Docket: 2013-1038(IT)G

BETWEEN:

MARIO STALTARI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 19, 2014, at Ottawa, Canada,
Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant:	Gregory Sanders
Counsel for the Respondent:	**Pascal Tétrault**

AMENDED JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2009 taxation year, notice of which is dated November 21, 2011, is allowed, with costs to the Appellant, and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the gift by the Appellant to the City of Ottawa of 19.59 hectares of land located at 6851 Flewellyn Road yielded a capital gain to the Appellant and that the taxable half of that capital gain is deemed to be equal to zero by paragraph 38(*a*.2) of the *Income Tax Act* (Canada).

This Amended Judgment is issued in substitution of the Judgment dated May 13, 2015.

Signed at Ottawa, Canada, this **5th** day of **June** 2015.

"J.R. Owen"

Owen J.

Citation: 2015 TCC 123
Date: 2015**0605**
Docket: 2013-1038(IT)G

BETWEEN:

MARIO STALTARI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

(Back page amended to change counsel of the Respondent)

Owen J.

[1] This is an appeal by Mr. Mario Staltari of a reassessment of his 2009 taxation year by notice dated November 21, 2011. The reassessment treated a gift of land made by Mr. Staltari to the City of Ottawa as a disposition of inventory and included the value of the land less its original cost in Mr. Staltari's income from a business for his 2009 taxation year. Mr. Staltari had filed his T1 income tax return for 2009 on the basis that the gain from the gift was a capital gain and that the taxable half of the capital gain was deemed to be equal to zero by paragraph 38(*a*.2) of the *Income Tax Act* (Canada) (the "ITA").

I. Evidence Regarding the Appellant

[2] Mr. Staltari testified on his own behalf. I found Mr. Staltari to be a credible witness who quite understandably did not recall all of the details of the past 14 years with perfect accuracy. His evidence was consistent with the objective circumstances.

[3] Mr. Staltari graduated from university in 1980 and worked for an accounting firm until he obtained his chartered accountant designation in 1983. From 1983 to 1987, he was the vice-president of finance at Regional Realty. He testified that in that role he did not buy or sell real estate.

[4] In 1987, Mr. Staltari incorporated his own commercial real estate brokerage company, Staltari Realty Corporation, which he continued to operate until 1996, when he joined J.J. Barnicke as Vice-president, Investment Sales. According to Mr. Staltari, J.J. Barnicke was a full-service commercial real estate brokerage. He testified that the majority of the sales activity in which he was involved entailed the acquisition or sale of predominantly commercial buildings on behalf of others in exchange for a fee.[1] Such things as land sales and development, office leasing and retail properties (such as shopping centres) would be handled by other groups in the company.

[5] Mr. Staltari testified that after approximately 10 years (which would have been in 2006),[2] he left J.J. Barnicke and again incorporated his own commercial real estate brokerage company, this time under the name Staltari Commercial Real Estate Corporation ("SCRC"). In cross-examination, he provided a more accurate departure date of 2009 when it was pointed out that SCRC was not listed in schedule 9 (the "Schedule") of a 2008 T2 corporate income tax return[3] filed by Flewellyn Land Holdings Inc. ("Flewellyn"), a corporation owned by Mr. Staltari that held the bare legal title to the land donated by him to the City of Ottawa. The 2009 date is consistent with a reference to Mr. Staltari's employment on page 4 of Exhibit R-8.

[6] SCRC, through Mr. Staltari, provided commercial real estate services that were the same as those he was involved in at J.J. Barnicke, but on a smaller scale. He also did work for "users", who are people who need land for a specific commercial purpose such as a car dealership. The user would identify what was needed (size of lot and location) and Mr. Staltari would seek out an appropriate parcel of land for the user to purchase.

[7] SCRC relied on word of mouth for its business, but also had a website. The website identified six areas of expertise: Agency/Brokerage, Industrial, Offices, Retail Services, Tenant Representation and Property Management. Mr. Staltari stated that he was capable of providing all of these services. The "About Us" web page for SCRC described the corporation as follows:

> Staltari Commercial Real Estate Corp. is a boutique real estate brokerage firm assisting clients in buying, selling, financing, leasing, managing, site selection and space location.

[1] Lines 16 to 22 of page 17 of the Transcript.
[2] Line 8 of page 19 of the Transcript.
[3] Exhibit R-1.

> The firm's power of execution relies on expertise in: valuation; market positioning; monetizing strategies; access to target markets; and mortgagee controlled sales.

[8] The "About Us" web page also referred to other firms and listed memberships in various organizations. Mr. Staltari explained that the other firms were two independent boutique firms – one in Toronto and one in Calgary – that chose to market themselves with SCRC. The owners of the firms would refer work to one another on occasion, but that was the extent of the collaboration. The reference to memberships was to collective memberships of the firms. Mr. Staltari stated that SCRC was not a member of the Builders Industry and Land Development (BILD) organization. Nor was SCRC a member of any of the other organizations listed.

[9] Mr. Staltari testified that he did own other companies and that one of those companies (identified as 1172210) acquired vacant land around 1996.[4] The parcel of land acquired was originally a single lot 265 feet wide by 110 feet deep but, prior to its purchase by the corporation, it was divided into three lots by its owner at the request of Mr. Staltari. Of the three lots purchased by 1172210, one was sold to Mr. Staltari's father-in-law, who built a house on it for himself, and one was used by Mr. Staltari to build a personal residence. Mr. Staltari stated that both he and his father-in-law still live in these homes.[5] The third lot was used by 1172210 to build four townhouses, which were then rented to third parties. Mr. Staltari stated that it was he who built the personal residence and the four townhouses on the two lots. He also stated that he had not built on any other vacant land for business purposes.[6]

[10] When initially asked in cross-examination whether he considered himself a builder, Mr. Staltari said he had built the house and four townhouses described in the immediately preceding paragraph as well as "a few houses for myself". He also conceded that he could correctly be described as the general contractor for the construction of the house and four townhouses built on the land purchased in 1996.[7] Mr. Staltari denied being a developer[8] and, when asked again later in cross-examination whether he represented himself as being a builder, he stated that he had held himself out as a builder in an appeal to the Ontario Municipal Board (the

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[4]Lines 1 to 28 of page 25 of the Transcript.
[5]Line 23 of page 26 of the Transcript.
[6]Lines 24 to 28 of page 27 and lines 1 to 3 of page 28 of the Transcript.
[7]Lines 16 to 28 of page 73 and lines 1 to 3 of page 74 of the Transcript.
[8]Lines 12 to 15 of page 73 of the Transcript.

"OMB").[9] He explained on re-examination that he had described himself as a builder to show he had some experience relevant to the subject matter of the application under appeal (the expansion of the dining room at, and increasing the occupancy capacity of, 174 Glebe Avenue described below) and that he would be able to do a good job.[10] When in re-examination he was asked why he also described himself as a chartered accountant in the appeal to the OMB, he explained that he was proud of his accounting designation, but paid dues as an inactive member and so did not practise as a chartered accountant.

