Docket: 2011-3726(IT)G

BETWEEN:

BELCOURT PROPERTIES INC./LES PROPRIÉTÉS BELCOURT INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 4, 2014, at Montreal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Konstantinos Voggas Elisabeth Robichaud
Counsel for the Respondent:	Marie-France Camiré

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2005 taxation year is allowed and the reassessment is referred back to the Minister of National Revenue for reassessment on the basis that the profit on the sale of both properties at issue was properly declared as a capital gain as reflected in the appellant's books and records and in its tax return for the 2005 taxation year.

Signed at Ottawa, Canada, this 27th day of June 2014.

"Lucie Lamarre"

Lamarre J.

Citation: 2014 TCC 208
Date: 20140627
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BELCOURT PROPERTIES INC./LES PROPRIÉTÉS BELCOURT INC.,

Appellant,

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REASONS FOR JUDGMENT

Lamarre J.

Issues

[1] In the present appeal, the issues in dispute are whether the Minister of National Revenue (**Minister**) erred in recharacterizing as business income the gain (declared by the appellant as a capital gain) realized by the appellant in its 2005 taxation year from the disposition of two properties, one located at 5253 Park Avenue, Montreal (acquired in June 2002) and the other located at 5655-5685 Côte-des-Neiges (corner Côte-Sainte-Catherine), Montreal (acquired in December 2000), and in reassessing on that basis. The tax treatment of the proceeds of those dispositions as declared by the appellant and as recharacterized is shown as it appears from the proposed adjustments of the Canada Revenue Agency (**CRA**) set out in Schedule 1 to the document dated July 14, 2009, filed as Exhibit A-1, Tab 12 (Appellant's Written Arguments and Authorities, page 4).

Park Avenue property Located at 5253 Park Avenue, Montreal			
	Declared	**Reassessed**	**Variance**
Sale Price	$700,000	$700,000	
Cost of land	(65,780)	(65,780)	
Cost of building	(187,220)	(187,220)	
Deducted in previous year		18,128	
Capital gain	447,000		
Taxable capital gain	223,500	-	($223,500)
Income	-	465,128	465,128
Recapture of CCA	18,128	-	(18,128)
Total:	**$241,628**	**$465,128**	**$223,500**

Deux Côtes property Located at 5655-5685 Côte-des-Neiges (corner Côte-Ste-Catherine), Montreal			
	Declared	**Reassessed**	**Variance**
Sale Price	$1,150,000	$1,150,000	
Cost of land	(72,000)	(72,000)	
Cost of building	(305,065)	(305,065)	
Deducted in previous year		29,540	
Cost of tenants improve.	(59,364)		
Tenants improve. acc. dep.	14,266		
Capital gain	727,837		
Taxable capital gain	363,919	-	($363,919)
Income	-	802,475	802,475
Recapture of CCA	29,540	-	(29,540)
Total:	**$393,459**	**$802,475**	**$409,016**

[2] The appellant submits that its intention in acquiring those properties was to hold them as investments in order to produce rental income, hence the capital gain declared following the disposition, 50 per cent of the profit being taxable in accordance with sections 38 and 39 of the *Income Tax Act* (**ITA**). The respondent is of the view that the sale of the two properties took place in the ordinary course of the appellant's business (or at least was an adventure or concern in the nature of trade) and therefore 100 per cent of the profit had to be included in the appellant's business income pursuant to sections 3 and 9 of the ITA.

Facts

[3] The appellant's president and sole shareholder, Michael Zunenshine, and the appellant's vice-president and chief financial officer, Maria Lerakis, both testified regarding the appellant's activities over the years. According to them, the appellant's activities were divided in two categories: building and selling residential condominiums for profit (the profits from the sales being categorized as business income), and building and/or purchasing commercial properties as investments for the purpose of earning long-term rental income. In the information statement filed with Quebec's Registraire des entreprises du Québec (Exhibit A-1, Tab 1, page 2, Activités économiques), the appellant referred to these two spheres of activity as being "management and construction" ("promotion et construction de maisons individuelles" in French) and "real estate investment" ("sociétés d'investissement" in French). In the financial statements, the properties being developed for sale are shown on the balance sheet as current (short-term) assets, and the revenue-producing properties appear with the long-term investment assets (Financial Statements for the taxation years 2000 to 2005, Exhibit A-1, Tab 3).

