previously agreed that if the Syndicate was unable to proceed beyond the preliminary work his fee would be a flat $400, this is the amount he was paid.

On October 29, 1954, the Mainshep Syndicate sold 3.06 acres on Main Street, which had been zoned residential, to Russell J. Peever, a builder, for the sum of $30,000, and in December, 1956, it sold the balance of the land to Ford Motor Company of Canada, Limited, for $306,360.

Three of the respondents, C. H. Lane, N. S. Robertson and F. D. Turville, were also members of a second syndicate of fourteen persons called New Sheppard Syndicate, evidenced by an agreement dated September 5, 1952, which was formed for the purpose of taking over some land situated in the vicinity of the Mainshep Syndicate's property and purchased in the spring of 1952, as well as purchasing some new acreage covering in all some 26 acres at a total purchase price of $34,000. No evidence was tendered with respect to any plans for erecting buildings or financing this venture, except that it was stated by Mr. Lane that the idea was initially to erect thereon stores, restaurants, etc., to service the residential development project of Mainshep. Eleven acres of the new Sheppard parcel was sold in January 1954, for $50,000 and the other 15 acres were sold in February 1955, for $60,000.

The question for consideration is whether, on the facts as disclosed by the evidence, the profits realized from the sale of the lands in question are profits from a business or property within the meaning of s-ss. (3) and (4) of the *Income Tax Act* and the extended meaning of "business" as defined in s. 139(1)(*e*) or, as submitted by the respondent, these Mainshep lands were acquired by the Syndicate and its members as an investment for the purpose of erecting thereon multiple residential units with a guaranteed rental plan and that it was only because this purpose was frustrated that the lands were sold, realizing therefrom a fortuitous profit by way of capital gain.

Now the test of trading is objective, as the intention or motive of the taxpayer, although relevant, cannot alone determine what his acts amount to and, in some cases, can be negated by these very acts; furthermore, whatever

alternative is taken by the taxpayer in the event his preferred intention becomes for some reason or other unrealizable can be taxable or not depending on whether the evidence discloses that this alternative is or is not an operation of trade.

Indeed such is the situation found in all these cases where land is purchased for the purpose of using it to create an investment and this secondary or alternative intention can, by proper evidence, be inferred from a number of things such as the circumstances surrounding the transaction, the conduct of the taxpayer, the state of development of the lands in the vicinity at the time, i.e., whether they were speculative or not, and the knowledge the taxpayer had of such development, the skills of the taxpayer, or any other fact or circumstance sufficient to indicate that the purchasing of the land as a speculation looking to resale was or must have been contemplated in the event the preferred intention could not be carried out.

It is, I believe, on this basis that the Supreme Court of Canada in *Regal Heights v. Minister of National Revenue*[1] (Judson J.) stated at p. 905:

> There is no doubt that the primary aim of the partners in the acquisition of these properties, and the learned trial judge so found, was the establishment of a shopping centre, but he also found that their intention was to sell at a profit if they were unable to carry out their primary aim.

Now, in the present instance, although four members of the Syndicate, N. S. Robertson, H. A. Smith, J. Van Nostrand and C. H. Lane, stated that the sole purpose of the Syndicate was to erect on the lands purchased a multi-dwelling guaranteed housing development, and the agreement recites such an intent, which in turn is corroborated by the engaging of an architect who prepared plans and investigated the sewers and water situation, and the inquiring as to whether a construction company would be interested in bidding on the construction job, as well as the letters written to Central Mortgage and Housing Corporation for a loan on the housing project, Mr. Lane, the respondent herein, gave a number of answers which,

[1] [1960] S.C.R. 902.

1964

MINISTER OF NATIONAL REVENUE v. CLIFTON H. LANE

Noël J.

in my opinion, indicate that such was not the case. cf. pp. 56-57 of the transcript:

Q. Wasn't that the whole object in Mr. DeMara coming to you? He said "Here is some land we can get at X dollars and a few days or months or years from now it is going to be worth a lot more money"?