[11] In cross-examination, Mr. Staltari was asked about eight corporations listed on the Schedule: (1) 1657-1673 Carling Inc. ("Carling"); (2) Moda Development Corporation ("Moda"); (3) Staltari Realty Corporation ("SRC"); (4) 1172210 Ontario Inc. ("1172210"); (5) Bayview Property and Asset Management ("Bayview"); (6) 174 Glebe Avenue Ltd. ("Glebe"); (7) 841133 Ontario Inc. ("841133"); and (8) 1128-1150 Cadboro Limited ("Cadboro").

[12] Carling held the bare legal title to a property at 1657-1673 Carling Avenue (the "Carling Property"), which was a 24,000-square-foot building with retail stores on the ground floor and offices on the second floor. Mr. Staltari could not recall the name of the beneficial owner of the Carling Property, but stated that it was either 1172210 or Moda.

[13] Moda was a holding company that owned the shares of 1172210. Moda also had a stock portfolio acquired with funds from refinancing the Carling Property in 2000. The Carling Property was sold in 2013 and a number of the companies owned by Mr. Staltari were amalgamated that same year to "clean up [his] affairs".[11]

[14] SRC was the corporation that operated the brokerage business started by Mr. Staltari in 1987, and 1172210 was the corporation that acquired the three vacant lots purchased in 1996. Bayview was a property management company set up in 1993 that did not own any property of its own.

[15] 841133 and Cadboro were inactive. Mr. Staltari said he could not find any records for 841133 to show what it did before it became inactive. Cadboro at one

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[9] Lines 14 to 28 of page 120 and lines 1 to 20 of page 121 of the Transcript and Exhibit R-7 at the bottom of page 2.
[10] Lines 17 to 24 of page 123 of the Transcript.
[11] Lines 15 to 17 of page 78 of the Transcript.

time held the bare legal title to a 6,000-square-foot strip mall on Cadboro Avenue (the "Cadboro Property") for a period of six months.

[16] Glebe held the bare legal title to a retirement home at 174 Glebe Avenue (the "Glebe Property") purchased in 2004. Mr. Staltari was asked about applications to the City of Ottawa regarding this property. He stated that an initial application was made to obtain approval for an increase in occupancy from 47 residents to 59 residents and the expansion of the dining room. The dining room expansion was approved but not the increase in occupancy. In 2011, another application was made to rezone the land to R4, which allows for the construction of condominiums.

[17] Mr. Staltari explained that the Glebe Property was subsidized by the City of Ottawa. The City, after raising an issue about the residence's administrator that was not resolved to its satisfaction, cancelled its contract to subsidize the residence. This resulted in the loss of all of the tenants. At that point, Mr. Staltari sought alternative uses for the property. Applications for town homes were denied, as was an application to build two doubles, so an application for the R4 zoning was made. That application was approved and it is anticipated that condominiums will be built by Moda at a cost of approximately $9.5 million. In cross-examination, Mr. Staltari stated that the construction will be overseen by a third party project manager with the necessary expertise and that the condominiums are being marketed through a real estate agent and on the website of SCRC.

II. Evidence Regarding the Land

[18] The vacant land (the "Land") that was donated by Mr. Staltari to the City of Ottawa in 2009 consisted of 19.59 hectares located at 6851 Flewellyn Road, Ottawa, Ontario. The Land had been purchased by Mr. Staltari's father in 1983 and was owned jointly by his father and mother. Mr. Staltari testified that nobody really knew why his father purchased the land other than because he wanted to own a piece of land. From time to time, his father and his father's friends would hunt on the Land, but other than that his father did nothing with it.

[19] Mr. Staltari testified that around 2000, his father, who was 72 and retired at the time,[12] approached him about purchasing the Land. Mr. Staltari stated that his father wanted some extra cash but was not willing to simply accept a gift from Mr.

[12] Prior to retirement, Mr. Staltari's father was a furrier.

Staltari. The sale of the Land to Mr. Staltari allowed his father to provide something in return for the cash.

[20] To the best of Mr. Staltari's recollection, the price of $70,000 was determined by his reviewing comparable properties in the area on MLS. He suggested in cross-examination that the magnitude of the purchase was such that it did not warrant more involved research regarding the price. At the insistence of his mother, the purchase price was to be paid over time, accordingly, an initial payment of $6,000 and thereafter annual payments of $8,000 were made. In 2002, Mr. Staltari paid two instalments of $8,000 because his father needed extra money that year.

[21] Mr. Staltari testified that he had had no independent intention to acquire the Land and that the only reason he purchased the Land was because his father asked him to. He also testified that, when he purchased the Land from his father and mother, he knew it was rural land that could be used as farmland, but he did not know the actual zoning of the Land. He suggested that the only thought he had at the time of purchase was that he might operate a tree farm on the Land when he retired 10 or 12 years down the road. He also stated that any development in the area was to the north of Stittsville or, more recently, to the east. In cross-examination, Mr. Staltari denied any knowledge of other residential developments in the area of the Land at the time he purchased the Land, but admitted current knowledge of one such development. He also admitted that he knew there were streets east of the property running north off Flewellyn Road but he did not know the names of those streets and still does not even today. A witness for the Respondent indicted that the streets were 1.5 km and 2 km to the east of the Land.

[22] Mr. Staltari testified that he did nothing with the Land until early 2003. He stated that he was advised by a lawyer friend at a cocktail party in late 2002 or early 2003 that the City of Ottawa was about to implement a freeze on estate lot development; she advised him that to protect himself he needed to make two applications to the City – one to rezone the Land and another to subdivide the Land. Mr. Staltari stated that he was advised that these applications had to be made prior to a council meeting that was to be held in April 2003.

[23] Mr. Staltari entered into evidence a letter from the aforementioned lawyer dated March 6, 2003 (Exhibit A-2) that referenced an enclosed copy of what is referred to in the letter as Recommendation 71 of the Ottawa Planning and Development Committee. The enclosure titled PLANNING AND

DEVELOPMENT COMMITTEE DISPOSITION 46 17 – 21 FEBRUARY 2003 states in paragraph 71:

> COUNTRY ESTATE LOT DEVELOPMENTS
>
> WHEREAS the Planning and Development Committee has heard from numerous rural residents and representatives of the rural development community that a complete ban on country estate lot development could be detrimental to the rural economy;
>
> THEREFORE BE IT RESOLVED that staff be requested to develop options and alternatives to a complete ban and provide such recommendations to the Committee prior to the Official Plan public meetings scheduled for late March.
>
> CARRIED

[24] Mr. Staltari engaged a consultant, who filed the applications on his behalf on April 16, 2003. He also engaged other people to test the soil, to confirm the availability of well water by drilling test wells and to perform a watershed study, all of which was required in support of the applications.

[25] A copy of the two applications entered into evidence by the Respondent in cross-examination[13] indicates that the applications were submitted with a Preliminary Tree Planting and Conservation Plan and an Environmental Impact Study and that a Hydrogeology Study and Terrain Analysis "will be provided".[14]

[26] Mr. Staltari also hired a contractor to build a gravel road on the Land at a cost of $104,719 plus tax.[15] Mr. Staltari explained that the road was necessary because the truck of the person who was hired to drill the test wells had become stuck in the peat moss on the site. According to Mr. Staltari, the road was necessary to free the truck and complete the test wells. In cross-examination, he stated that the road was built from Flewellyn Road to the location of the truck approximately three-quarters of the way to the north side of the property. He also stated that the road was not suitable for a subdivision because it did not extend all the way to the north end of the property and it did not end in a roundabout.