[4] The two properties at issue were not included in the appellant's inventory but were transferred into the long-term investment assets in 2002 (the year of acquisition of the Park Avenue property and of completion of construction on the Côte-des-Neiges property). This is evidenced by the work-in-progress sheets, which reflect the cost of the two properties (land and building); the same cost amount is used and included in the schedule of revenue-producing properties (Exhibit A-1, Tab 5), and the ending balance amounts are used to calculate the amortization taken, as reflected in the balance sheet for the 2002 year-end (appellant's financial statements for the taxation year ended in 2002, Exhibit A-1, Tab 3-C, page 2 and page 8, note 7). Further, the rental income earned from the two properties at issue is computed in the statement of net rental income along with the rental income from five other income-earning properties owned by the appellant (Exhibit A-1, Tab 4).

[5] Mr. Zunenshine testified that he had been involved in real estate development for some 60 years. Prior to investing through the appellant, he and his late brother, through other corporate entities that they owned jointly, had developed industrial, residential and commercial properties and apartment buildings to hold for rental purposes. Mr. Zunenshine said that he started liquidating the real estate portfolio jointly held through other corporate entities than the appellant 20 years ago at the insistence of his sister-in-law when her husband, Mr. Zunenshine's brother, became sick with Alzheimer disease; his brother died in December 2013. Mr. Zunenshine continued on his own, rebuilding a real estate investment portfolio through the appellant beginning in 1995.

[6] However, in the mid-1990s, he had to adjust to a changed economic reality and started investing in residential condominium projects with commercial space on the ground floor. The residential condos were developed for the purpose of selling them at a profit. The commercial premises brought long-term rental income which produced cash flow (Transcript, pages 40, 84, 92, 158).

[7] Ms. Lerakis testified as to her functions, which include supervision with regard to record keeping and the financial documentation prepared internally. She has been working with the Zunenshine brothers and subsequently with the appellant for at least 25 years. According to her testimony, the appellant manages its commercial rental activities internally through its own staff. These activities include the negotiation of leases, which is mainly handled by Mr. Zunenshine personally; the maintaining of lease abstracts by means of a specialized real estate software for lease management to enable the appellant's staff to perform the specific tasks that each person may have with respect to the commercial leases entered into by the appellant (copies of such abstracts were filed as Exhibit A-1, Tabs 26 and 36, for the two properties at issue); the drafting of leases based on master leases created by the appellant that it modifies for each particular tenant (copies of blank lease agreements between the appellant and the different tenants in 2002 and 2003 were filed as Exhibit A-1, Tabs 28 (Bell), 37 (Telus), 38 (Soup & Noodles), 39 (Mikes Restaurant) and 41 (Soup & Noodles)). Ms. Lerakis said that the signed copies were given to the purchasers when the properties were sold.

[8] It appears that the appellant's rental activities were continuously growing from the time of acquisition of the first property under dispute in 2000 until the sale of both properties in 2005. The total gross revenues and net revenues before and after depreciation and amortization (**D&A**) from all rental properties between 2000 and 2005 are reproduced hereunder from the statements of net rental income for the 2000 to 2005 taxation years (Exhibit A-1, Tab 4):

	Gross	Net Income before D&A	After D&A
2000 year-end	$395,265	$107,661	$48,799
2001 year-end	$622,846	$207,147	$79,577
2002 year-end	$1,037,594	$161,719	($34,349)
2003 year-end	$1,115,634	$261,087	$52,038
2004 year-end	$1,186,423	$348,767	$142,406
2005 year-end	$834,480 (year of sale of 4 properties)	$(37,596)	$(92,431)

[9] Furthermore, the appellant used its own staff to sell the residential condos. The staff was not mandated or instructed to sell or to find buyers for the commercial properties.

The Park Avenue property

[10] Mr. Zunenshine testified that he was approached by a broker with regard to the purchase of the Park Avenue property. The building comprised at the time commercial space on the ground floor leased to Videotron and space on the roof leased to cellular companies for the installation of antennas. The upper floors consisted of empty office space that the previous owner had been unable to lease.

[11] The appellant purchased the building with the intent of transforming the office space into residential condos for resale and keeping the ground floor and the roof for investment purposes to earn rental income in order to rebuild its cash flow (testimony of Mr. Zunenshine and Ms. Lerakis, Transcript, pages 16-17, 92, 101, 158).