A. I think so, but I don't remember him putting it that way.

Q. What other reason would there be for him suggesting this parcel to you?

A. I do not know of any other.

Q. I suggest that is a reasonable situation. Then when he suggested the proposition to you I gather he suggested this is too big for you and me; we need some others to come in on it?

A. Yes.

And at p. 76 of the transcript, in answer to a number of questions he said:

Q. Was there any consideration given to the possibility of re-sale either of the land or of the completed buildings?

A. No, there was no set policy or arrangement on that.
HIS LORDSHIP: Was it ever discussed?
WITNESS: I think it was, my lord. If you couldn't do one thing you could sell. There was always the sale of it.

Now, there is also Mr. Lane's letter to Central Mortgage and Housing Corporation of October 15, 1951, and particularly that passage which has already been quoted to the effect that "there has been a great deal of activity in the subdivision and sale of real estate in that vicinity in the last year". This establishes that the lands belonging to the Syndicate were already in a speculative state when they were purchased and this would not appear to me to be surprising in view of the manner in which they were brought to the attention of the Syndicate by Mr. C. DeMara, an experienced and active realtor, it being in my opinion significant that the latter not only participated as a member in the transactions of this Syndicate but instigated their sale to the Syndicate, stipulated a high commission fee in the Syndicate's agreement where he was appointed its real estate agent and ended up by advertising and selling the lands.

May I also add that the organization of the Syndicate, as well as the various professional and business skills of its members, including that of a professional realtor, together with the knowledge they had of the large Eaton and Murray Printing developments which made certain the

rising price of the surrounding lands including those of the Syndicate, also establishes that the Syndicate knew and realized that if the land could not be zoned residential, or the necessary finance could not be obtained from Central Mortgage and Housing Corporation, it was obviously good and profitable for commercial purposes and I must, therefore, conclude that the sale of these lands was surely contemplated.

There are, however, other aspects of these appeals which also drive me to the conclusion that if the purchase of the lands was for the purpose of erecting dwelling houses, it was also with a view to reselling them at a profit if the preferred intention was not possible. Indeed, there is the statement in section 1 of the Syndicate's agreement which says that the lands were required for the purpose "of constructing duplexes or other multiple dwellings upon the same or otherwise dealing with the said lands". Now although this may be a standard insertion in a document of this kind it does, in my opinion, indicate that the members had other purposes in mind and of course one of which might possibly have been their sale at a profit. The prohibition contained in the Syndicate's document of making capital commitments without the unanimous consent of the Syndicate's members, although a normal clause to prevent the executive committee from involving, without consultation the members in large capital expenses, would, however, indicate that the implementation of the proposed investment project could not commence until such time as the members had been consulted and had consented. That the evidence establishes that there never was a meeting of all the members for this purpose is not surprising in view of the refusal of Central Mortgage and Housing Corporation to make the necessary loans, but what appears to be more surprising, however, is that when immediately after the hearing before the Town Planning Committee, on February 26, 1952, in an attempt to zone the Syndicate's property for manufacturing, which incidentally is in itself also surprising, and may I add somewhat of an anticlimax to its letter to Central Mortgage and Housing Corporation of February 12, 1962, where it was stated that representa-

1964

MINISTER OF NATIONAL REVENUE v. CLIFTON H LANE

Noël J

tions would be made for residential zoning, a decision to sell the lands was then, around the end of February 1962, immediately taken by the executive committee without consultation with the members and C. DeMara (the pre-appointed real estate agent by section 9 of Ex. "A") immediately prepared an attractive printed brochure describing the property in question and offering it for sale at the date for a price of $320,000. This also, in my opinion, would indicate that the proposed investment project was not too important nor serious if it could so easily be set aside, without consultation and the sales of the land entered into without a meeting of the members, nor their authorization which does not seem to have even been requested.

