BETWEEN:

SENSIBAR DREDGING CORPORATION LTD. ..... APPELLANT;

AND

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

AND

BETWEEN:

CONSTRUCTION AGGREGATES CORPORATION ..... APPELLANT;

AND

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

Toronto 1967
Apr. 4-7, 17-18
Ottawa July 18

Income tax—Company engaged in dredging business—Purchase of dredge on completion of contract—Transfer to subsidiary—Sale of dredge—Whether profit income or capital gain—Intention—Whether profit attributable to parent or subsidiary.

A company which carried on a world-wide dredging business operated five dredges in Canada for mining companies under contracts which gave it the right to buy them on completion of the contracts. With a view to expanding its Canadian operations it arranged to buy one of the dredges on completion of its contract, and while looking for work for the dredge was approached by a prospective purchaser of the dredge The company indicated interest in the proposition but nothing came of it and the company then obtained a dredging contract, purchased the dredge for $725,000, arranged to have it dismantled and reassembled in a different place at a cost of $340,000, and transferred its title to a subsidiary incorporated for that purpose. New proposals were then made by the prospective purchaser and after lengthy discussions the dredge and dredging contract were sold for $2,000,000

Held, the profit on the sale of the dredge should on the evidence be regarded as a profit of the subsidiary company rather than of the parent company; but whether made by either company the profit was a business profit and not a capital gain.

The parent company's intention in acquiring the dredge was not to use it as a dredge exclusively but to turn it to account by using it or disposing of it in any profitable way. Moreover the considerations which caused it to sell the dredge were related to its trading rather than its capital structure. Finally, the negotiations leading to sale of the dredge were characteristic of trading rather than mere realization of a capital asset.

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The subsidiary's intention in acquiring the dredge was to carry out the will of its parent company and the latter's intention and the intention of those directing it were also the intentions of the subsidiary; the same applied to the activities by which the deal was accomplished.

Californian Copper Syndicate v. Harris (1904) 5 T.C. 159; *Ducker v. Rees Roturbo Development Syndicate* [1928] A.C. 132, applied.

INCOME TAX APPEALS.

G. D. Watson for appellants.

D. A. Keith, Q.C. and *Bruce Verchere* for respondent.

THURLOW J.:—These are appeals from re-assessments of income tax which were heard together on common evidence pursuant to an order of the Court made prior to the trial. In the case of Construction Aggregates Corporation (hereinafter referred to as Construction Aggregates) the appeal is in respect of its 1962 taxation year. In the case of Sensibar Dredging Corporation Limited (hereinafter referred to as Sensibar Dredging), which is a wholly owned subsidiary of Construction Aggregates, the appeal is in respect of its 1961 taxation year. In both cases, however, the broad issue is whether the appellant is liable for income tax in respect of the same amount, a profit of $1,093,996.35 realized on or about June 23, 1961, in a transaction involving *inter alia* the sale to McNamara Suction Dredging Limited of a dredge known as the *Fleur de Lis*.

The Minister's position is that the amount in question is a taxable profit and that Construction Aggregates made the profit and is liable for the tax, but that if Construction Aggregates did not realize the profit Sensibar Dredging did realize it and is liable for tax in respect of it. Both appellants take the position that the profit was a capital gain but that if it is taxable it was Sensibar Dredging and not Construction Aggregates which realized the profit and is liable for the tax.

Construction Aggregates is a Delaware corporation which was incorporated in 1939 and since then has carried on a business formerly carried on by a predecessor corporation consisting mainly in dredging and land reclamation work. It also owns an area in the state of Michigan from which it produces sand and gravel which it processes and sells in the Great Lakes area. The dredging business is

carried on in various parts of the world but principally in the United States. It includes the supplying under charter and the operating of dredges owned by Construction Aggregates in the performance of contracts for dredging work and it has included as well the performance of contracts for the designing and supervision of the construction of dredges for others and the operation of them for their owners on a fee basis. Under such a contract with Steep Rock Iron Mines Ltd., made in 1949 the company designed and supervised the building of two dredges and thereafter operated them in Canada for about twelve years for their owner. Under a further contract made in 1953 the company designed and supervised the building of another two dredges for Caland Ore Company Limited and operated them for that company for about nine years. And under a further contract made in 1954 the company designed and supervised the construction of the *Fleur de Lis* for Lake Asbestos of Quebec Limited (hereinafter referred to as Lake Asbestos), a subsidiary of American Smelting and Refining Company and thereafter operated it for its owner for about five years. In each of these cases from the point of view of the owner the purpose of the contract and operation was to secure the removal of underwater material so as to uncover ore bodies and in each case the contract contained a provision giving Construction Aggregates an opportunity to buy the dredge when no longer required by its owner at any price offered by another party which the owner would be prepared to accept. Until the events to be related these were the only operations ever carried out by Construction Aggregates in Canada.