[12] At the time of acquisition, the commercial properties were already rented. The deed of sale was executed on June 21, 2002 and letters were sent the same day to the three commercial tenants advising them that the appellant was the new landlord (Deed of sale, Exhibit A-1, Tab 23 and letters dated June 21, 2002, Exhibit A-l, Tab 24).

[13] According to the testimony of Mr. Zunenshine, after the acquisition, the appellant renewed the lease with Bell at a higher rent and the appellant increased the space rented by Videotron, for which Videotron paid additional rent (Transcript, pages 16, 20, 78-80). All three leases were for long-term periods: a 5-year term with one 5-year option for Videotron; a 5-year term with three 5-year options for Bell; a 10-year term with three 5-year options for Rogers (Rent Roll, Exhibit A-1, Tab 25; Lease Abstract Detail Report, Exhibit A-1, Tab 26; notice of registration of rights on the land registry by Rogers, Exhibit A-1, Tab 27; lease agreement with Bell, Exhibit A-1, Tab 28; and notice of registration of rights on the land registry by Bell, Exhibit A-1, Tab 29). In 2005, the aggregate annual rents for the three tenants were $77,899.20 (Rent Roll for Park Avenue, Exhibit A-1, Tab 25).

[14] In 2005, the appellant sold the Park Avenue property (the commercial portion, i-e., the ground floor and roof) as a result of an unsolicited offer. Mr. Zunenshine testified that he was approached several times by his daughter's neighbor, Mr. Shaika, a gentleman from Israel. Apparently, Mr. Shaika persistently expressed his desire to acquire the Park Avenue property and offered in return to introduce

Mr. Zunenshine to investment opportunities in Israel, having himself very good connections there. Mr. Zunenshine was interested in investing in Israel for his other daughter and his son-in-law, who were residing there. It was in that context that Mr. Zunenshine finally agreed to sell at a lower price than he would have sold at under other circumstances (a 10% return was apparently given to Mr. Shaika to reciprocate for an investment of similar value in Israel, Transcript, pages 86, 90). Soon after this sale, Mr. Zunenshine went to Israel several times and started making real estate investments through Mr. Shaika. Ms. Lerakis corroborated this and participated herself in business trips related to those investments in Israel (Transcript, pages 158-159). The Park Avenue property was sold on November 1, 2005.

Côte-des-Neiges property

[15] This property is centrally located at the corner of Côte-des-Neiges and Côte-Sainte-Catherine in Montreal, and had been operated as a gas station by Shell, which put it up for sale. Mr. Zunenshine's bid for the property was unsuccessful, but the gentleman who made the winning bid, Mr. Osher, through a corporate entity, Brandev Properties Inc., approached Mr. Zunenshine with a view to developing the property in a joint venture. The intent was to build residential condominiums for the purpose of selling them at a profit. Mr. Zunenshine and Mr. Osher testified that they intended to have commercial space on the ground floor (in accordance with municipal regulations) which would be rented out. Given the central location of the property (close to a hospital and a university), they believed that the residential units would be sold quickly and that good tenants for the commercial space would be easy to find.

[16] A joint venture agreement was entered into between the appellant and Brandev Properties Inc. (Exhibit A-1, Tab 33). The property was thereafter acquired by the appellant and S.O.S. Taxi Ltée, a company belonging to Mr. Osher, and each purchaser held a fifty per cent interest therein (deed of sale dated December 11, 2000, Exhibit A-1, Tab 34).

[17] The joint venture in fact concluded long term leases with three tenants: Mikes Restaurant, occupying the largest area on the ground floor; the restaurant Soup & Noodles; and one Telus franchisee. The leases provided for terms of 5 to 10 years, with rental increases and options to renew. The joint venture had its first commercial tenants in the course of the year 2002 (Rent Roll, Exhibit A-1, Tab 35; Lease Abstract Retail Reports 2000-2005, Exhibit A-1, Tab 36; and the leases and a notice of registration of rights at the land registry by Mikes Restaurant, Exhibit A-1, Tabs

37 to 40). In the year 2005, the aggregate annual rents were $216,772 (Exhibit A-1, Tab 35).

[18] In 2004, the joint venture entered into a loan agreement secured by a hypothec registered against the commercial property (excerpt from the index of immoveables, Exhibit A-1, Tab 31). By that time, the residential units were almost all sold. According to Mr. Osher, it is typical for building owners to seek loans in order to have money for immediate use, and they use the rents to repay those loans.