[27] Mr. Staltari testified that the City of Ottawa raised a concern that the Land was close to environmentally sensitive land and commissioned a wetland study.

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[13] Exhibit R-2.

[14] Page 5 of Exhibit R-2.

[15] According to an invoice dated May 9, 2003, filed as Exhibit A-4.1.

This left the rezoning and subdivision applications in limbo. To move matters along, Mr. Staltari requested that he be informed of the City's position on the applications and the City said the applications would not be approved. Mr. Staltari then appealed to the Ontario Municipal Board in order to preclude the Land being designated environmentally sensitive wetlands.

[28] Copies of two appeals by Flewellyn to the OMB dated January 13, 2005 were entered into evidence by the Respondent.[16] In cross-examination, Mr. Staltari stated that the appeals were filed because the City of Ottawa did not make a decision on the applications within the applicable limitation period.[17] He also agreed that the appeals were pending until they were withdrawn on February 3, 2009.[18] When asked about the status of the Land as wetlands, Mr. Staltari stated that, at the time of the applications to the City of Ottawa, he had no concern that the Land was wetlands. This concern was raised after the applications had been filed.[19]

[29] At some point between 2005 and the time of the donation,[20] while the appeal to the OMB was ongoing, the Ministry of Natural Resources (the "MNR") requested permission to come onto the Land to assess its environmental status. Mr. Staltari granted permission for the visit because he did not think the Land was environmentally sensitive. The representative of the MNR who visited the property told him about the possible advantages of donating the Land. He then researched online the possibility of a donation and came to the conclusion that the City of Ottawa would be a qualified donee.

[30] Mr. Staltari approached the City and the City agreed to accept the donation. The Land was appraised at $1,935,000 and was donated to the City in 2009. The City issued an official charitable donation receipt to Mr. Staltari for the appraised value of $1,935,000. The Minister of the Environment certified the Land as ecologically sensitive land and also certified the fair market value of the Land as being $1,935,000.

[31] Mr. Staltari used $875,000 of the ecological gift receipt amount to claim a non-refundable income tax credit for his 2009 taxation year under subsection

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[16] Exhibit R-5.

[17] The limitation periods are stated on the applications as being 120 days for the rezoning application and 180 days for the plan of subdivision application.

[18] Lines 22 to 24 of page 112 and lines 2 to 7 of page 114 of the Transcript, and Exhibit R-6.

[19] Lines 11 to 28 of page 114 of the Transcript.

[20] The time frame is described at page 54 of the Transcript.

118.1(3) of the ITA. The Respondent does not contest the eligibility of the gift of $1,935,000 for inclusion in Mr. Staltari's "total ecological gifts" and "total gifts", as defined in subsection 118.1(1) of the ITA, for 2009.

[32] Mr. Staltari testified that his reasons for choosing to donate the Land to the City of Ottawa were as follows:[21]

> What was going through my mind at that time after I explored the donation, I had wetlands hanging over my head. I had the OMB appeal that I could continue with, and I had this donation option in front of me.
>
> To not do the donation and not do the appeal, okay, meant in my mind then and now, by the way, but even then was I was going to end up with environmentally sensitive land and I could do nothing. So that was not an option I was going to do.
>
> So then the option was do I continue with the appeal, protect my future rights, or I had this donation receipt, which was very -- financially was very attractive because I had a large gain with the building I sold and I could use a good chunk of that gain that year.
>
> So I said financially, this makes the most sense, okay? So I took the gift and then dropped the appeal.

[33] In re-examination, Mr. Staltari stated that the purpose of the application relating to a plan of subdivision was to secure approval of such a plan of subdivision and nothing more. He stated that no discussions were held regarding the construction of homes, and no steps were taken in furtherance of the construction of homes, on the Land.

[34] Mr. Staltari testified that he incurred expenses of $293,820.98 in respect of the Land, which included the $70,000 purchase price. He also stated that the expenses were paid by his corporation and were recorded as a balance owing by him to the corporation in the shareholder loan account of the corporation. In cross-examination, Mr. Staltari clarified that in fact the corporation owed him money, so the payments reduced the amount owed to him by the corporation.[22] He did not recall which corporation's shareholder loan balance was so reduced and conceded that he did not have the relevant accounting records with him.[23]

III. Evidence of the Respondent

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[21] Lines 25 to 28 of page 62 and lines 1 to 13 of page 63 of the Transcript.
[22] Lines 18 to 28 of page 118 of the Transcript.
[23] Lines 1 to 16 of page 119 of the Transcript.

[35] Two witnesses testified for the Respondent: Michael Berghout and James Atkinson. Michael Berghout is an income tax auditor with the Canada Revenue Agency ("CRA") and in 2011 audited the gift by Mr. Staltari of the Land to the City of Ottawa in 2009. James Atkinson is a manager in the Large Business Audit Division of the CRA, but was formerly with the Income Tax Rulings Directorate. As a rulings officer, he dealt in November 2008 with a request submitted by Mr. Staltari for an advance income tax ruling regarding the income tax characterization of the gift of the Land to the City of Ottawa.

[36] Mr. Berghout testified that as part of his audit he researched estate lot developments in the vicinity of the Land. He determined that there was a similar development approximately 2 km away on Ridingview Crescent and that MLS listings suggested that the homes in the development were being built from 2000 to 2004. In cross-examination, Mr. Berghout conceded that in the Reply the Respondent assumed that the homes on Ridingview Crescent were built in 2003 and 2004.[24] Mr. Berghout also testified that building was underway in the Ironstone estate development when he drove by in July or August 2011. That development was about 1.5 km from the Land.

[37] Mr. Berghout testified that he researched the purchase price paid by Mr. Staltari for the Land by looking on GeoWarehouse, which provides a summary of land registry information. The information on GeoWarehouse indicated that the purchase price was $70,000, as stated by Mr. Staltari. Mr. Berghout testified that Mr. Staltari did not provide any information to confirm the other expenses included in the $293,820.98 identified by Mr. Staltari as having been incurred in respect of the Land.[25]

[38] In cross-examination, Mr. Berghout confirmed that the only assumptions relating to 2000 (that is, the year in which Mr. Staltari purchased the Land from his father) are found in paragraphs 8 a) to e) of the Reply. He also stated that he was not aware of any other facts that existed at the time of that purchase. In re-examination, he confirmed that paragraph 8 f) of the Reply was an accurate statement of an assumption made regarding a fact that existed at the time of the purchase.

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[24] Paragraph 8 i) of the Reply.

[25] The T20 Audit Report prepared by Mr. Berghout (Exhibit A-6) states on page 3: "The taxpayer did not agree with the inventory determination and therefore did not provide documentation and/or amounts to support other allowable deductions or expenses."