In the case of the *Fleur de Lis* the work for which the dredge was designed and constructed was completed in September 1959 and shortly thereafter conversations took place which resulted in engineering personnel of Construction Aggregates preparing at the request of Lake Asbestos an estimate of the value of the dredge and the equipment associated with it. The estimate so produced was $828,000 and this was regarded by Lake Asbestos as a fair valuation though the evidence, so far as it goes, indicates that it was on the high side. In January 1960 a verbal understanding was reached that, subject to Lake Asbestos obtaining offers of a higher amount in the meantime, when Lake Asbestos was ready to dispose of the dredge Construction

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Aggregates might acquire it at the amount at which it had been valued less the value attributed to any portions of the equipment which Lake Asbestos might dispose of or decide to keep. Construction Aggregates thereupon began looking for work for the dredge in the course of which, in March 1960, it bid, unsuccessfully, on a substantial job to be done in Detroit. Later it negotiated with the International Nickel Company for the dredging work on a project at Thompson Lake in Manitoba but this fell through when the Nickel company deferred the project indefinitely. By mid-July another project was in the offing for work to be done near Quebec on a National Harbours Board project under a subcontract for dredging to be let by the Raymond International Company Limited (hereinafter referred to as Raymond), but it is not clear on the evidence whether Construction Aggregates knew of this job or not when near the end of July it received a letter from A. L. Quinlan the general manager of McNamara Marine Limited, one of a family of McNamara companies (hereinafter referred to as the McNamara organization), asking for an opportunity to discuss either at Chicago or elsewhere the possibility and means by which it might purchase one of the five dredges which had been or were being operated by Construction Aggregates for their owners in Canada on terms mutually satisfactory to both parties.

Thereafter on August 9 a conference took place at Chicago between Quinlan and Ezra Sensibar, the senior vice-president of Construction Aggregates, following which Sensibar circulated to several officials of Construction Aggregates a memorandum the first paragraph of which read as follows:

> His firm is interested in acquiring the "FLEUR DE LIS" and would like to work out something with us I told him that we had already reached an agreement in principle with AS&R under which we would buy the "FLEUR DE LIS" and were entirely agreeable to working out some joint arrangement with them and also that we did not close the door on an outright sale

The remainder, and by far the greater part, of the memo recites information which Sensibar obtained from Quinlan about the equipment held by a number of companies engaged in dredging in Canada. There is evidence that at this time Construction Aggregates regarded the opportunity for expanding its operations into eastern Canada to be

favourable and intended to bid for Canadian jobs and to use the *Fleur de Lis,* when acquired, to do them. The *Fleur de Lis* was a 30 inch suction cutter dredge and was then at Black Lake near Thetford Mines in the Province of Quebec where it had been in use by Lake Asbestos. In order to use it elsewhere it would be necessary to dismantle, remove and rebuild it, which would be a substantial undertaking, but it seems to be common ground that once removed to the St. Lawrence River and rebuilt it would be far more efficient than any dredge controlled by competitors in eastern Canada from which I would suppose that it would put its possessor in a very favourable position to compete for work which it was capable of executing.

Save for a letter thanking Sensibar for his hospitality and saying that he, Quinlan, would write at a later date in the event that any concrete proposition could be made concerning the *Fleur de Lis* there was no further communication to or from the McNamara organization until the following January.

In the meantime Construction Aggregates bid for and obtained the Raymond subcontract to be performed by the use of the *Fleur de Lis,* arranged to buy the dredge from Lake Asbestos on a long term payment plan for $725,000 (this being the difference between $828,000 and the value of equipment disposed of or to be retained by Lake Asbestos) and prepared specifications for and called for bids for the work of dismantling, moving to the St. Lawrence River and rebuilding and refitting the dredge for work on the Raymond subcontract. Early in December Construction Aggregates learned that it would be necessary to have the dredge registered under the *Canada Shipping Act* and on December 30 instructed its Toronto solicitors to organize a Canadian subsidiary corporation the purpose of which was to be limited to a general contracting business with particular emphasis on dredging activities.