[19] In 2004, Mr. Zunenshine was approached by a broker with regard to the purchase of the property. According to Mr. Osher and him, Mikes Restaurant, although still paying its rent, was not doing well, having very few clients at the restaurant. Both were afraid that it would go bankrupt. The Telus franchisee was also renting space in another building downtown belonging to Mr. Osher, who was experiencing difficulties with that tenant there, and Mr. Osher apprehended problems with that tenant at the Côte-des-Neiges location too (Transcript, pages 111-113). With regard to the third tenant, which was operating Soup & Noodles, an internal dispute between the partners and non-payment of rent were concerns for the joint venture (apparently a notice of resiliation of the lease was sent to the operator of Soup & Noodles in August 2003, but it was cancelled after Soup & Noodles' guarantor fulfilled the restaurant's obligations, memorandum of agreement, unsigned, Exhibit A-1, Tab 42).

[20] Mr. Osher testified that he initially considered the Côte-des-Neiges property as a trophy property because of its location and long-term rental potential. Unfortunately, things did not turn out as he had expected. He was worried and did not want to have to face a situation where he would lose the tenants. This is why, when he was informed by Mr. Zunenshine that there was an interesting offer to purchase the commercial property, he was of the view that this offer should be accepted by the joint venture, and Mr. Zunenshine agreed. According to them, they decided to sell as a result of a change in circumstances rather than because of any intention at the time of acquisition to sell for a profit (Transcript, page 114). On April 1, 2005, the joint venture sold the Côte-des-Neiges property.

Other facts pointed out by the respondent

[21] It was pointed out by the respondent that for a 10-year period (1997 to 2007), the appellant reported, among other income, total gross rental income and total income from the sale of properties representing respectively 3 and 84 per cent of total income (auditor's report, revenue distribution schedule, Exhibit R-1, Tab 7, page

153). The list of properties sold during that same period indicates that some 24 real estate projects (the majority of which being condominium projects) were sold by the appellant (Exhibit R-1, Tab 10, 2nd and 3rd pages). It also appears that, as at June 9, 2008, there were 18 or so residential real estate projects being developed by the appellant to be sold (Exhibit R-1, Tab 10, 1st page). From 2000 to 2005, the appellant owned from 2 to 7 rental properties (including 7 in 2005, 4 of which were sold in that year, Exhibit A-1, Tab 4, and Tab 2, Schedule 6). The appellant has admitted that in 2005 it declared for the first time capital gains on the sale of properties (par. 15 k) of the Reply to the Notice of Appeal (**Reply**), admitted at the hearing).

[22] The respondent also pointed out that the sale of the commercial property on Park Avenue took place 91 days after the sale of the last residential condo unit (par. 15 y) and bb) of the Reply). This was not however admitted by the appellant. It was admitted that the first condo unit was sold in July 2003 and that the appellant handed over the property to the syndicate in July 2004 (par. 15 w) and x) of the Reply).

[23] With respect to the Côte-des-Neiges property, the respondent referred to the joint venture agreement (Exhibit R-3, Tab 3, page 1) and noted that the purpose stated in the preamble was "the development and construction of a 4-6 storey commercial and residential condominium project" and that the joint owners also expressed their desire to provide for, among other things, "the leasing or sale and management of the Property". The agreement also covers the eventuality of a third party offer to purchase the property (other than the residential portions) that one of the co-owners wishes to accept; in such a case, the other co-owner was given the right to match the offer of the third party and thus to retain the property (section 11 of the agreement, Exhibit R-3, Tab 3, page 6).

[24] It is admitted that the appellant handed over the property (the condominiums portion) to the syndicate in November 2003. The appellant received a written offer to purchase the commercial property on August 9, 2004 and the offer was accepted the same day (Exhibit A-1, Tab 43). The property was sold on April 1, 2005, approximately 18 months after the appellant had divested itself of the residential properties.

[25] The respondent also pointed out that S.O.S. Properties, the joint owner of the Côte-des-Neiges property, had reported the proceeds of the sale as income from a business and not as a capital gain.

Parties' arguments

[26] The respondent argued that the two transactions at issue were part of the appellant's ordinary course of business (buying, construction, renovation and selling in the real estate field), or in the alternative, that those transactions could qualify as an adventure or concern in the nature of trade, and that the profit on the sale of the two properties should in either case be treated as income under section 9 of the ITA.

