Case and Comment

INCOME TAX — PURCHASE AND RESALE BY COMPANY OFFICER IN PRIVATE CAPACITY — WHETHER "AN ADVENTURE OR CONCERN IN THE NATURE OF TRADE"

Minister of National Revenue v. Taylor[1] a decision of the Exchequer Court, clarifies the meaning of "an adventure or concern in the nature of trade" in the definition of "business" in s. 139 (1) (e) of the Income Tax Act.[2] Actually the case arose under s. 127 (1) (e) of the 1948 Act,[3] but the sections are identical.

The case illustrates the narrowing scope of the tax exempt capital gain transaction. It enunciates positive and negative rules by which to determine whether a transaction is of a capital nature or is a "trading adventure" productive of taxable income.

The respondent, Taylor, was the president and general manager of the Canada Metal Company, Ltd., a wholly owned subsidiary of an American parent, engaged in Canada in fabricating non-ferrous metal products including lead. Because of the parent's policy of refusing to allow its Canadian subsidiary to keep more than a thirty day supply of lead on hand the subsidiary suffered from shortages from time to time. In 1949, when foreign lead prices were sharply reduced, the subsidiary requested permission of the parent to import a three month supply of lead, but was refused. Respondent was given permission, however, to buy the lead as an individual. Accordingly he bought 1,500 tons which he later resold to the company at a large profit, lead prices having increased. Respondent was assessed on this profit. The Income Tax Appeal Board allowed his appeal;[4] the Minister appealed to the Exchequer Court.

Although the respondent testified that it was not his intention to resell the lead at a profit, but rather to guarantee his company a supply, the Exchequer Court applied an objective standard, and held that absence of intention to sell at a profit was not an answer. The transaction was "an adventure or concern in the nature of trade." "The considerations prompting the transaction may be of such a business nature as to invest it with the character of an adventure in the nature of trade even without any intention of making a profit on the sale of the purchased commodity."[5]

Two helpful positive criteria were laid down by which the commercial character of a doubtful case may be established: (1) if a person deals with a commodity bought by him in a manner similar to that of a dealer

(1) [1956] C.T.C. 189 (Ex.).
(2) R.S.C. 1952, c. 148.
(3) The Income Tax Act, 11-12 Geo. 6, c. 52.
(4) Taylor v. Minister of National Revenue, [1953] 9 Tax A.B.C. 358.
(5) [1956] C.T.C. 189, at p. 212.

in the commodity, such dealing is a trading adventure; (2) the "nature and quantity" of the commodity may be such as to make a transaction in it inherently commercial, and to exclude the possibility of its being merely the realization of a capital investment. In this case the respondent's conduct in buying and selling the lead at a profit through the same channels and in the same manner as conventional lead dealers satisfied the first test, and 1,500 tons of lead, requiring more than twenty freight cars to transport them, satisfied the second.

To be taxable the transaction itself need not be part of a going business or trade: isolation is not decisive. In a Scottish case Lord President Clyde said: "A single plunge may be enough provided it is shown to the satisfaction of the Court that the plunge is made in the waters of trade."[6] That nothing has been done by the purchaser to make the article saleable before resale does not deprive its subsequent sale of a trading character. In *C.I.R. v. Fraser*,[7] a woodcutter bought a consignment of whisky which he later sold in three lots at a profit. He did not blend or advertise the whisky: it merely passed through his hands. Yet, the transfer was commercial and therefore taxable. Similarly lack of a business organization to market the article is not decisive. Again, dissimilarity of the activity from the trader's usual business is not crucial: a purchase and resale outside the taxpayer's usual line of business may well be taxable.

Since in the present case, the respondent's reasons "were business reasons of a trading nature,"[8] and the adventure a speculative one, lack of intention to make a profit, lack of processing of the product and the isolated nature of the transaction were not enough to deprive it of its trading character. The speculation was commercial and its profit taxable.

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(6) **The Balgownie Land Trust, Ltd. v. C.I.R., [1929] 14 T.C. 684, at p. 691.**
(7) **[1942] 24 T.C. 498.**
(8) **[1956] C.T.C. 189, at p. 215.**

INSURANCE — FORFEITURE — ELECTION TO DEFEND — NON-WAIVER AGREEMENT — JOINDER AS THIRD PARTY.

The plaintiff, an insurer, issued a policy indemnifying the defendant against liability arising by law while operating a motor vehicle. The defendant ran down one, Kane, while driving in the State of Washington, U.S.A. The defendant informed the plaintiff of the accident including the fact that he had been drinking before the accident. Kane commenced an action in Washington. The plaintiff obtained a non-waiver agreement from the defendant and undertook the defence of the Kane action. Then the plaintiff commenced an action in B.C. claiming a declaration that the defendant by drunkenness forfeited his rights under the policy. *Held*, for the defendant. *Federal Insurance Co. v. Matthews*, [1956] 3 D.L.R. (2d) 322 (B.C.).