The subsidiary corporation, Sensibar Dredging, was incorporated under the *Companies Act*[1] on January 24, 1961, by letters patent which fixed its capital at $10,000 and stated its objects as being "to own and operate dredges and dredging equipment, apparatus and vessels and to

[1] R.S.C. 1952, c. 53.

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undertake and perform construction work and material moving contracts". By an agreement dated February 15, 1961, which recited that this company had been designated as the nominee of Construction Aggregates to take title to the dredge and equipment purchased from Lake Asbestos, Sensibar Dredging agreed with Lake Asbestos to assume the obligations of Construction Aggregates under the contract to purchase the dredge and equipment and by a bill of sale dated March 1, 1961, Lake Asbestos conveyed the dredge and equipment to Sensibar Dredging. Thereafter by a formal contract dated March 3, 1961 for the dredging work to be done near Quebec, Construction Aggregates, representing that it controlled the dredge, let it to Raymond under a charter arrangement in which Construction Aggregates agreed to provide the dredge and "all supervision, crew, master, labour, materials, fuel provisions, supplies, tools and equipment" and to perform the dredging work. In the meantime on January 24, 1961 Construction Aggregates had accepted by letter the tender of Geo. T. Davie & Sons Ltd. to dismantle, remove and rebuild the dredge for an amount somewhat in excess of $340,000. A formal contract for this work dated March 16, 1961 was later entered into by Construction Aggregates in its own name. The same company between February 2 and March 24 made three payments of about $34,000 each to the Davie company and on or about March 23 it also arranged for the issue of an irrevocable letter of credit from its banker to the Davie company to secure further progress payments totalling $241,980 all on account of the work being done or to be done on the dredge.

While these events were under way the McNamara organization in the fall of 1960 had been making a study of what would be required to dismantle, remove and rebuild the *Fleur de Lis* at Whitby, Ontario for its own purposes and on this basis had also made estimates of the value of the dredge at Black Lake, and of what amount it ought to be prepared to offer for it. I would infer from Exhibits V. 52 and A that it had intended to make its offer to Lake Asbestos but left it too late and then learned that Construction Aggregates had already bought the dredge. It does not appear that McNamara had heard at this stage of the Raymond subcontract or that it had been interested in bidding for it. On the other hand Construction Aggregates

was not aware that the McNamara organization was engaged in making its study of the value of the dredge and of the costs of removing and refitting it.

Early in January 1961 George McNamara of the McNamara organization telephoned Ezra Sensibar and arranged to meet him on January 19 at the office of Construction Aggregates in New York. The meeting took place and, according to Sensibar, the gist of what occurred was that McNamara indicated that his organization was interested in some kind of a deal, preferably in buying the *Fleur de Lis*, and asked for a figure to discuss, that Sensibar told him that the figure would be based on cost of replacement which would be in the vicinity of $2,500,000, that Construction Aggregates was not interested in selling and preferred a joint project but that it was up to McNamara. McNamara indicated that he regarded the figure as unduly high. Sensibar's evidence is that his company was not in fact interested in selling the dredge and that it was reluctant but willing to consider joint operation or joint ownership.

About the middle of February McNamara called again and asked for another meeting. This was held in Chicago on February 28, when McNamara indicated that his organization continued to be interested in acquiring some ownership of the *Fleur de Lis*, but that he thought the price unreasonably high and suggested that a means of bridging the gap might be to combine his organization's equipment with the *Fleur de Lis* in a new company to be organized. The Construction Aggregates representatives were not much interested in this proposal, did not think the three small dredges owned by McNamara equivalent to the *Fleur de Lis* or that the scheme would be likely to be profitable and the meeting broke up to give the parties an opportunity to think about it and to meet again in Toronto. Sensibar and a Mr. Peebles, who was general counsel and a member of the executive committee of Construction Aggregates, met representatives of the McNamara organization in Toronto on March 7, were shown about their premises, decided that they did not wish to accept McNamara's proposal and so informed McNamara. McNamara was also informed that he still wished to buy the *Fleur de Lis*. Construction Aggregates was willing to do business at $2,400,000 but not otherwise.