[27] The appellant is of the view that it has demonstrated that its intention at the time of acquisition of both properties was to hold them for investment purposes with a view to earning rental income, as opposed to including the said properties in its inventory of properties (comprising all of the condo units) to be sold at profit.

Analysis

[28] Subsection 248(1) of the ITA defines "business" as including a profession, calling, trade, manufacture or undertaking of any kind whatever and an adventure or concern in the nature of trade.

[29] From the appellant's standpoint, on the one hand it operates a business purchasing real estate and building and selling residential condo projects. On the other hand, the income-earning properties, including the two properties at issue, are not part of the business's trading activities but are acquired and held for investment purposes, and therefore must be considered as capital investments and not as being part of a business venture or an adventure or concern in the nature of trade.

[30] The decision by the Federal Court-Trial Division in *Happy Valley Farms Ltd. v. The Queen*, [1986] 2 C.T.C. 259, is still very relevant when it comes to deciding whether a transaction which is not itself part of a trade or a business can be held to be an adventure or concern in the nature of trade. The court stated the following at pages 262-64:

> Since income tax was introduced in Canada, a considerable amount of jurisprudence has arisen from the use of the phrase "adventure or concern in the nature of trade" used in the extended definition of business in subsection 248(1) of the *Income Tax Act*. This legislative provision states the "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever and includes "an adventure or concern in the nature of trade but does not include an office or employment." The most comprehensive analysis of the meaning of "adventure in the nature of trade" is found in *M.N.R. v. Taylor*, [1956] C.T.C. 189; 56 D.T.C. 1125 (Ex. Ct.) where the Court set out a number of tests to be applied to determine when a transaction, which

is not itself a trade or business, can be held to be "an adventure or concern in the nature of trade". The decision makes it clear that the question to be answered, in cases of this nature is, was the asset acquired by the taxpayer as an investment or was it not. If not, then any gain realized by the taxpayer upon the sale of the asset is taxable as income. Whether an asset was acquired as an investment is to be determined by all the facts of a particular case including, the course of conduct of the taxpayer, the nature of the subject property, the probability of the asset producing income without the need to be turned over and the similarity of the transaction in question to a trading transaction.

Several tests, many of them similar to those pronounced by the Court in the *Taylor* case, have been used by the courts in determining whether a gain is of an income or capital nature. These include:

1. *The nature of the property sold*. Although virtually any form of property may be acquired to be dealt in, those forms of property, such as manufactured articles, which are generally the subject of trading only are rarely the subject of investment. Property which does not yield to its owner an income or personal enjoyment simply by virtue of its ownership is more likely to have been acquired for the purpose of sale than property that does.

2. *The length of period of ownership*. Generally, property meant to be dealt in is realized within a short time after acquisition. Nevertheless, there are many exceptions to this general rule.

3. *The frequency or number of other similar transactions by the taxpayer*. If the same sort of property has been sold in succession over a period of years or there are several sales at about the same date, a presumption arises that there has been dealing in respect of the property.

4. *Work expended on or in connection with the property realized*. If effort is put into bringing the property into a more marketable condition during the ownership of the taxpayer or if special efforts are made to find or attract purchasers (such as the opening of an office or advertising) there is some evidence of dealing in the property.

5. *The circumstances that were responsible for the sale of the property*. There may exist some explanation, such as a sudden emergency or an opportunity calling for ready money, that will preclude a finding that the plan of dealing in the property was what caused the original purchase.

6. *Motive*. The motive of the taxpayer is never irrelevant in any of these cases. The intention at the time of acquiring an asset as inferred from surrounding circumstances and direct evidence is one of the most important elements in determining whether a gain is of a capital or income nature.

While all of the above factors have been considered by the courts, it is the last one, the question of motive or intention which has been most developed. That, in addition to consideration of the taxpayer's whole course of conduct while in possession of the asset, is what in the end generally influences the finding of the court.

