FRANKEL CORPORATION LIMITED .... APPELLANT;

1959
May 7
*Jun. 25

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Sale of one of taxpayer's operations including inventory—Whether sale of separate business—Whether profit on inventory taxable—The Income Tax Act, 1948 (Can.), c. 52, ss. 2(1), (3), 3, 4, 127(1)(e).

The appellant company carried on four business operations: (1) a steel operation; (2) a wreckage and salvage operation; (3) a scrap iron and steel operation; and (4) a non-ferrous smelting and refining operation. In 1952, the appellant sold its non-ferrous operation, including the inventory on hand. The price paid for the metals inventory was at a figure higher than that carried on the appellant's books. The Minister treated the difference as a taxable profit. The Income Tax Appeal Board allowed the appellant's appeal, but this judgment was reversed by the Exchequer Court.

Held: The amount in question was not taxable.

The sale of the inventory here in question was not a sale in the business of the appellant, but was made as a part of a sale of a business of the appellant, and consequently the proceeds of that sale were not income from a business within the meaning of s. 4 of the *Income Tax Act*. *Doughty v. Commissioner of Taxes*, [1927] A.C. 327, applied.

The submission, based on *Sharkey v. Wernher*, [1955] 3 All E.R. 493, that the inventory was removed or diverted from the appellant's stock-in-trade before it was sold so as to require the market value of the inventory to be placed in its trading account, could not be entertained. Here, the appellant received the consideration for the inventory as a part of the consideration for the whole transaction.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], reversing a decision of the Income Tax Appeal Board. Appeal allowed.

R. L. Kellock, Q.C. and *H. C. Walker, Q.C.*, for the appellant.

W. R. Jackett, Q.C., J. D. C. Boland and *G. W. Ainslie*, for the respondent.

The judgment of the Court was delivered by

*PRESENT: Locke, Fauteux, Abbott, Martland and Judson JJ.

[1] [1959] Ex. C.R. 10, C T.C. 314, 58 D.T.C. 1173.

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MARTLAND J.:—This is an appeal from a judgment of the Exchequer Court, which allowed an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board and which resulted in the addition to the taxable income of the appellant for the year 1952 of an amount of $78,095.68, described in the notice of re-assessment as "profit on sale of inventory".

The facts, as fully and clearly stated in the judgment of the Exchequer Court, are as follows:

The appellant was incorporated on October 30, 1950, and on the following day it took over the business assets and operations of Frankel Brothers Ltd. Thereafter the appellant carried on such operations in the same way as its predecessor had done until the events in question occurred. Frankel Brothers Ltd. had been operating since 1924 as a dealer in ferrous and non-ferrous scrap, and in the smelting and alloying of non-ferrous metals. The latter operation consisted of the recovering of certain non-ferrous metals from scrap material, alloying them with other non-ferrous metals to specifications required by the purchasers, and selling the products. The selling part of the non-ferrous metals operations was carried on under the name "National Metal Company" by Frankel Brothers Ltd. in its time and by the appellant in its turn, and both made use of a registered trade mark consisting of the letters "N.M.C." and also of the word "National" in connection with products. These operations had been expanded in 1942 to include the smelting and alloying of copper recovered from scrap material. During the time this operation was carried on by the appellant, its activities as a dealer in non-ferrous scrap metal were incidental to the smelting operation, purchases of non-ferrous scrap metal being made only for the purposes of the smelting operation and sales of such scrap materials being made only when the appellant was over-supplied.

The ferrous scrap operation consisted of acquiring the scrap, sorting and preparing it by breaking the iron and shearing the steel for use in iron foundries and steel mills and selling it.

In 1926 Frankel Brothers Ltd. had begun carrying on wrecking and salvage operations which consisted of the wrecking and demolition of buildings and structures and the salvaging and sale of materials therefrom. The chief product of this operation was salvaged timber, but considerable quantities of ferrous scrap metal and minor quantities of non-ferrous scrap metal were recovered as well. When recovered, such ferrous scrap metal was transferred to the ferrous scrap metal operation and the non-ferrous scrap metal to the smelting operation.

In 1929 Frankel Brothers Ltd. had further expanded its activities to include a steel fabrication and erection operation consisting of the fabrication of steel for building in its plant and the erection of the steel on the site.