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No written memo of what transpired at any of these meetings was made but there is evidence that the prices mentioned were for the dredge and associated equipment and did not include the Raymond subcontract.

Around the beginning of April, McNamara called again and a further meeting took place at Chicago on April 6 when several alternative propositions were discussed. A memo of these propositions was afterwards circulated and reads as follows:

> It was agreed that the McNamara interests are to have an option until April 30, 1961, to accept any one of four alternative propositions All of the propositions are based upon the complete "FLEUR DE LIS" dredge plant as it will be just before starting the Quebec contract (for Raymond International) or just after completing the work on the site. The plant will consist of the following
>
> a) The Dredge "FLEUR DE LIS".
> b) 1500' of pontoon line
> c) 8000' of 30" shoreline.
> d) One derrick barge
> e) One cable reel barge together with cable
> f) Two tugs.
> g) One lot of spare parts and operating supplies and tools
> h) Six 1600 H.P G M diesel engines in the warehouse in Baltimore.
>
> The alternative propositions are as follows·
>
> 1 CAC will sell to McNamara the dredge plant together with the Raymond Sub-contract, before starting work, for $2,400,000 Sixty percent (60%) of this price is to be paid in cash and the remainder is to be paid by means of five serial notes bearing interest at the rate of five percent (5%), and due at one year intervals over a period of five years
>
> 2 CAC will sell to McNamara the dredge plant as above upon completion of the work under the Raymond contract or any extensions of it for $2,000,000 This is to be paid sixty percent (60%) in cash and the balance by means of five notes drawing interest at five percent (5%), and due at one year intervals over a period of five years.
>
> 3. McNamara and CAC will form a Canadian company which will buy the dredge plant, or the dredge plant and the Raymond contract McNamara will pay in sixty percent (60%) of the capital of this company and CAC will pay in forty percent (40%). The new company will buy the "FLEUR DE LIS" plant together with the Raymond contract just before work is commenced for the sum of $2,200,000 An agreement will be made between the parties so that either one may at any time post a price at which he would either buy or sell his stock. The other party will then have sixty (60) days during which he may exercise the right to buy or sell at this price. If he fails to act, then at the end of this period the first party must buy his stock.
>
> 4 The provisions under "3" above are modified only to the extent that the dredge plant will be purchased after the completion of the work at the Raymond site and the price would be $1,800,000

It was agreed that on or before April 30th, McNamara will notify CAC

a. That the deal is off;

or

b That it chooses one of the four alternative propositions

In the meantime McNamara may inspect the dredge in the George T. Davie Shipyard at Quebec

None of these propositions was ever accepted and Construction Aggregates did not even hear from McNamara until the middle of May when McNamara called by telephone and indicated that he wanted to take up the option even though it had expired and that he was ready to close on the basis of the purchase of the dredge with the Raymond subcontract immediately before the dredging was to begin, but that the price would have to be reduced to $2,000,000, that this was his final offer and that Construction Aggregates could either take or leave it, that there would be no further negotiations in the matter. A meeting was thereupon arranged for May 24 in Toronto when, after lengthy discussions, a deal was made and McNamara paid a deposit of $100,000. In essence, the deal was for the sale for $2,000,000 of the dredge with the Raymond subcontract as well, but not including one of the two tugs referred to in the memorandum of April 6 and not including as well the six diesel engines referred to in the memorandum. McNamara was given an option to purchase the diesel engines for an additional $200,000 but did not exercise it. Up to this time dredging in performance of the Raymond subcontract had not yet been started though expenses, referred to as "job costs" in the vicinity of $100,000 had been incurred in organizing and preparing to carry out the work. As part of the transaction, which purports to have been made between Sensibar Dredging and George McNamara on behalf of a company to be incorporated, McNamara agreed to pay these expenses and to assume responsibility for performance of the contract and in turn became entitled to the amounts payable by Raymond under it. The closing of the transaction was set for June 23 and it was provided that until that time Sensibar Dredging should perform the contract as agent for McNamara and should continue to perform it on the same basis thereafter in the event that Raymond should fail to consent to the assignment. On its part Sensibar Dredging undertook, subject to the consent of Raymond, to assign the contract

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and to cause Construction Aggregates to concur in such assignment. There is evidence that it had been intended to perform the dredging in the name of Sensibar Dredging, that an operating account and a payroll account had been opened in its name at a bank in Quebec and that the sign on the office on the job site bore that name but up to that time there had been no assignment to Sensibar Dredging of the contract or of the amounts to be paid by Raymond under it.