This test has been carried one step further by Canadian courts into what has generally been referred to as the "secondary intention" test. This has meant, in some cases, that even where it could be established that a taxpayer's main intention was investment, a gain on the sale of the asset would be held *taxable* as income if the court believed that, at the time of acquisition, the taxpayer had in mind the possibility of selling the asset if his investment project did not, for whatever reason, materialize. In *Racine, Demers and Nolan v. M.N.R.*, [1965] C.T.C. 150; 65 D.T.C. 5098 (Ex. Ct.), Noel, J. provided the following summary of the secondary intention test at 159 (D.T.C. 5103):

> . . . the fact alone that a person buying a property with the aim of using it as capital could be induced to resell it if a sufficiently high price were offered to him, is not sufficient to change an acquisition of capital into an adventure in the nature of trade. In fact, this is not what must be understood by a "secondary intention" if one wants to utilize this term.
>
> To give to a transaction which involves the acquisition of capital the double character of also being at the same time an adventure in the nature of trade, the purchaser must have in his mind, at the moment of the purchase, the possibility of reselling as an operating motivation for the acquisition; that is to say that he must have had in mind that upon a certain type of circumstances arising he had hopes of being able to resell it at a profit instead of using the thing purchased for purposes of capital. Generally speaking, a decision that such a motivation exists will have to be based on inferences flowing from circumstances surrounding the transaction rather than on direct evidence of what the purchaser had in mind.

[31] In *Canada Safeway Limited v. The Queen*, 2008 FCA 24, 2008 DTC 6074, Nadon J. A. said that although the courts have used various factors to determine whether a transaction constituted an adventure in the nature of trade or a capital transaction, the most determinative factor is the intention of the taxpayer at the time of acquiring the property. If that intention reveals a scheme for profit-making, the court will conclude that the transaction is an adventure in the nature of trade (par. 43). If the primary intention is to exploit the property, it is necessary to determine as well whether the taxpayer acquired the property also with a view to reselling it at a profit depending on the opportunities that might arise (the secondary intention) (par. 48, 50). Nadon J. A. then reiterated the principle, with respect to secondary intention, that for the transaction to constitute an adventure in the nature of trade, the possibility of resale, as an operating motivation for the purchase, must have

been in the mind of the taxpayer. In order to make that determination, inferences will have to be drawn from all of the circumstances, meaning that the taxpayer's whole course of conduct has to be assessed. The requirements of the secondary intention doctrine will not be satisfied unless the prospect of resale at a profit was an important consideration in the decision to acquire the property (par. 61).

[32] It was held in that case that Canada Safeway did not acquire its co-ownership interest in a shopping centre with the intention of producing income from that interest, that is, with a view to generating rental income, nor was its interest to be used in carrying on its grocery business. The evidence supported the inference that, from the beginning, Canada Safeway had not wanted to keep its interest in the joint venture for a long period but had intended to resell it at a profit. The Court concluded that it was not a case where the sale of property is triggered by unexpected circumstances, such as financial difficulties or non-solicited offers to purchase (par. 70, 71 and Pelletier J. A.'s concurring judgment, par. 81).

[33] In the present case, it is true that Mr. Zunenshine and the appellant have a history of trading in real estate in the form of residential condominiums. The respondent argued that this is a relevant consideration which points away from the purchases in issue having been made with the primary intention of securing income-producing assets (*Vaughan Construction Co. v. M.N.R.*, [1970] C.T.C. 350 at 353, referred to in *Leonard Reeves Inc. v. M.N.R.*, [1985] 2 C.T.C. 2054 at page 2059). However, I am satisfied that the appellant has demonstrated that its course of conduct with regard to the rental-income-earning properties is consistent with an investment purpose that is distinct from the real estate trading activities. As a matter of fact, the accounting records for these properties clearly show that they were not meant to be part of inventory but were reported as long-term investments either from the very moment of acquisition (in the case of the Park Avenue property) or at the time construction was completed (in the case of the Côte-des-Neiges property), in 2002 in both instances. Mr. Zunenshine testified as to his long history in rental activities and his desire to rebuild his real estate investment portfolio after he had to cease operating with his brother. Ms. Lerakis corroborated the evidence regarding the course pursued by Mr. Zunenshine through the appellant. The internal documentation (lease abstracts generated by a specialized real estate software for lease management, draft leases based on master leases created by the appellant, books and records reporting the income-earning properties as long-term assets and not including them in real estate project inventory) shows that the appellant's real estate portfolio included rental-income-earning properties, and this was in addition to the trading activities.