The appellant, on assuming these operations in October, 1950, also acquired the rights of Frankel Brothers Ltd. in the premises where the operations were carried on. These consisted of an area of land between Broadview and Lewis Avenues in Toronto devoted exclusively to the wrecking and salvage operation, and another area nearby at the corner of East Don Roadway and Eastern Avenue where the other three operations were carried on. The latter area was the larger of the two and was equipped with four crane runways and a number of buildings. It was also served by a railway line. Each of the remaining three operations had separate portions of this area where the machinery and equipment used in connection with them were located and the processing of the materials was carried out. In general, the portion used for the purposes of the non-ferrous smelting operation adjoined Eastern Avenue and was completely separated from that of the ferrous scrap metal operation by the area occupied by the steel fabrication operation which lay between the areas occupied by the other two operations and, by itself, held more than half of the whole area.

Not only were the areas and equipment of these operations separate, but the equipment of one was neither used nor usable in connection with any of the other operations. Goods or materials on the premises, for the purposes of these operations, were stored on the portion of the premises allotted to the particular operation and separate accounts of them were maintained, that of the non-ferrous metals being a complete list of each item with its weight and value. When scrap metal from the wrecking and salvaging

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operation was transferred to the ferrous or non-ferrous operation, the transfer was recorded by a voucher crediting the wrecking and salvaging operation and debiting the receiving operation with the market value of the scrap. Both the sources of material and the customers who bought the products of any of these operations were, in general, different from those of the other operations. The staffs who carried out the different operations were also separate and distinct from each other. Those employed in the non-ferrous smelting operation worked exclusively in that operation and consisted of some sixty-five persons, including a production supervisor, three salesmen, a purchasing agent, and laboratory and other workers.

The accounting practices followed by the appellant and its predecessor were not explained in detail, nor was detailed evidence given respecting the duties of clerical or accounting employees. In the annual statements, however, which accompanied the appellant's income tax returns, the profit and loss statement was broken down between what was headed "Metals Division", including both the ferrous and non-ferrous metal operations, and the "Structural Division", embracing the steel fabrication and the wrecking and salvage operations. A separate operating profit from each of these divisions was carried to the profit and loss statement, and overhead expenses, consisting of selling expenses, property expenses, and administrative expenses, were deducted generally to show the operating profit of the company for the year. To what extent these expenses were incurred separately for and charged to separate operations in the course of business does not appear, though there is evidence that the accounting for the structural steel operation and for the wrecking and salvage operation were separate from the others but that for the ferrous scrap and non-ferrous metals operations was combined. Nor does it appear to what extent, if any, items such as directors' fees, municipal taxes on the property occupied, and other items of an apparently overall nature, were in fact incurred exclusively for or charged to any of the several operations. All four operations were, however, under the control of a single board of directors, each operation having one person in charge responsible to the board.

There is also evidence that the appellant had a single union labour contract and insurance and pension plans covering employees of all the operations.

As a business field, the smelting and alloying of non-ferrous metals, such as copper, lead, zinc, tin and aluminum, is regarded by persons engaged in the trade as separate from that of iron and steel on the one hand and the precious metals such as gold, silver, and platinum on the other, the type of plant and equipment, the sources of raw material, the processing and the uses of the product being quite different and distinct in each field.

In August, 1951, the appellant became aware that American Smelting and Refining Corporation (hereinafter referred to as "Asarco"), a large organization controlling some fourteen non-ferrous metals smelting and refining plants in the United States, as well as mining and other allied enterprises, was seeking a favourable opportunity to establish a non-ferrous metals smelting and refining business in Canada, and negotiations ensued which led to the sale in question in these proceedings. From the point of view of the appellant, two principal reasons prompted the course which it took. First, the appellant was controlled by members of the Frankel family, the younger members of which were more interested in the structural steel operation and in its expansion than in the other operations, and more space on the premises was required to accommodate such expansion. The second and more important reason was the prospect of another large competitor in the Canadian market. Ultimately, on December 19, 1951, an agreement was reached by which the appellant sold to Federated Metals Canada Ltd. (hereinafter referred to as "Federated"), a subsidiary of Asarco, all the assets used in the non-ferrous metals operation other than the land and buildings, a number of overdue accounts, and a quantity of drosses representing about one per cent of the non-ferrous metals inventory. In the transaction the appellant leased the land and buildings to the purchaser for a four-year term and transferred to it, as well, the employees engaged in this operation. The assets transferred to the purchaser included machinery and equipment, laboratory equipment, inventories of raw, partly processed, and