The transaction was finalized on or about June 23 when McNamara paid an amount of $840,000 together with certain adjustments on closing, assumed liability to the extent of $360,000 for the work done under the Davie contract in rebuilding the dredge and gave a mortgage on the dredge in favour of Sensibar Dredging to secure the remaining $700,000. The documents delivered included as well a bill of sale of the dredge from Sensibar Dredging to McNamara Suction Dredging Limited and assignments of the Davie and Raymond contracts. By the last mentioned assignment, in which Construction Aggregates joined, that company assigned the contract to McNamara Suction Dredging Limited, Sensibar Dredging assumed responsibility for the obligations of Construction Aggregates under it and McNamara assumed responsibility for the obligations of both Construction Aggregates and Sensibar Dredging under it. Thereafter the performance of the contract, which had been begun in the meantime on or about June 5 in the name of Sensibar Dredging, was undertaken by McNamara itself. Raymond, however, declined to release Construction Aggregates from its responsibility under the contract and did not formally consent to the assignment; though it appears to have been aware of the transaction and that the work was actually being done by McNamara it issued its cheques in payment for the work in favour of Construction Aggregates which thereupon endorsed them to McNamara. As part of the arrangements an engineer in the employ of Construction Aggregates continued to supervise the work at the expense of McNamara throughout the performance of the contract.

In the course of a year following the completion of this transaction Construction Aggregates acquired the dredges which it had been operating for Steep Rock Iron Mines Ltd. and Caland Ore Company Limited and still held all

four of them at the time of the trial. Sensibar Dredging appears to have let to McNamara Suction Dredging Limited for a time the tug which had been excepted from the sale and to have earned some revenue therefrom and some interest on amounts belonging to it but it carried on no dredging or other business operations after the transaction in question and on May 15, 1962 its directors met and resolved that the company dispose of its property, distribute its assets rateably among its shareholders and proceed to wind up its affairs.

In the course of the argument counsel for the appellants as well as counsel for the Minister approached the matter, and suggested that I do so as well, by considering first the question whether the amount in question was income within the meaning of the *Income Tax Act* and thereafter the question of which of the two appellants, if either, is assessable in respect of it. However, while the answer in one case may be affected to some extent by the answer in the other, as I see it, the basic question in each case is whether the particular appellant realized a gain of the amount in question which in its hands was income for the purposes of the *Income Tax Act* and I have not found it convenient to consider the nature of that amount apart from the facts pertaining to the particular appellant. I propose therefore to consider first the nature of the gain on the assumption that it was realized by Construction Aggregates, thereafter the nature of the gain on the assumption that it belonged to Sensibar Dredging and finally the question which of the two should be regarded for the purposes of the *Income Tax Act* as having realized it.

The question with respect to the nature of the gain for the purposes of the *Income Tax Act* is whether the gain was profit from a "business" within the meaning of that term which, as defined in the Act, includes "a trade manufacture or undertaking of any kind whatsoever" and "an adventure or concern in the nature of trade". This issue is frequently stated as being whether profit realized from a transaction was income or a capital gain but while this may be a convenient way of posing it the relevent question for the purpose of the act is whether the profit arose from a business as defined in it. If so the profit is taxable as income whether or not by some standards it might be regarded as a capital gain. On the other hand if the profit

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is not profit from a business—and is not otherwise income—it matters not what name may aptly characterize it. The test to be applied for determining the question as propounded in *Californian Copper Syndicate v. Harris*[2] and as since applied in cases arising under the *Income Tax Act* is whether the gain in question was "a gain made in an operation of business in carrying out a scheme for profit making".