[39] Mr. Atkins testified that he advised Mr. Staltari by telephone in November 2008, in response to a ruling request submitted by Mr. Staltari, that the CRA did not provide advance income tax rulings on questions of fact such as whether a disposition of property yields income or a capital gain. He also testified that he said that, on the facts that he had available, "it's likely that we would say it was inventory, but that's not a determinative answer".[26]

IV. The Position of the Appellant

[40] Counsel for the Appellant submitted that paragraph 38(*a*.2) of the ITA, which excludes from taxable capital gains any capital gains resulting from a gift to a qualified donee of property described in the definition of "total ecological gifts" in subsection 118.1(1), implies that, where land qualifies for such treatment, it should be considered capital property of the donor. Paragraph 38(*a*.2) is a specific provision that is not limited in its application to a disposition of "capital property" and it would have been an easy matter for Parliament to insert the word "capital" before the word "property" in subparagraph 38(*a*.2)(i). As a specific provision addressing the disposition of environmentally sensitive land, paragraph 38(*a*.2) must be given precedence over the more general regime distinguishing capital gains from business income.

[41] Counsel for the Appellant submitted that treating qualifying environmentally sensitive property as capital property is consistent with the underlying incentive-oriented policy of the provisions applicable to the donation of such property and provides certainty to taxpayers regarding the tax result of such donations. Counsel noted that such donations are described on the Environment Canada website as providing certain tax advantages — for individuals, a charitable donation tax credit without any taxable capital gain resulting from the gift. Nowhere is it stated that these tax consequences may be denied, and taxpayers are entitled to certainty regarding such matters.

[42] On the more general issue of whether the Land was capital property or inventory of Mr. Staltari, counsel submitted that there was no evidence that Mr. Staltari had either a primary or a secondary intention to sell the Land at a profit at the time he acquired the Land in 2000. Mr. Staltari's real estate career and his attempts to secure approval of a plan of subdivision on being made aware of the City of Ottawa's change in policy do not support such a primary or secondary intention. In particular, with the exception of the construction of the four

[26] Lines 8 to 10 of page 151 of the Transcript.

townhouses, there is no evidence that Mr. Staltari had experience in developing vacant land, and certainly he did not have it to the extent required for a parcel the size of the Land. The evidence showed that Mr. Staltari was an active real estate agent involved in commercial and retail property acquisition and leasing. As well, there was no evidence that Mr. Staltari was aware of the City's change of policy prior to 2003 or that he took any action related to the development of the Land between the purchase of the Land in 2000 and the beginning of 2003.

[43] Counsel referred to the decision of the Federal Court, Trial Division (as it then was) in *Happy Valley Farms Ltd. v. M.N.R.*, [1986] F.C.J. No. 465 (QL) and of the Exchequer Court in *Racine, Demers et Nolin v. Ministre du Revenu National*, [1965] 2 Ex. C.R. 338 for the proposition that, in order for a transaction involving the acquisition of a capital asset to be characterized as an adventure or concern 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. Counsel submitted that this requirement was affirmed by the Federal Court of Appeal in *Canada Safeway Limited v. The Queen*, 2008 FCA 24.

[44] Counsel also referred to the decision of the Federal Court, Trial Division (as it then was) in *Demeter Equity Limited v. The Queen*, 79 DTC 5230 (which, at page 5233, referred to another decision of that court) and submitted that the oral evidence of Mr. Staltari is sufficient in this case to establish intent given that his purchase of the Land is explained by his desire to help out his parents and that he did nothing with the Land until the beginning of 2003, when circumstances changed.

[45] Counsel submitted that the following conclusions could be drawn from the evidence:[27]

1. The zoning of the Land at the time of acquisition did not allow for the development of estate lots, so that at the time of acquisition Mr. Staltari would not have been able to develop the Land without taking extra steps.

2. Mr. Staltari's business did not include the development of vacant lots into subdivisions.

[27] Lines 21 to 28 of page 161 and lines 1 to 15 of page 162 of the Transcript.

3. Mr. Staltari would have needed to arrange substantial financing to develop the Land, yet he made no effort to raise financing, nor did he market the plan of subdivision to possible purchasers.

4. Mr. Staltari made no improvements to the Land. His activity on the Land from 2003 to 2004 was limited to taking the necessary steps to obtain the reports needed to support the subdivision plan, including the construction of the road to deal with the truck stuck in the peat.

5. Mr. Staltari was not under any personal financial pressure that would have required him to sell the Land in order to recover his costs.

6. Mr. Staltari never completed the subdivision process.

[46] Counsel submitted that, on the evidence, Mr. Staltari's primary reason for purchasing the Land was to help his parents. Mr. Staltari's secondary reason for purchasing the Land, if he had one, was to use the property in retirement for tree farming. Counsel also submitted that the donation crystallized the character of the Land as capital property of Mr. Staltari's because he had no opportunity for profit from that method of disposition, and counsel cited in support of this proposition page 1602 of the decision of this Court in *Whent v. The Queen*, reported sub nom. *Pustina et al. v. The Queen*, at 96 DTC 1594, affirmed at 251 N.R. 252 sub nom. *Canada v. Zelinski et al.*, leave to appeal to the Supreme Court of Canada denied at 266 N.R. 393.

V. The Position of the Respondent

[47] Counsel for the Respondent argued that the Land was inventory because Mr. Staltari was a real estate specialist who often sold properties for others and occasionally for himself. The Land was acquired by Mr. Staltari as part of a business scheme, as evidenced by the fact that Mr. Staltari held real estate through several corporations and the Land was held in much the same fashion. Mr. Staltari had built properties in the past (the row of four townhouses and his own home) and had a current scheme involving the construction and sale of condominiums at 174 Glebe Avenue in Ottawa.

[48] In the alternative, counsel submitted that the purchase and donation of the Land was an adventure or concern in the nature of trade with the result that the gift

of the Land triggered income from a business. The donation was akin to an unsolicited offer of purchase that was accepted by Mr. Staltari, the only difference being that instead of there being a sale price, the ITA deemed the proceeds of disposition to be equal to the fair market value of the Land.

[49] Counsel for the Respondent referred to the judgment of the Supreme Court of Canada in *Friesen v. Canada*, [1995] 3 S.C.R. 103 and to the judgment of the Federal Court of Appeal in *Canada Safeway, supra*. In particular, counsel referred to the factors identified in paragraphs (i) to (iv) on page 116 of *Friesen* and to the summary of the guiding principles at paragraph 61 of *Canada Safeway*. Counsel recited the fifth principle identified in *Canada Safeway*, namely that ". . . viva voce evidence of the taxpayer with respect to his or her intention is not conclusive and has to be tested in the light of all the surrounding circumstances" and then referred to the principle stated in *Ludco Enterprises Ltd. v. Canada*, 2001 SCC 62, [2001] 2 S.C.R. 1082 at paragraph 54, that "In the interpretation of the Act, as in other areas of law, where purpose or intention behind actions is to be ascertained, courts should objectively determine the nature of the purpose, guided by both subjective and objective manifestations of purpose: . . ."