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finished non-ferrous metals, supplies useful in the non-ferrous metals operation, accounts receivable, prepaid insurance and similar items, and

(*f*) *Good-will, Patents, Trade Marks, etc.* All the business, unfilled customers' orders, good-will, trade connections, patents, patent applications, inventions, licences, formulae, processes, trade names and trade marks of every nature and description owned or possessed by Frankel and pertaining to its non-ferrous metals business.

On completion of the transaction, the appellant ceased operating in the smelting and refining of non-ferrous metals and as a dealer in non-ferrous scrap metal, and the purchaser assumed and carried on that operation on the same portion of the premises which had theretofore been used by the appellant for that purpose. The appellant continued as before with its other three operations, save that non-ferrous scrap metal recovered in the wrecking and salvage operation was thenceforth disposed of to the purchaser, pursuant to a term of the contract. No new or other operation in the smelting or refining of non-ferrous metals or the sale of non-ferrous scrap metal was set up or carried on by the appellant.

The contract, pursuant to which the sale was effected, was made between the appellant and Asarco and, after reciting the nature of the appellant's non-ferrous metals operations and the general nature of the agreement between the parties, proceeded as follows:

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the premises and the mutual promises hereinafter exchanged, it is agreed as follows:

1. Frankel agrees to sell, transfer and convey to Federated the following assets of its non-ferrous metals business, namely:

(*a*) *Machinery and equipment.* The machinery and equipment listed on Schedule "A" attached hereto and made a part hereof at the price for each item indicated on said Schedule "A", which Schedule is identified by the signature of E. L. Frankel on behalf of Frankel and by Max Robbins on behalf of Asarco.

(*b*) *Inventories of Raw Materials and Finished Metals.* All raw materials, such as scrap metals, drosses, skimmings and residues, and all new or finished metals on hand at the time of closing hereunder. The purchase price for scrap and other raw materials shall be the market price therefor at the time of closing, but should there be any dispute between the parties as to such market price, then Frankel shall offer such material for sale, privately or in any available market, and Asarco shall have the option of purchasing the same at a price equal to the best price bid therefor. Since Federated will take over Frankel's unfilled customers' orders at the time of closing and some of these may have been taken at prices below the current market at the time of closing, it is agreed that a sufficient allowance from said purchase price for raw materials will be made to Federated for the quantity of raw materials required to fill such customers' orders which are below market price so that said allowance will result in a market price for such raw materials that would normally prevail therefor when the finished product is sold at the price at which such orders were taken. The puchase price of ingot and other finished product shall be determined by adding the cost of manufacture to the current market price at the time of closing of the scrap or other raw materials that went into the manufacture thereof, provided such purchase price shall not exceed the current market price for the finished product less a fair allowance for the cost of storing, selling and delivering the same. If any of such ingot or other finished product is required to fill customers' orders to be transferred to Federated and such orders are at prices below the current market prices at the time of closing, any necessary allowance will be made on the purchase price of the finished product to enable Federated to complete such customers' orders and make the normal profit which would accrue if such orders were at current market prices and made from currently priced raw material.

(*c*) *Supplies.* All supplies useful in the operation of said non-ferrous metals business, including laboratory supplies, at current market prices at the time of closing for the quantities heretofore regularly purchased by Frankel.

(*d*) *Accounts Receivable. . . .*

(*e*) *Prepaid Items. . . .*

(*f*) *Good-will, Patents, Trade Marks, etc. . . .*

* * *

2. The purchase price for all of the aforesaid property shall be:
   - (i) for the items specified in subparagraphs (*a*), (*b*), (*c*), (*d*) and (*e*) of paragraph 1 hereof, the aggregate of the sums specified therein which shall be payable in cash by Federated to Frankel at the time of closing, and
   - (ii) for the items set forth in subparagraph (*f*) of paragraph 1 hereof the amount of 150,000.00 which shall be payable in cash by Federated to Frankel at the time of closing, together with 49,000 shares without nominal or par value in the capital stock of Federated to be allotted and issued to Frankel or its nominee at the time of closing as fully paid and non-assessable and constituting 49% of the capital stock of Federated then authorized, issued and outstanding.