In the present case assuming that the profit from the transaction in question was realized by Construction Aggregates it appears to me to have been a profit that arose from and in the course of its business. As might be expected in a case such as this counsel for the appellants stressed the scope of the ordinary operating activities of Construction Aggregates, the nature of a dredge as capital equipment in that operation, that the *Fleur de Lis* was acquired for use in the business and that the transaction was a fortuitous and isolated one. These are undoubtedly matters to be weighed in determining the question but they are not inconsistent with the transactions from which the gain arose having been transactions of the appellant's business and there appear to me to be other features of the situation which taken together outweigh them and point to the conclusion which I have reached.

It is of course perfectly clear that a dredge may be an item of capital equipment for a person engaged in the dredging business and it is also clear that the *Fleur de Lis* might have become an item of capital equipment in the hands of Construction Aggregates if it had been held and put to use as such but the fact that it was acquired to some extent through Construction Aggregates having a right to do so obtained under a contract made in the course of its business together with the fact that the company had similar rights under two other contracts under which in due course, and possibly not very long afterwards, four other dredges might become available seems to me to militate against and to offset the *prima facie* character as capital equipment which a dredge in the hands of a corporation engaged in the dredging business, by its nature would otherwise suggest. In these circumstances the inten-

[2] (1904) 5 T.C. 159.

tion with which the dredge was acquired appears to me to become particularly important. On the evidence I see no reason to doubt that Construction Aggregates in negotiating for the dredge did so with the intention, which it may well have had from the outset and no doubt had for some time before the Lake Asbestos dredging contract was completed, of acquiring the dredge for use in its business if it could do so on satisfactory terms. I see no reason to think, moreover, that it would not have acquired the dredge at or about the time when it did acquire it even if it had not in the meantime heard of or from the McNamara organization. The real state of Construction Aggregates purpose, however, is I think apparent from the memorandum which Ezra Sensibar wrote following his meeting with Quinlan on August 9, 1960. The company at that point appears to me to have intended to turn its rights with respect to the dredge and the dredge itself to account by acquiring and using or disposing of it in any way that might be likely to yield a satisfactory profit whether alone or in concert with others, which, as I see it, might have been done through a partnership or by selling the dredge to a company owned by the partnership or perhaps in other conceivable ways, or even by outright sale. There is evidence that resale of the *Fleur de Lis* was neither considered nor discussed by the directors of Construction Aggregates but there is also evidence that from that time on the possibility of working out terms for the outright sale of the dredge was in the mind of Ezra Sensibar, who appears to have been the person chiefly concerned on behalf of both appellants in the transactions in question, and in the minds of those to whom he reported. Nor do I see any reason to think that the purpose had changed by the time the contract to purchase the dredge was made even though by that time Construction Aggregates required it and intended to use it to perform the Raymond subcontract. The appellant's willingness to talk terms shortly afterwards to a person principally interested in purchasing rather than in any kind of joint venture together with the subsequent dealings between them appear to me to confirm that the intention of Construction Aggregates remained constant throughout. With respect to the appellant's inten-

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tion the situation seems to me to be the same in principle as that in *Ducker v. Rees Roturbo Development Syndicate*[3] where Lord Buckmaster said:

> Turning to the findings of the Commissioners, I find that they set out in detail the circumstances connected with the working of this company, and, in particular, the reports, which begin in 1907 and continue down to 1918. These reports show that the directors were contemplating from the beginning the possibility of the sale of some of these patents. It is quite true that they preferred not to sell them if a sale could be avoided, but the statement in para. 11 of the case is quite plain, that "the possibility of the sale of the foreign patents or rights has always been contemplated by the appellant company in respect of such interest as it possessed in the foreign patents". It is one of the foreign patents with which this appeal has to do, and the agreements, which are set out, showing the way in which the foreign patents in the case of France and of Canada have also been dealt with, show that that statement was not a statement of a mere accidental dealing with a particular class of property, but that it was part of their business which, though not of necessity the line on which they desired their business most extensively to develop, was one which they were prepared to undertake.

Next there is the fact that the considerations which influenced Construction Aggregates to make the deal were to my mind trading considerations. On this point, according to my note, Mr. Peebles said that there had been no change in value of the dredge from the time Construction Aggregates bought it in November 1960 until June of 1961 but that eastern Canada was regarded as an area in which dredging activity was developing rapidly, that the company intended to engage in dredging in that area and that it was important to keep the dredge out of the hands of a competitor. He went on to say that the reason for departure from the previous position was that the sale afforded Construction Aggregates the opportunity to arrive at a profit figure of $1,000,000 taxable at 25 per cent (in the United States) as a capital gain whereas they took into account that in operations one does not get continuity and assurance of profit and the opportunity to capture in a short time a capital gain profit of $1,000,000 was just too appealing.