It would appear from this that the Syndicate's non-active members were quite content to leave the handling of the Syndicate's activities to the executive committee who had carte blanche to handle the business of the Syndicate as they thought best and because of this situation, the passive members here would be in no different position than that of the active members. Indeed, if the transactions are business transactions, any profit derived therefrom from any of the members would be taxable.

The likelihood that the purchase of the lands as a speculation looking to resale was never considered in the event the preferred purpose could not be realized, is further negated by a number of imponderables which the Syndicate fully appreciated. It bought land which was not zoned for residential buildings; there were no sewers within one and a half miles; it was doubtful that the employees of T. Eaton's warehouse or the Murray Printing Company would live in that area; there was considerable doubt that the money would come from Central Mortgage and Housing Corporation; the investment yield under a guaranteed rental plan was very low, Mr. Robertson admitting that it was 5 per cent at the most; there was a serious commercial risk in the event of vacancies occurring; even if 85 per cent of the $3,790,000 required for the investment project was borrowed from Central Mortgage and Housing, the members would still have to find $700,000 and it does not appear

that most of these members could have supplied this amount.

In my opinion, this is clearly a venture in the nature of trade and the above facts would alone be sufficient to establish this. However, there is still more convincing evidence of trade in that the Syndicate even purchased after the preferred investment scheme failed and, of course, these other subsequent transactions, if I had any doubt as to the Mainshep transaction being of such a nature, which I must say, however, I have not, would (as stated by Wheatcraft in his volume *The Law of Income Tax, Surtax and Profits,* p. 1-426) convince me of its taxability "in the same way that the thirteenth stroke of a crazy clock throws doubt on what has gone before."

Indeed, on March 11, 1952, after the issuance of by-law No. 7625, which zoned the Syndicate's property for warehousing only and prohibited the building of dwellings thereon and at which time the Syndicate knew of the impossibility of going ahead with the project not only because of this restrictive by-law but also because of the definite refusal of Central Mortgage and Housing to approve of the loan, it went ahead and extended the option to Parcel B, thereby committing itself to an immediate payment of $5,000, an additional payment of $25,000 on account of the purchase price on April 15, 1952, an increase of the original purchase price by $1,000 to be paid in cash by April 15, 1952, thus leaving an amount outstanding, to which they also committed themselves, of $40,000 due and payable on April 15, 1953.

Such an important commitment, as we have just seen, entered into after the Syndicate knew that it was no longer prepared to go along with its original intention and build residences on the land can only strengthen my conviction that the managing committee of the Syndicate to whom the other members were content to leave the details of the transactions on the date of the extension of this option of Parcel B on March 11, 1952, definitely acquired it for the sole purpose of reselling it at a profit as soon as possible which it eventually did. I might add here that, although Mr. Lane, with some hesitation, stated that he thought the

1964

MINISTER OF NATIONAL REVENUE v. CLIFTON H. LANE

Noël J.

Syndicate was committed to purchasing this Parcel B, such was not the case as at that time $5,100 only had been paid for the option and it is not even sure that this amount would have been appropriated by the optionor in the event the option was not taken up. In any event it could have meant at the most a loss of $5,000.

Now the same applies to the Newshep Syndicate, which, as we have seen, was organized and set up long after the residential development of Mainshep had been given up and there is no evidence of any attempt to build anything on this land.

It is therefore also clear here that the lands purchased by the Newshep Syndicate, of which three of the respondents, C. H. Lane, N. S. Robertson and F. Turville were members, were commercial purchases looking to resale, i.e., adventures or concerns in the nature of trade.