* * *

11. *Non-compete Agreement.* At or before closing Frankel shall deliver to Asarco agreements in form satisfactory to Asarco's solicitors respectively executed by such of the directors and officers of Frankel as may be required by Asarco to the effect that each of them, personally, covenants and agrees that he will not either individually or in partnership or in conjunction with any other person or persons, firm, association, syndicate, company or corporation as principal, agent, shareholder, creditor, or in any other manner whatsoever (except as a director, officer and/or shareholder of Federated or as a holder of listed securities purchased in the normal course of investment) carry on or be engaged in or concerned

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in or advise, lend money to, guarantee the debts or obligations of any person or persons, firm, association, syndicate, company or corporation engaged in or interested in, or permit his name to be used or employed in carrying on within Canada—

(*a*) the business of buying, selling or dealing in non-ferrous metals or non-ferrous metal scrap materials or in the smelting of such materials or the manufacture of brass ingots or other non-ferrous metal alloys—within the period commencing with the date of closing and ending with the completion of the purchase by Asarco of 49% of the capital stock of Federated as provided in paragraph 4 hereof (which period is herein referred to as "the period of joint ownership"),

(*b*) the business of smelting non-ferrous metal scrap materials or the manufacture of or dealing in brass ingots or other non-ferrous metal alloys—within the period of five years next following the period of joint ownership.

Provided, however, that should Frankel as incidental to its salvage and wrecking business acquire non-ferrous scrap, such acquisition will not be deemed a breach of this paragraph 11 so long as such scrap is offered to Federated at the market value thereof.

12. During the period of joint ownership and for five years thereafter neither Federated nor Frankel shall, directly or indirectly, approach any employee of the other company or of such other company's affiliated companies in any way that might reasonably be deemed to be a suggestion or invitation to such employee to leave his employment, except as specifically provided in paragraph 9 hereof.

13. During the period of joint ownership Asarco, through its Federated Metals Division, will not compete with Federated in the purchase or sale in Canada of scrap metals or products within the scope of Federated's normal activities and products.

14. *Closing*. The sale hereunder shall be closed as at the opening of business on January 2, 1952, with all adjustments made to that date, and the closing shall take place at the office of Messrs. Blake, Anglin, Osler and Cassels, 25 King Street West, Toronto, at 10 o'clock in the forenoon on December 27th, 1951, or at such other time and place as may be agreed upon between the parties hereto.

The contract also included indemnity clauses, provisions for the sale of the 49,000 shares to Asarco within certain times, a provision that, in the meantime, certain members of the Frankel family should be members of the Board of Directors of Federated, a clause respecting the leasing of the premises to Federated, and several clauses respecting the transfer of employees and the protection of the appellant in respect to their pension and insurance rights.

The whole of the appellant's inventory of non-ferrous metals was purchased by Federated pursuant to the contract, with the exception of certain drosses which accounted for some one per cent. of the whole. The aggregate amount paid by Federated pursuant to paragraph 2(i) above included $822,611.15 in respect of inventory calculated as set out in the above paragraph 1(*b*). The same inventory was being carried at the end of 1951 at a cost of $744,515.47 and it is the liability of the appellant to income tax on the difference between these figures, i.e. $78,095.68, which is in issue in this appeal.

In the profit and loss statement accompanying the appellant's income tax return for 1951, the closing inventory for the metals division was shown at $767,191.01, of which $744,515.47 represented inventory of non-ferrous metals. This statement formed part of the report of the appellant's auditors which was dated May 15, 1952. In the report it was stated that subsequent to the year end the appellant disposed of the non-ferrous metals division of the business to Federated. In the profit and loss statement accompanying the appellant's 1952 income tax return, the opening inventory of the metals division was shown as follows:

Inventory December 31, 1951	$767,191.01
Less sold to Federated Metals Canada Limited	744,515.47
	$ 22.675.54

and only the difference was carried into the computation of gross profit for the year. The sum of $822,611.15 was not included as a receipt. The auditors' report stated that on January 2, 1952, the appellant disposed of the non-ferrous metals division of the business to Federated.