The evidence of Mr. Ezra Sensibar is I think to the same effect. He said that in August 1960 on the occasion of his first conference with Mr. Quinlan he told Quinlan that Construction Aggregates had an agreement in principle to

[3] [1928] A.C. 132 at 141.

buy the dredge from Lake Asbestos, that their object was to go into the dredging business in eastern Canada which he regarded as an excellent market, that they regarded the *Fleur de Lis* as a most efficient dredge and had no special interest in selling but in operating it, that Quinlan pointed out that the McNamara organization could be of great help to Construction Aggregates because of their contacts and that he, Sensibar, said that Construction Aggregates would consider some sort of joint operation but had very little interest in selling. He also said that he knew very little about the competitive situation at that time, in fact had never heard of the McNamara organization, and that he took the opportunity to get the information about the dredges owned by the persons engaged in the business in Canada and to circulate it to his associates by the memo which he wrote. With respect to the reason for sale he said that it is not often they had an opportunity to earn $1,000,000 as a capital gain as a sure profit, that it took many years of successful hazardous operation to earn $2,000,000 which would be equivalent to $1,000,000 as a capital gain, and that the opportunity was more than they could resist. Viewed against the background of the company's widespread activities in the dredging business in various parts of the world, the considerations mentioned by the witnesses as the basis for their decision to sell the dredge and abandon the particular field to a competitor, appear to me to be distinctly related to the company's trading rather than to its capital structure, and this conclusion is, I think, enhanced when it is considered that a substantial trading contract which was regarded as being a valuable one was included in the deal.

Finally, the negotiations leading up to the transaction appear to me to be characteristic of trading rather than of mere realization of a capital asset. Counsel for the appellants pointed to the fact that it was McNamara throughout who was seeking a deal while Construction Aggregates was forging ahead with its plans to put the dredge to work in its business and that the deal ultimately made was unsought and unsolicited on the part of Construction Aggregates. However, the persons who represented Construction Aggregates in the negotiations, and particularly Mr. Ezra Sensibar, were skilled and experienced individuals with a wide knowledge of the dredging business as well as

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of the usefulness and value of dredges to persons engaged or proposing to engage in it. They were in a position to estimate and I think did estimate very well from time to time the strength of McNamara's determination to acquire or participate in the control of the *Fleur de Lis* and this I think put them in a position to suggest as a basis for negotiations a price far beyond what the dredge had cost their company. They then proceeded to yield somewhat from time to time whether by reduction of the price or otherwise. The price was first reduced from $2,500,000 to $2,400,000 for the dredge without the Raymond contract and later to $2,400,000 for the dredge with the Raymond contract or $2,000,000 without the contract. Though they suggested on the occasion in Toronto, when the McNamara proposal for a new company was rejected, that it was up to McNamara to purchase at their price or not as he wished, they nevertheless used the next occasion as one for further bargaining in which no less than four different propositions were made available to McNamara. Even after these had expired and McNamara had made a "take it or leave it" offer of $2,000,000 for the dredge and the Raymond contract they hammered out a deal at $2,000,000 for the dredge and the contract but not including some of the equipment included in the earlier offer. To my mind such activities are of the kind normally associated with trading with a view to profit.

I am accordingly of the opinion that, on the assumption that it was realized by Construction Aggregates, the amount in question was profit from that company's business and was income for the purposes of the *Income Tax Act*.

I turn now to the question whether the amount, assuming it to have been realized by Sensibar Dredging, was income in its hands. In this case as I view it the first consideration which I have mentioned in the case of Construction Aggregates does not apply since Sensibar Dredging was not party to and never did have any interest in the contracts by which Construction Aggregates obtained rights in respect of the purchase of the dredges which they had designed and operated for their owners. When, however, one comes to the question of the company's intention in

assuming the purchase of the *Fleur de Lis,* notwithstanding the narrow expression of the objects of its incorporation contained in its letters patent, I see no reason to differentiate the intention of Sensibar Dredging from that which existed in the case of Construction Aggregates. The real object of Sensibar Dredging, as I see it, was to carry out the will of Construction Aggregates and the latter's intentions and those of the persons who directed it were also those of Sensibar Dredging. The same applies to the activities by which the deal was accomplished. This company had no previous or world-wide business activities which might have provided a setting or context by which the nature of the transaction might be determined but whether the acquisition and sale of the dredge and contract are regarded either with or apart from the events which preceded the company's incorporation in the light of its intention in acquiring the dredge at a time when a price had already been put on it in negotiations with McNamara and of the activities leading up to its disposition some two and a half months later the profit from the sale appears to me to have been one realized "in an operation of business in carrying out a scheme for profit making" and to have been income for the purposes of the *Income Tax Act.*