Mr. Lane raised another point applicable however to his case only which is that of the 3,400 units he owned in the Newshep Syndicate, 1,425 were held by him in trust for his wife and that the proceeds from the realization of this Syndicate's assets were divided between them in that proportion. At p. 46 of the transcript he explains why these units were held in his name:

> A. To go back, Cyril R. DeMara, who was one of the managers, and I discussed the question of wives and we thought to avoid having to call them to meetings and send notices and that sort of thing, the husbands would hold them in trust, and he did the same for his wife, as it appears in the lower court, and I had some for my wife.
>
> To obtain the money we put a new mortgage on a house which was jointly owned and out of that mortgage the old mortgage was paid off and the net result was divided between my wife and myself and she paid for what she received for units in the New Sheppard Syndicate. Subsequently, when a call was received, she had no more money and I put in just for myself and that is how the units, this proportion between us. The monies were divided and cheques were issued to me and I paid my wife. There was one error where I guess my secretary knowing of this interest, issued the cheque directly to Mrs. Lane but by and large I paid for it and it was paid to her.

This statement appears to be corroborated by Ex. J which is the mortgage document referred to by Mr. Lane and which establishes that on April 12, 1951, both he and his wife borrowed $9,000, part of which was used to purchase the units in the Sheppard Syndicate which apparently existed at that time but which had not yet been formalized

1964

MINISTER OF NATIONAL REVENUE v. CLIFTON H. LANE

Noël J.

in the later New Sheppard Syndicate agreement of September 5, 1952.

This document indicates that both Mr. Lane and his wife became jointly responsible for the money borrowed and covenanted to pay it.

In view of this, it would appear that the 1,425 units were beneficially owned by the respondent's wife and as the money used to purchase these 1,425 units was borrowed by her and was her money, this would take it out of the provisions of s. 21(1) of the *Income Tax Act* which to be applied requires that property be transferred to one's spouse and, consequently, of the 3,400 units in Newshep it must be held that 1,425 belonged to the respondent's wife.

He then raised another point which is that part of the monies invested by him in the Syndicates was borrowed and that any interest paid on monies so borrowed should be allowed as an expense. This submission, in my opinion, should be accepted provided satisfactory evidence is adduced and this matter is referred back to the Minister for reconsideration and reassessment.

It therefore follows that on the particular facts and circumstances of this case, I must and do find that of the 3,400 units held in the name of the respondent in the Newshep Syndicate, 1,425 belonged to his wife; that the matter of the interest on the money borrowed by the respondent to purchase his interest in the Syndicates be and is hereby referred back to the Minister for reconsideration and reassessment; that the profits realized by him from the sale of the Mainshep Syndicate property as well as those realized from the sale of the lands belonging to the Newshep Syndicate, were not enhancements of the value of investments but were made in the operation of a speculative business scheme for profit making and are adventures in the nature of trade and, therefore, taxable.

They are, because of the definition of "business" in s. 139(1)(*e*) income from a business within the meaning of s-ss. (3) and (4) of the *Income Tax Act*.

As the Minister was right in assessing the respondent as he did for the taxation years involved this appeal is therefore allowed and the appellant will be entitled to the costs to be taxed in the usual way in the eight appeals but as the latter were heard on the same evidence and at the same

1964

MINISTER OF NATIONAL REVENUE v. CLIFTON H. LANE

Noël J.

time, counsel for the appellant will be entitled to one set of counsel fee at trial only to be apportioned between the eight respondents with the exclusion of Mrs. Kathleen DeMara.

Judgment accordingly.

Editor's Note: The appeals in *Minister of National Revenue v. H. A. Smith, Minister of National Revenue v. John Van Nostrand, Minister of National Revenue v. Mrs. A. Mulholland, Minister of National Revenue v. C. Mulholland, Minister of National Revenue v. W. Z. Estey, Minister of National Revenue v. Norman S. Robertson* and *Minister of National Revenue v. F. D. Turville,* referred to in the foregoing reasons for judgment at p 868 were dealt with by consent on the same evidence and argument as that of the appeal in the case of *Minister of National Revenue v. Clifton H. Lane,* above reported, and for the reasons set out, the appeals were likewise allowed.

The appeal in *Minister of National Revenue v. Kathleen DeMara* was allowed after the respondent failed to appear at the opening of the hearing and the Court was informed through her solicitors that she did not wish to take any further part in the proceedings.