[34] The respondent argued that the Park Avenue property was sold 91 days after the last condo was sold in that project and the Côte-des-Neiges property a year and a half after the last condo was sold in that project. The respondent contended that the short length of ownership is an indication that the properties were part of inventory and that therefore the gain on disposal should be treated as income. First of all, I note that there is no evidence as to the date the last condos were sold. Second, I agree with the appellant that the evidence does not disclose a link between the sale of the last condominium and the disposal of the commercial property. Had the appellant had it in mind at the time of their acquisition to sell the commercial properties rather than to hold them for rental income purposes, there is no reason why it would not have attempted to sell them before the last residential condo was sold. The appellant derived rental income from the commercial properties for three years. In my view, the length of the period of ownership here is not a factor that should have any impact on the characterization of the gain.

[35] The respondent also raised the fact that only a small percentage of the appellant's total income was derived from those rental activities. In my view, this has no bearing on the fact that the properties in question were in reality held as investment properties. Indeed, as stated by Judge Dussault in *Immeubles M.H.T. Ltée v. Minister of National Revenue*, 1992 CarswellNat 428, at par. 30, 93 DTC 79 at 87, "a taxpayer may have two different approaches to the ownership of assets consisting in real property, and . . . the fact that he or she previously acquired a property in order to resell it at a profit does not mean that all subsequent transactions by the taxpayer must be considered as giving rise to a business income rather than to a capital gain."

[36] The two properties at issue were in good locations; they attracted long-term tenants and were geared towards producing a steady rental cash flow. Over the years, the total gross rental income increased. This, combined with the fact that Mr. Zunenshine, through different entities, always kept income-earning properties among his real estate assets, is an indication that the appellant acquired those properties as part of its investment portfolio.

[37] Further, an investment in an income-producing property with the prospect of an increasing capital value is not necessarily evidence of a purchase for resale amounting to the launching of an adventure or concern in the nature of trade (*Hiwako Investments Ltd. v. R.*, 1978 CarswellNat 200, par. 7, 78 DTC 6281 at 6282 (FCA)). Nor is the mere fact that a person buying a property with the aim of using it as a capital asset might be induced to resell it if a sufficiently high price was offered sufficient to change an acquisition of a capital asset into an adventure in the nature of trade (*Racine Demers and Nolin v. M.N.R.*, 65 DTC 5098 at 5103, [1965] C.T.C. 150

at 159 (Fr.)). "To give to a transaction which involves the acquisition of capital the double character of also being at the same time an adventure in the nature of trade, the purchaser must have in his mind, at the moment of the purchase, the possibility of reselling as an operating motivation for the acquisition" (*Racine*, *supra*, at 5103 DTC, 159 C.T.C.). This is what is referred to in the case law as being the secondary intention, as mentioned by Nadon J. A. in *Canada Safeway*, *supra*.

[38] In the present appeal, the secondary intention is alleged in the grounds relied on by the respondent in the Reply. However, that allegation cannot be taken as a plea that the Minister assumed in making the assessment that a motivating reason for the purchase of the property was an expectation that, in the event that the investment did not prove to be profitable, it could be sold at a profit, and that this expectation was one of the factors that induced the taxpayer to make the purchase (*Hiwako*, *supra*, at 6284-85 DTC, par. 16 and 17 CarswellNat). The assumptions of fact relied upon by the Minister are stated in paragraph 15 of the Reply, and it was assumed that: "[t]he appellant's intend [*sic*] when he acquired the Park Avenue property was to renovate, subdivided [*sic*] the units in [*sic*] condominium units and sell them for profit"(15 n)); "[t]he appellant always intended to sell the commercial property for profit" (15 ff)); "[t]he appellant's intend [*sic*] when he acquired the Côte-des-Neiges property was to sale [*sic*] all condominium units for profit" (par. 15 hh)); "[t]he appellant always intended to sell the commercial units for profit (par. 15 vv)); and "[t]he appellant always knew that it could sale [*sic*] the commercial units of the Park Avenue property and the Côte-des-Neiges property for profit" (par. 15 zz)). Those assumptions refer in my view to the primary intention or true intention of the appellant, which, according to the respondent was to acquire the properties at issue not in order to exploit them as income properties, but in order to resell them at a profit.

[39] As was pointed out by Judge Dussault in *Immeubles M.H.T., supra*, at 86 DTC, par. 23 CarswellNat, the appellant does not have the burden of proving that a fact on which the Minister did not rely in making his assessment, and further, which was not alleged in the pleadings, does not exist. Therefore, and similarly to the situation in *Immeubles M.H.T.*, since the secondary intention of reselling at a profit was not explicitly alleged by the respondent in the Reply as a determinative factor which motivated the appellant to purchase the two properties at issue, the appellant did not have to lead evidence that there was no such intention (*Immeubles M.H.T., supra*, at 86 DTC, par. 23 CarswellNat).