[50] With respect to the objective circumstances, counsel submitted that the fact that Mr. Staltari spent, according to his own estimation, around $226,000 to protect his interest in the Land belied the suggestion that he had no plans for the Land at the time of purchase, as no reasonable man would spend that much money to protect a $70,000 property for which he had no plans. As well, the suggestion that Mr. Staltari would start a tree farm in his retirement was problematic as he attributed this idea to a friend he played hockey with, but had also suggested in his request for an advance ruling that his father had considered tree farming. Counsel questioned why this idea would not have come from his father if indeed it was considered at the time of purchase.

[51] Counsel also noted that Mr. Staltari had been in the real estate business all of his professional life and submitted that there was a pattern of behaviour that supported an inference of business-like dealings with the Land, such as the use of a nominee corporation to hold legal title to the Land, the existence of a form of financing of the purchase price of the Land (i.e., the deferred annual payments), the absence of any income from the Land and the making of two applications —one for rezoning and one for subdivision approval — roughly two years after acquisition in order to enhance the value of the Land. Counsel observed that this last step was much like the initial application to make 174 Glebe Avenue more profitable by increasing the number of occupants from 47 to 59.

[52] Finally, counsel submitted that I should draw an adverse inference from the fact that Mr. Staltari did not present other witnesses, such as his parents or those involved in the rezoning and subdivision approval applications, who might have corroborated his story.

VI. The Statutory Provisions

[53] Under paragraph 38(*a*) of the ITA, a taxpayer's taxable capital gain from the disposition of any property is one-half of the taxpayer's capital gain from the disposition of that property. Paragraph 38(*a*) states:

> 38. Taxable capital gain and allowable capital loss — For the purposes of this Act,
>
> > (*a*) [taxable capital gain — general] — subject to paragraphs (*a*.1) to (*a*.3), a taxpayer's taxable capital gain for a taxation year from the disposition of any property is ½ of the taxpayer's capital gain for the year from the disposition of the property]

[54] Paragraph 38(*a*.2) of the ITA provides an exception to the general rule in paragraph 38(*a*) by deeming a taxpayer's taxable capital gain from the disposition of ecologically sensitive land to be zero. The portion of the paragraph relevant to this appeal states:

> 38. Taxable capital gain and allowable capital loss — For the purposes of this Act,
>
> > (*a*.2) [taxable capital gain — ecological gift] — a taxpayer's taxable capital gain for a taxation year from the disposition of a property is equal to zero if
> >
> > > (i) the disposition is the making of a gift to a qualified donee (other than a private foundation) of a property described, in respect of the taxpayer, in paragraph 110.1(1)(*d*) or in the definition "total ecological gifts" in subsection 118.1(1), or . . .

[55] Paragraph 39(1)(*a*) of the ITA describes what constitutes a taxpayer's capital gain for a taxation year from the disposition of any property other than certain listed properties. The paragraph states:

> 39. (1) Meaning of capital gain and capital loss [and business investment loss] — For the purposes of this Act,

(*a*) a taxpayer's capital gain for a taxation year from the disposition of any property is the taxpayer's gain for the year determined under this subdivision (to the extent of the amount thereof that would not, if section 3 were read without reference to the expression "other than a taxable capital gain from the disposition of a property" in paragraph 3(*a*) and without reference to paragraph 3(*b*), be included in computing the taxpayer's income for the year or any other taxation year) from the disposition of any property of the taxpayer other than

(i) eligible capital property,

(i.1) an object that the Canadian Cultural Property Export Review Board has determined meets the criteria set out in paragraphs 29(3)(*b*) and (*c*) of the *Cultural Property Export and Import Act* and that has been disposed of,

(A) in the case of a gift to which subsection 118.1(5) applies, within the period ending 36 months after the death of the taxpayer or, where written application therefor has been made to the Minister by the taxpayer's legal representative within that period, within such longer period as the Minister considers reasonable in the circumstances, and

(B) in any other case, at any time,

to an institution or a public authority in Canada that was, at the time of the disposition, designated under subsection 32(2) of that Act either generally or for a specified purpose related to that object,

(ii) a Canadian resource property,

(ii.1) a foreign resource property,

(ii.2) a property if the disposition is a disposition to which subsection 142.4(4) or (5) or 142.5(1) applies,

(iii) an insurance policy, including a life insurance policy, except for that part of a life insurance policy in respect of which a policyholder is deemed by paragraph 138.1(1)(*e*) to have an interest in a related segregated fund trust,

(iv) a timber resource property, or

> (v) an interest of a beneficiary under a qualifying environmental trust; . . .

[56] Paragraph 39(1)(*a*) must be read in conjunction with the relevant portions of section 3 of the ITA, which state:

> 3. Income for taxation year — The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:
>
> (*a*) determine the total of all amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property,
>
> (*b*) determine the amount, if any, by which
>
> (i) the total of
>
> (A) all of the taxpayer's taxable capital gains for the year from dispositions of property other than listed personal property, and
>
> (B) the taxpayer's taxable net gain for the year from dispositions of listed personal property,
>
> exceeds
>
> (ii) the amount, if any, by which the taxpayer's allowable capital losses for the year from dispositions of property other than listed personal property exceed the taxpayer's allowable business investment losses for the year,
>
> . . .

[57] A taxpayer's income for the year from a business or property is described in subsection 9(1) of the ITA:

> 9. (1) Income — Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.

[58] The basic rules for measuring a capital gain are found in subsection 40(1) of the ITA. Subsection 40(1) states, in part:

> 40. (1) General rules [gain and loss calculation] — Except as otherwise expressly provided in this Part
>
> > (*a*) a taxpayer's gain for a taxation year from the disposition of any property is the amount, if any, by which
> >
> > > (i) if the property was disposed of in the year, the amount, if any, by which the taxpayer's proceeds of disposition exceed the total of the adjusted cost base to the taxpayer of the property immediately before the disposition and any outlays and expenses to the extent that they were made or incurred by the taxpayer for the purpose of making the disposition . . .

[59] The term "capital property" is defined in section 54 as follows:

> "capital property" of a taxpayer means
>
> > (*a*) any depreciable property of the taxpayer, and
> >
> > (*b*) any property (other than depreciable property), any gain or loss from the disposition of which would, if the property were disposed of, be a capital gain or a capital loss, as the case may be, of the taxpayer; . . .

[60] The term "business" is defined in subsection 248(1) of the ITA as follows:

> 248. (1) Definitions — In this Act,
>
> "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(*c*), section 54.2, subsection 95(1) and paragraph 110.6(14)(*f*), an adventure or concern in the nature of trade but does not include an office or employment; . . .