There remains the question which of these two corporations should be regarded for the purposes of the *Income Tax Act* as having realized the profit in question. There is, in my view, nothing in the evidence of what occurred prior to May 24, 1961, when the deal with McNamara was struck, which is necessarily inconsistent with the profit belonging to either. When offering by its letter of October 17, 1960 to buy the dredge Construction Aggregates proposed that it or a subsidiary would do so. Subsequently Construction Aggregates made the down payment and executed a formal contract to purchase. It subsequently designated Sensibar Dredging "as its nominee to take title" and that company by a formal contract with Lake Asbestos assumed responsibility for the purchaser's obligations to the vendor. Thereafter Construction Aggregates in its own name let the contract for the work to be done on the dredge and provided the financing therefor and it conducted the negotiations with McNamara as if Sensibar

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Dredging did not exist. In the circumstances, however, all this appears to me to be equivocal. Next there is the fact that the Raymond subcontract both initially and up to the time of the sale was in fact the contract of Construction Aggregates. On the other hand the evidence also shows that it was intended to have Sensibar Dredging perform it though on what basis is not clear and may, it seems, have been left undecided. There is also the fact that by the end of Sensibar Dredging's first fiscal period the bulk of the profit from the transaction was in the hands of Construction Aggregates and appears in the former's balance sheet as a debt owed to it by the parent company. On the evidence taken as a whole and on the last-mentioned features in particular there is I think something to be said for the submission on behalf of the Minister that Sensibar Dredging was a mere convenience and never did in fact own the dredge or realize the profit in question. On the other hand, there is evidence of Mr. Peebles, which I accept as reliable, that Sensibar Dredging was formed with the intention that it would hold title to the dredge and perform the Raymond contract. There is also evidence of Mr. Ezra Sensibar which I regard, as well, as reliable that the preliminary work at the site was carried out in the name of and for the account of Sensibar Dredging. There is also the fact that so far as appears Sensibar Dredging alone committed itself to and became party to the sale to McNamara and received the consideration. *Prima facie* this seems to me to indicate that the transaction which resulted in the profit in question was that of Sensibar Dredging and there does not appear to me to be anything in the evidence pointing unequivocally to the conclusion that the acts of Sensibar Dredging in connection with the transaction were or were intended to be in fact those of the parent company. There is also the consideration that as between a parent and its wholly owned subsidiary what is in fact to be done as the act of the subsidiary as distinguished from that of the parent is very much a matter of internal arrangement and of decision by the parent. In the present case the particular transaction from which the profit in question arose, besides being carried out in the name of the subsidiary appears from the audited state-

ments attached to the income tax returns of both parent and subsidiary to have been treated as the transaction of Sensibar Dredging and I am unable to see any compelling reason why this should not be recognized. I shall therefore hold that the profit in question was realized by Sensibar Dredging.

In the case of Construction Aggregates the Minister's reply included a plea that that company had transferred to Sensibar Dredging its right to receive the consideration for the dredge and was liable for tax in respect of the profit from the transaction under section 16(1) of the Act. At the trial this plea was neither pressed nor abandoned but in view of the conclusion I have reached that the transaction from which the profit arose was Sensibar Dredging's there is, in my opinion, no scope for the application of section 16(1).

The appeal of Sensibar Dredging therefore fails and it will be dismissed with costs. In the circumstances the course taken by the Minister of assessing both appellants and contesting both appeals was in my opinion a proper one and the costs to be paid by Sensibar Dredging will include the Minister's costs in the Construction Aggregates appeal.

The appeal of Construction Aggregates will be allowed without costs and the re-assessment will be referred back to the Minister to be revised in accordance with these reasons.