[40] With respect to the Park Avenue property, I have no reason to disbelieve the testimony of Mr. Zunenshine that, in exchange for his help in investing in Israel, he agreed to sell to his daughter's neighbour, Mr. Shaika, upon the latter's insistence, at

a lower price than he could have asked on the market. Ms. Lerakis corroborated this. Further, the evidence does not disclose that the appellant was holding that property until it became ripe for profitable disposition and in the interim deriving income from the rental of the property (as it was put in *Hazeldean Farm Co. Ltd. v. Minister of National Revenue*, [1967] 1 Ex. C.R. 245 at page 256, referred to in *Canada Safeway, supra*, at par. 49). On the contrary, Mr. Zunenshine said that the appellant did not sell at market price but sold on the basis of a 10% return on the sale price. Furthermore, the appellant performed on the commercial portion of the property work which resulted in higher rent and long, renewable terms being negotiated with at least one of the existing tenants.

[41] With respect to the Côte-des-Neiges property, the existence in the joint venture agreement of the right given to a co-owner to match the offer to purchase of any third party and to thereby retain the property might perhaps have given the appellant the additional idea that it might resell the rental-income-producing property if things did not turn out as planned. However, Mr. Zunenshine explained that that kind of clause was not unusual and that the clause served to protect the co-owners from any attempt by their partner (acting alone or with a third party) to buy them out (Transcript, page 68). Further, that clause applied specifically to the commercial units; no such clause was necessary for the residential condominiums as it was not the intent of the co-owners to keep them (Transcript, page 92). As a matter of reality, and as mentioned earlier in my reasons, Mr. Osher testified that he had initially considered the Côte-des-Neiges property as a trophy property because of its location and long-term rental potential. Unfortunately, things did not turn out as he had expected. He became worried and did not want to be faced with a situation in which they would lose the tenants. This is why, when the unsolicited offer was presented, Mr. Osher told Mr. Zunenshine that he wanted to accept the offer, and Mr. Zunenshine agreed to do so.

[42] Further, I agree with the appellant that the preamble to the joint venture agreement, which provides that the purpose of the joint venture was, among other things, the "leasing or sale" of the property, did not mean that the commercial portion of the project was intended to be either sold or leased, but rather meant, as stated by Mr. Zunenshine and Mr. Osher in their testimony, that the leasing activity referred to the commercial part of the building and the selling activity referred to the residential condos (Transcript, pages 61 and 109).

[43] With respect to the fact raised by the respondent that S.O.S Properties reported the proceeds of the sale as business income, Mr. Osher explained that he did not have any training in accounting and that he did not know how his accountant treated the

profit (Transcript, page 125). I am satisfied that this does not necessarily have any impact on Mr. Osher's credibility with respect to his testimony on his intent at the time of the investment (Mr. Osher corroborated Mr. Zunenshine's testimony that the purpose of the joint venture was to sell the residential condominiums and to keep the commercial space on the ground floor as a revenue property (Transcript, page 40 and page 109). Rather, it is my understanding that Mr. Osher, because of his lack of knowledge, did not discuss with his accountant how the profit on the sale should be reported in S.O.S.'s tax return for the 2005 taxation year.

[44] Considering that the Minister did not clearly contemplate the secondary intention of reselling at a profit as a determinative factor which motivated the appellant to purchase the properties at issue and that therefore the burden to prove the contrary does not fall on the appellant, I am satisfied with the explanation given by Mr. Osher and Mr. Zunenshine that they accepted unsolicited offers for reasons beyond their control that they could not foresee at the time the properties were purchased.

Decision

[45] The appeal is allowed and the reassessment is referred back to the Minister for reassessment on the basis that the profit on the sale of both properties at issue was properly declared as a capital gain as reflected in the appellant's books and records and in its tax return for the 2005 taxation year.

Costs

[46] The appellant is awarded its costs. At its request, it shall file its submissions with respect to the amount of costs claimed within 30 days of the date of this judgment. The respondent will have 30 days thereafter in which to reply.

Signed at Ottawa, Canada, this 27th day of June 2014.

"Lucie Lamarre"

Lamarre J.

CITATION:	2014 TCC 208
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