[61] A donation by an individual of ecologically sensitive land to a qualified donee may entitle the individual to a non-refundable tax credit determined in accordance with the rules in section 118.1 of the ITA. The portions of section 118.1 relevant to this appeal state:

> 118.1 (1) Definitions — In this section,
>
> "total ecological gifts", of an individual for a taxation year, means the total of all amounts each of which is the eligible amount of a gift (other than a gift described in the definition "total cultural gifts") of land (including a covenant or an

easement to which land is subject or, in the case of land in the Province of Quebec, a real servitude) if

> (*a*) the fair market value of the gift is certified by the Minister of the Environment,
>
> (*b*) the land is certified by that Minister, or by a person designated by that Minister, to be ecologically sensitive land, the conservation and protection of which is, in the opinion of that Minister or the designated person, important to the preservation of Canada's environmental heritage, and
>
> (*c*) the gift was made by the individual in the year or in any of the five preceding taxation years to
>
> > (i) Her Majesty in right of Canada or of a province,
> >
> > (ii) a municipality in Canada,
> >
> > (iii) a municipal or public body performing a function of government in Canada, or
> >
> > (iv) a registered charity one of the main purposes of which is, in the opinion of that Minister, the conservation and protection of Canada's environmental heritage, and that is approved by that Minister or the designated person in respect of the gift,
> >
> > to the extent that those amounts were not included in determining an amount that was deducted under this section in computing the individual's tax payable under this Part for a preceding taxation year;

"total gifts" of an individual for a taxation year means the total of

> (*a*) . . .
>
> (*b*) the individual's total Crown gifts for the year,
>
> (*c*) the individual's total cultural gifts for the year, and
>
> (*d*) the individual's total ecological gifts for the year.

118.1 (3) Deduction by individuals [credit] for gifts — For the purpose of computing the tax payable under this Part by an individual for a taxation year, there may be deducted such amount as the individual claims not exceeding the amount determined by the formula

$$(A \times B) + [C \times (D - B)]$$

where

A is the appropriate percentage for the year;

B is the lesser of $200 and the individual's total gifts for the year;

C is the highest percentage referred to in subsection 117(2) that applies in determining tax that might be payable under this Part for the year; and

D is the individual's total gifts for the year.

[62] Finally, under paragraph 69(1)(*b*) of the ITA, a taxpayer who has disposed of property by way of gift *inter vivos* is deemed to have received proceeds of disposition for the property equal to the fair market value of the property at the time of the gift. Paragraph 69(1)(*b*) states:

> 69. (1) Inadequate considerations — Except as expressly otherwise provided in this Act,
>
> . . .
>
> (*b*) where a taxpayer has disposed of anything
>
> (i) to a person with whom the taxpayer was not dealing at arm's length for no proceeds or for proceeds less than the fair market value thereof at the time the taxpayer so disposed of it,
>
> (ii) to any person by way of gift *inter vivos*, or
>
> (iii) to a trust because of a disposition of a property that does not result in a change in the beneficial ownership of the property; and
>
> the taxpayer shall be deemed to have received proceeds of disposition therefor equal to that fair market value; and . . .

VII. Analysis

[63] The Respondent submits that Mr. Staltari purchased, owned and disposed of the Land as part of a business conducted by him as a sole proprietor. In the alternative, the Respondent submits that Mr. Staltari's purchase, ownership and disposition of the Land constituted an adventure or concern in the nature of trade,

which is a "business" under the definition of that word in subsection 248(1) of the ITA.

[64] Under either position, the disposition of the Land to the City of Ottawa would give rise to business income for Mr. Staltari equal to the difference between the cost of the Land to Mr. Staltari and the proceeds of disposition of the Land, which are deemed by paragraph 69(1)(*b*) of the ITA to equal the fair market value of the Land at the time of the gift. The parties agree that the fair market value of the Land at the time of the gift was $1,935,000, as certified by the Minister of the Environment.

[65] Before embarking on an analysis of these positions, it is useful to provide some context for the analysis.

[66] For taxation years prior to 1972, income was subject to income tax provided it was "income from a source", and capital was not subject to income tax.[28] When the 1952 *Income Tax Act* was amended by chapter 63 of the Statutes of Canada 1970-71-72, section 3 describing the income of a taxpayer for a taxation year was replaced with a version that addressed taxable capital gains, with the result that such gains (net of allowable capital losses) were included in income even though the receipt was in fact of a capital nature. A taxpayer's taxable capital gain or allowable capital loss from a disposition of capital property is determined in accordance with the rules in Subdivision c of Division B of Part I of the ITA.

[67] In the context of a disposition of property that is not listed in subparagraphs 39(1)(*a*)(i) to (v),[29] such as the Land, paragraph 39(1)(*a*) identifies whether there is a capital gain by asking whether the proceeds of disposition from the property

---

[28] In Peter W. Hogg, Joanne E. Magee and Jinyan Li, *Principles of Canadian Income Tax Law*, 5th ed. (Toronto: Thomson Carswell, 2005) at pages 80-81, the authors describe the judicial concept of income as follows:

> The courts have approached the question of what is income on a case-by-case basis, rather than providing an exhaustive definition. The question of what is income in the context of section 3 is often considered together with the "source concept". The source theory takes as its metaphor the fruit and the tree. The courts have stated clearly that income is fruit only and never the tree. On the basis of case law: (1) capital receipts are not income; (2) unrealized gains are not income; and (3) income that does not have a source is not income.
>
> Generally speaking, "capital" is a concept akin to a fund of "after-tax dollars". A taxpayer's savings out of after-tax salary, business profits, etc. are capital. So are his or her windfall gains, inheritances or other amounts received tax-free. Capital may be in the form of cash, personal assets, real property, or investments. There is a rich body of case law on the distinction between capital and income. In making the distinction, the courts have held that payments for the surrender of a potential source of profit are capital receipts. The tree is "capital" while the fruit is "income".

[29] These subparagraphs exclude certain properties from the regime in Subdivision c, which addresses capital gains and losses, generally speaking because they are addressed by other rules in the ITA.

would be included in income if section 3 were read without reference to the inclusion of taxable capital gains net of allowable capital losses. Although the parenthetical language in paragraph 39(1)(*a*) may appear at first blush to create a circularity in the definition of capital gain, in fact the language simply draws upon the body of jurisprudence that had developed under the pre-1972 income tax statutes and which provided the basis for distinguishing between "income from a source" and "capital".

[68] If the relevant proceeds of disposition are included in the taxpayer's income for the year under section 3 read without reference to the portions of that section that address taxable capital gains, then the capital gains rules in Subdivision c do not apply by virtue of the parenthetical language in paragraph 39(1)(*a*). On the other hand, if the proceeds from the disposition of the property are capital under the traditional analysis, then the capital gains rules do apply and one-half of the capital gain (called the taxable capital gain) is brought into the taxpayer's income through paragraph 3(*b*) of the ITA.