The respondent contends that the amount of $78,095.68 was part of the appellant's taxable income in 1952 on two main grounds:

1. That the sale made by the appellant to Federated, the subsidiary of Asarco, in so far as the inventory of non-ferrous metals is concerned, was a sale of current trading assets of its business and not a part of the sale of the appellant's business and, consequently, the profit on the sale of those assets was a profit from the appellant's business and is taxable.

2. That, if the non-ferrous metals business was a separate business of the appellant, sold by it to Federated, then the inventory of non-ferrous metals must have been removed from the appellant's stock-in-trade

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before it was sold and the amount which must be placed in the trading account of the appellant by reason of that removal is not the cost price, but the market value of the goods in question, that is, the amount for which they were sold, which results in a taxable profit to the appellant of $78,095.68.

Dealing with the first point, counsel for the respondent stated that he did not contend that the profit on the sale of a business is taxable, but that he did contend that the facts of this case did not establish that there had been the sale of a business. His argument was that the appellant only operated one business, even though it comprised four operations; i.e., (*a*) a steel operation; (*b*) a wreckage and salvage operation; (*c*) a scrap iron and steel operation; and (*d*) a non-ferrous smelting and refining operation.

His contention was that the appellant's business continued after the sale had been effected because the other three operations continued.

In support of this contention he pointed out that in the appellant's financial statements operations (*c*) and (*d*) above mentioned were dealt with together under a heading "Metals Division" and not separately.

Further, it was urged that the contract between the appellant and Asarco previously mentioned was not a contract for the sale of a business, but one for the sale of assets. In this connection reference was made to the preamble clause in the agreement, which refers to "the disposition by Frankel and the acquisition by Asarco, through its subsidiary hereinafter mentioned, of certain assets of such non-ferrous metals business", and to clause 1, which commences: "Frankel agrees to sell, transfer and convey to Federated the following assets of its non-ferrous metals business, namely: . . ."

It was also noted that clause 1(*b*), dealing with the non-ferrous metals inventory, says that "The purchase price for scrap and other raw materials shall be the market price therefor at the time of closing" and that "The purchase price of ingot and other finished product shall be determined by adding the cost of manufacture to the current market price".

The respondent, therefore, contends that, in so far as the inventory is concerned, the agreement contemplated a sale of current trading assets at the market price, that such sale was a part of the business of the appellant and that the profits of such sale are taxable.

The relevant sections of the *Income Tax Act*, 1948 (Can.), c. 52, are the following:

PART I—Income Tax

Division A—Liability For Tax

2. (1) An income tax shall be paid as hereinafter required upon the taxable income for each taxation year of every person resident in Canada at any time in the year.

. . . .

(3) The taxable income of a taxpayer for a taxation year is his income for the year minus the deductions permitted by Division C.

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

. . . .

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

. . . .

PART VI—Interpretation

127. (1) In this Act,

. . . .

(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment.

Section 85E of the *Act* has no application to this case, as it became effective in respect of sales made after April 5, 1955.

Section 3 clearly contemplates that a taxpayer (which includes a corporation) may carry on more than one business. The question in issue is as to whether or not the profit realized on the sale of the inventory of non-ferrous

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metals as part of the assets sold by the agreement of December 19, 1951, was "income from a business" within the meaning of s. 4.

The test to be applied is the often quoted one stated by the Lord Justice Clerk in *Californian Copper Syndicate v. Harris*[1], which was last applied in this Court in *Minerals Ltd. v. Minister of National Revenue*[2]:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.
>
> What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

To be taxable the profit must be one from the exercise of trading activity, not the profit from a sale of capital as such. Mere realization of assets does not constitute trading. *Commissioner of Taxes v. British-Australian Wool Realization Association, Ltd.*[3].

In *Doughty v. Commissioner of Taxes*[4], Lord Phillimore, at p. 331, says:

> Income tax being a tax upon income, it is well established that the sale of a whole concern which can be shown to be a sale at a profit as compared with the price given for the business, or at which it stands in the books, does not give rise to a profit taxable to income tax.