[69] The issue in this case is whether the proceeds of disposition that Mr. Staltari was deemed to have received on the gift of the Land to the City of Ottawa in 2009 are income included under section 3, without regard to the language in that section that includes taxable capital gains net of allowable capital losses. Paragraph 3(*a*) read this way includes in income the taxpayer's income for the year from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property. The only source relevant to the issue in this case is a business.[30]

[70] The term "business" is defined in subsection 248(1) to include a "profession, calling, trade, manufacture or undertaking of any kind whatever and, . . . an adventure or concern in the nature of trade but does not include an office or employment". This inclusive definition means that the ordinary meaning of the term "business" also applies. The most commonly cited such meaning is "anything which occupies the time and attention and labour of a man for the purpose of profit is business": see *Stewart v. Canada*, 2002 SCC 46, [2002] S.C.R. 645 at paragraph 38. Where a business of a taxpayer exists, subsection 9(1) states that the taxpayer's

[30] A gain on the disposition of property is not income from the property and the gain in issue did not arise from an office or employment.

income for a taxation year from the business is the taxpayer's "profit" from that business for the year.[31]

[71] The statutory definition of "business" was included for the first time in *The Income Tax Act* (1948) for taxation years commencing after 1948. The new definition added the concept of "an adventure or concern in the nature of trade" to the meaning of business. In *Minister of National Revenue v. Taylor*, [1956-1960] Ex. C.R. 3, President Thorson described the change as follows at pages 13-14:

> As already stated, the prime issue in this appeal is whether the respondent's purchase and sale of 1500 tons of lead was an adventure or concern in the nature of trade. If it was, his profit from it was taxable income from a business within the meaning of section 3 of *The Income Tax Act* of 1948, as defined by section 127(1)(*e*). The expression "adventure or concern in the nature of trade" appeared for the first time in a Canadian income tax act in section 127(1)(*e*) of the 1948 Act. It was, no doubt, taken from the *Income Tax Act, 1918* of the United Kingdom. In that Act under Case I of Schedule D tax was chargeable in respect of any trade . . . and section 237 defined trade as including "every trade, manufacture, adventure or concern in the nature of trade". Prior to its inclusion in the definition of trade by section 237 of the *Income Tax Act, 1918*, the expression appeared in the *Income Tax Act* of 1842. In that Act provision was made in the First Case under Schedule (d) for the charging of duties in respect of any "Trade, Manufacture, Adventure, or Concern in the nature of Trade, ..." Indeed, the expression goes back to the Act of 1803.
>
> It is, I think, plain from the wording of the Canadian Act, quite apart from any judicial decisions, that the terms "trade" and "adventure or concern in the nature of trade" are not synonymous expressions and it follows that the profit from a transaction may be income from a business within the meaning of section 3 of the Act, by reason of the definition of business in section 127(1)(*e*), even although the transaction did not constitute a trade, provided that it was an adventure or concern in the nature of trade.

[72] After extensively reviewing the UK jurisprudence addressing the same phrase used in the UK income tax statutes, President Thorson stated at pages 24 - 26:

> The cases establish that the inclusion of the term "adventure or concern in the nature of trade" in the definition of "trade" in the United Kingdom Act substantially enlarged the ambit of the kind of transactions the profits from which

[31] Profit is not defined as such and the determination of profit is a question of law: *Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147, paragraph 32. In *Minister of National Revenue v. Irwin*, [1964] S.C.R. 662 at 664, the Supreme Court described profit as "the difference between the receipts from the trade or business *during such year* . . . and the expenditure laid out to earn those receipts." This description was adopted in *Canderel* at paragraph 30.

> were subject to income tax. In my opinion, the inclusion of the term in the definition of "business" in the Canadian Act, quite apart from any judicial decisions, has had a similar effect in Canada. I am also of the view that it is not possible to determine the limits of the ambit of the term or lay down any single criterion for deciding whether a particular transaction was an adventure of trade for the answer in each case must depend on the facts and surrounding circumstances of the case. But while that is so it is possible to state with certainty some propositions of a negative nature.
>
> . . .
>
> In my opinion, it may now be taken as established that the fact that a person has entered into only one transaction of the kind under consideration has no bearing on the question whether it was an adventure in the nature of trade. It is the nature of the transaction, not its singleness or isolation, that is to be determined.
>
> Nor is it essential to a transaction being an adventure in the nature of trade that an organization be set up to carry it into effect. The contention that this is necessary arose from the finding of the Commission in *Martin & Lowry* [[1927] A.C. 312] which the House of Lords did not disturb, but it is plain from the decisions in such cases as *Rutledge v. The Commissioner of Inland Revenue* (*supra*) *and Lindsay et al. v. The Commissioners of Inland Revenue* (*supra*) that a transaction can be an adventure in the nature of trade even although no organization has been set up to carry it into effect.
>
> And the two last mentioned cases are authority for saying that a transaction may be an adventure in the nature of trade even although nothing was done to the subject matter of the transaction to make it saleable, as in *The Commissioners of Inland Revenue v. Livingston et al.* (*supra*).
>
> Likewise, the fact that a transaction is totally different in nature from any of the other activities of the taxpayer and that he has never entered upon a transaction of that kind before or since does not, of itself, take it out of the category of being an adventure in the nature of trade. What has to be determined is the true nature of the transaction and if it is in the nature of trade, the profits from it are subject to tax even if it is wholly unconnected with any of the ordinary activities of the person who entered upon it and he has never entered upon such a transaction before or since.

[73] In *Hiwako Investments Ltd. v. M.N.R.* (1978), 21 N.R. 220 (F.C.A.), Chief Justice Jackett explained the general approach to determining whether income from a disposition of property was from a business source:

> 20 . . . The three principal, if not the only, sources of income are businesses, property and offices or employments (section 3). Except in very exceptional

> cases, a gain on the purchase and re-sale of property must have as its source a "business" within the meaning of that term as extended by section 139 [now 248(1)]. Where property is bought and re-sold at a profit or loss, the question whether the profit or loss must be taken into account for tax purposes depends, therefore, generally speaking, on whether
>
> > (a) it is a profit or loss from a "business" within the ordinary sense of that term, or
> >
> > (b) it is a profit or loss from an undertaking or venture in the nature of trade.
>
> It may be a profit or loss from a "business" in the ordinary sense of that word if the transaction falls within the scope of the business carried on. If property is acquired when there is no business even though one possibility in the mind of the purchaser is to use the property as the capital asset of a proposed business - or the purchaser has not considered how he will use it - a re-sale may be the consummation of a venture in the nature of trade. Where the subject of the purchase and re-sale is an active profit producing property, it may be more difficult to conceive of its having been acquired both as an investment in the sense of property to be held for the income arising therefrom and as a speculation in the sense of an undertaking or venture in the nature of trade. . . .

[74] A majority of the Supreme Court of Canada provided additional clarification regarding the meaning of "adventure or concern in the nature of trade" in *Friesen v. Canada, supra*:[32]

> 15 The concept of an adventure in the nature of trade is a judicial creation designed to determine which purchase and sale transactions are of a business nature and which are of a capital nature. This question was particularly important prior to 1972 when capital transactions were completely exempt from taxation. The question was succinctly stated by Clerk L.J. in *Californian Copper Syndicate v. Harris* (1904), 5 T.C. 159 (Ex., Scot.), at p. 166:
>
> 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?
>
> 16 The first requirement for an adventure in the nature of trade is that it involve a "scheme for profit-making". The taxpayer must have a legitimate intention of gaining a profit from the transaction. Other requirements are conveniently summarized in Interpretation Bulletin IT-459 "Adventure or Concern in the Nature of Trade" (September 8, 1980) which references Interpretation Bulletin

[32] In *Friesen*, the question of whether the land in question was held as part of an adventure or concern in the nature of trade was not in issue. As stated by the majority at paragraph 3 of the judgment: "The narrow issue in this appeal is whether land held for resale as an adventure in the nature of trade may be valued as inventory under s. 10(1) of the *Income Tax Act*."