He goes on to say:

> It is easy enough to follow out this doctrine where the business is one wholly or largely of production. In a dairy farming business or a sheep rearing business, where the principal objects are the production

[1] (1904), 5 Tax Cas. 159 at pp. 165-6.

[2] [1958] S.C.R. 490 at 495, 14 D.L.R. (2d) 560.

[3] [1931] A.C. 224.

[4] [1927] A.C. 327.

of milk and calves or wool and lambs, though there are also sales from time to time of the parent stock, a clearance or realization sale of all the stock in connection with the sale and winding up of the business gives no indication of the profit (if any) arising from income; and the same might be said of a manufacturing business which was sold with the leaseholds and plant, even if there were added to the sale the piece goods in stock, and even if those piece goods formed a very substantial part of the aggregate sold.

Where, however, a business consists, as in the present case, entirely in buying and selling, it is more difficult to distinguish between an ordinary and a realization sale, the object in either case being to dispose of goods at a higher price than that given for them, and thus to make a profit out of the business. The fact that large blocks of stock are sold does not render the profit obtained anything different in kind from the profit obtained by a series of gradual and smaller sales. This might even be the case if the whole stock was sold out in one sale. Even in the case of a realization sale, if there were an item which could be traced as representing the stock sold, the profit obtained by that sale, though made in conjunction with a sale of the whole concern, might conceivably be treated as taxable income.

It is the proposition stated in the first of these last two paragraphs which appears to me to be applicable in the present case.

It is now necessary to apply these rules in the circumstances of the present case and the question to be determined is one of fact, namely: Was this the sale of a business, as contended by the appellant, or merely the sale of certain current trading assets, as contended by the respondent?

In the Court below this issue was determined in favour of the appellant. The learned trial judge says (and I have used the word "appellant" throughout this passage to indicate the appellant in the present appeal):

Turning now to the facts in the present case, it may be noted that, while the appellant's non-ferrous metals operation was not separate in all respects from its other operations, it was, nevertheless, separate in many of its features, and as a whole it was readily separable from the others. The sources of the material and supplies used in the operation, the employee of the appellant who bought them, the machinery and equipment used in the operation, and the employees who operated it, the portion of the premises where the operation was carried on, the customers who bought the products, and the employees of the appellant who sold them, the name under which the operation was carried on and the trade mark and trade name used on the products, as well as the supervision provided, were all almost entirely distinct from the other operations. Indeed, the whole process by which profit was earned seems to have been quite distinct from the others, save in respect of the acquisition of minor quantities of scrap material from the wrecking and salvage operation, the combination for some purposes of the accounting with that of the ferrous

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scrap operation and such general matters as control by the same board of directors, the arrangement of a single union contract for employees of the appellant, employees' pension and insurance plans, and the ultimate preparation of the profit and loss account for the operations of the company.

Next, the contract was, in my opinion, an indivisible one for the sale of the items mentioned in their entirety, rather than for the sale of the separate items by themselves. While the contract contained formulae for ascertaining the amount by which the aggregate sum to be paid by the purchaser would be increased according to the amount of inventory transferred to the purchaser in the transaction; and while the formula was, in the case of raw material, based on the prevailing price and, in the case of finished goods, on the lower of the cost of materials at prevailing rates plus the cost of manufacture, or market price, there was but one transaction in which, for the aggregate sums to be paid, the purchaser was to acquire not only the stock, equipment, good-will, business and other assets, but a right, as well, to a four-year term in the premises in addition to the benefit of the other covenants. Under this contract neither party could have held the other to any part of it while refusing on its part to carry out the whole and, despite the formulae above mentioned, I think it is impossible to say that the contract or the transaction shows that the sum calculated according to the formulae as forming part of the aggregate sum paid was paid or received for the inventory. The truth is that the whole consideration was paid and received for the assets and rights granted as a whole, and no part of the consideration was paid or received for inventory alone or for equipment alone or for any other single asset or right by itself. Now the assets sold included substantially the whole of the inventory of processed and unprocessed non-ferrous metals and partly processed metals as well. It also included the supplies provided for the processing of non-ferrous metals. Neither partly processed metals nor supplies had previously been sold in the course of the appellant's business. In the same transaction, substantially all of the tangible and intangible assets of the non-ferrous metals operation were also sold, including good-will, trade name and trade mark and—what is perhaps more significant—the unfilled customers' orders under terms which contemplated that they would be filled by the purchaser in the course of its own trading, and not on behalf of the appellant. The same contract provided for the transfer to the purchaser of the employees engaged in the operation and for the granting to the purchaser of a lease of the premises used in the operation. Finally, by or in conjunction with this transaction, the appellant put itself out of the non-ferrous metals trade. While none of these features would in itself be conclusive, in my opinion, taken together they distinguish this transaction from those of the appellant's business and classify this sale as one not in the business but outside and beyond the scope or course of that business. It follows, in my opinion, that no part of the receipts from this sale was a receipt from the appellant's business.

I agree with these conclusions. In my opinion the evidence establishes: (1) that the appellant ceased its trading in non-ferrous metals by December 31, 1951; and (2) that the sale of the inventory of non-ferrous metals as a part of the assets sold by the agreement of December 19, 1951, by the appellant to Federated was not a sale in the business of the appellant, but was made as a part of a sale of a business of the appellant, and consequently the proceeds of that sale were not income from a business within the meaning of s. 4 of the *Income Tax Act*.

The second argument submitted by the respondent, which was successful in the Court below, was that, even if the sale of the inventory of non-ferrous metals was a part of the sale of a business, nevertheless, to effect such sale, such inventory was removed or "diverted" from the appellant's stock-in-trade before it was sold and such removal or diversion required that there be placed in the appellant's trading account the market value of the goods so sold, thus giving rise to a trading receipt equal to the amount realized upon such sale.

This submission is based solely on the authority of *Sharkey v. Wernher*[1].

The facts of that case were as follows: The taxpayer, Sir Harold Wernher, was assessed to income tax in respect of profits of his wife, Lady Zia Wernher, arising from her stud farm. In the year ending December 31, 1948, Lady Wernher transferred five horses from her stud farm to her racing stables, which she carried on as a recreation and not as a trade. The cost of breeding the horses had been debited in the stud farm accounts, and it was common ground that, for income tax purposes consequent on the transfer of the horses, some figure had to be brought into the stud farm accounts as a receipt. The market value of the horses was considerably in excess of their cost. The taxpayer contended that the figure proper to be brought into the accounts was the cost of breeding and not, as contended by the Crown, the market value of the horses.

The problem involved in that case is stated by Viscount Simonds, at p. 495, as follows:

> The problem, therefore, in all its simplicity is whether a person carrying on the trade of farming or, I suppose, any other trade, who disposes of part of his stock-in-trade not by way of sale in the course of trade but for his own use, enjoyment, or recreation, must bring into his trading account for income tax purposes the market value of that stock-in-trade at the time of such disposition.

[1] [1955] 3 All E.R. 493.

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The decision was that the horses must be treated as having been disposed of by way of trade and the sum which should be regarded as having been received on the disposal of the horses must be a sum equivalent to their market value.

With great respect, I do not see how the decision in that case has any application to the circumstances of the present one. In the *Sharkey* case nothing had, in fact, been received by the stud farm in respect of the five horses. The judgment was that for income tax purposes the stud farm should be regarded as having received, on the disposal of the horses, a sum equivalent to their market value. Had such sum, in fact, been received by the stud farm, it was obviously income derived from the business of the stud farm.

In the present case the goods in question were actually sold and the appellant received the consideration for them as a part of the consideration for the whole agreement between the appellant and Asarco. The issue here is not as to what amount should be deemed to be received by the appellant for those goods, but whether the actual amount received was income from the appellant's business, an issue which did not arise at all in the *Sharkey* case.

In my view the *Sharkey* case is not authority for the legal proposition for which it has been advanced by the respondent and no other authority has been cited to support that submission. The contention of the respondent on this point also fails.

In my opinion, therefore, the appeal should succeed and the appellant should be entitled to its costs both here and in the Exchequer Court.

Appeal allowed with costs.

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Solicitor for the respondent: A. A. McGrory, Ottawa.