> IT-218 "Profit from the Sale of Real Estate" (May 26, 1975) for a summary of the relevant factors when the property involved is real estate.
>
> 17 IT-218R, which replaced IT-218 in 1986, lists a number of factors which have been used by the courts to determine whether a transaction involving real estate is an adventure in the nature of trade creating business income or a capital transaction involving the sale of an investment. Particular attention is paid to:
>
> > (i) The taxpayer's intention with respect to the real estate at the time of purchase and the feasibility of that intention and the extent to which it was carried out. An intention to sell the property for a profit will make it more likely to be characterized as an adventure in the nature of trade.
> >
> > (ii) The nature of the business, profession, calling or trade of the taxpayer and associates. The more closely a taxpayer's business or occupation is related to real estate transactions, the more likely it is that the income will be considered business income rather than capital gain.
> >
> > (iii) The nature of the property and the use made of it by the taxpayer.
> >
> > (iv) The extent to which borrowed money was used to finance the transaction and the length of time that the real estate was held by the taxpayer. Transactions involving borrowed money and rapid resale are more likely to be adventures in the nature of trade.

[75] In *Canada Safeway, supra*, the Federal Court of Appeal reviewed *Hiwako Investments*, *Friesen* and other cases involving a disposition of real estate and then summarized the principles to be drawn from those cases as follows:

> 61 A number of principles emerge from these decisions which I believe can be summarized as follows. First, the boundary between income and capital gains cannot easily be drawn and, as a consequence, consideration of various factors, including the taxpayer's intent at the time of acquiring the property at issue, becomes necessary for a proper determination. Second, 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. In other words, the taxpayer's whole course of conduct has to be assessed. Third, with respect to "secondary intention", it also must also have existed at the time of acquisition of the property and it must have been an operating motivation in the acquisition of the property. Fourth, the fact that the taxpayer contemplated the possibility of resale of his or her property is

> not, in itself, sufficient to conclude in the existence of an adventure in the nature of trade. In *Principles of Canadian Income Tax Law*, *supra*, the learned authors, in discussing the applicable test in relation to the existence of a "secondary intention", opine that "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" (see page 337). I agree entirely with that proposition. Fifth, the *viva voce* evidence of the taxpayer with respect to his or her intention is not conclusive and has to be tested in the light of all the surrounding circumstances.

[76] In assessing whether a disposition of property gives rise to income from a business or a capital gain, regard must be had to all the surrounding circumstances in order to objectively test the taxpayer's assertions of intent with respect to the property. That does not mean, however, that the taxpayer's *viva voce* evidence is to be ignored or otherwise discounted simply because it is oral testimony. In *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, Justice L'Heureux-Dubé made the following comments at paragraphs 87 and 88, which were adopted by the Federal Court of Appeal in *House v. The Queen*, 2011 FCA 234 at paragraph 56:

> . . . Furthermore, where the *ITA* [*Income Tax Act*] does not require supporting documentation, credible oral evidence from a taxpayer is sufficient notwithstanding the absence of records: . . . .
>
> . . . the *ITA* does not require that the revenue be shown in the financial statements and, accordingly, since no issue of credibility was raised, the evidence adduced by the appellant is clearly sufficient.

[77] The assessment of intent therefore requires due consideration of the taxpayer's testimony, which is to be assessed in the context of all the surrounding circumstances. If the objective circumstances cast doubt on the taxpayer's version of events, then less weight (or no weight) may be given to that testimony. If the objective circumstances do not cast doubt on the taxpayer's testimony, then that testimony is sufficient to establish intent (or lack of intent) unless there is some other reason to doubt the credibility of the taxpayer.

[78] Turning to the Respondent's first position, namely, that Mr. Staltari acquired, owned and disposed of the Land in connection with a business conducted by him as a sole proprietor, there is simply no evidence to support that proposition. In order to find that Mr. Staltari was conducting a business and that the Land was acquired, owned and disposed of in connection with that business, there would need to be evidence tying Mr. Staltari to at least some of the typical indicia of a business, such as a business plan or strategy, a marketing plan, financial records, an office, furniture, office supplies, a telephone listing, an e-mail address, a

computer, stationery, business cards, one or more employees, actual or prospective customers, advertising, marketing, a website, banking arrangements, solicitations of business, business-related documents, *etc*.

[79] In this case there is no evidence that in 2000, when he acquired the Land, Mr. Staltari was personally conducting a business to which the purchase of the Land could be connected in some fashion. Contrary to the assertion of the Respondent, the mere fact that bare legal title to the Land was put in the name of a corporation does not establish the existence of a business conducted by Mr. Staltari. The steps taken from 2003 forward to subdivide and rezone the Land do not in and of themselves establish the existence of a business in the ordinary sense of that word (i.e., without regard to the inclusion of an adventure or concern in the nature of trade).

[80] From 1996 to 2009, Mr. Staltari was an employee of J.J. Barnicke and did not carry on his own real estate brokerage business. While he admits that in 1996 a corporation he indirectly owned acquired land on which he and his father-in-law each built homes for their own personal use and on which the corporation built four townhouses that were rented to third parties, that was an isolated undertaking that involved the construction of either personal use property (the homes) or investment property (the townhouses). As well, while corporations owned directly or indirectly by Mr. Staltari did own other real estate during the period from 2000 to 2009, the activities of those corporations involved the ownership of income-producing investment property. In any event, the commercial activities of corporations cannot be attributed to Mr. Staltari personally without evidence that he, and not the corporations, was conducting those activities, and that he was doing so on his own account. There is no such evidence. Finally, Mr. Staltari stated that one reason for making the gift of the Land was a large gain he realized in 2009. The Respondent did not suggest in the Reply or in cross-examination or argument that this gain supported the existence of a business and I have no evidence in front of me to suggest the origin or nature of the gain referred to by Mr. Staltari.

[81] In addition to the foregoing facts, Mr. Staltari's second brokerage corporation, SCRC, did not start operating until 2009, and the application to build condominiums on the Glebe Property did not take place until 2011 and was brought about by an unforeseen change in circumstances (the loss of subsidization for the Glebe Property). Again, in both of the above cases, the commercial activities in issue were conducted by corporations and not by Mr. Staltari on his own account. These facts do not support the existence of a sole proprietorship of Mr. Staltari in 2000 to 2009.

[82] Accordingly, there are simply no circumstances that suggest that Mr. Staltari personally conducted a business in 2000 and that he acquired the Land in connection with that business. There are also no circumstances that suggest that he disposed of the Land to the City of Ottawa as part of a business conducted by him at that time as a sole proprietor. In fact, the donation was made for personal reasons — to save personal income tax – and not in connection with a business conducted by Mr. Staltari as a sole proprietor. Accordingly, I reject the Respondent's first position.

[83] The Respondent's alternative position is that Mr. Staltari's acquisition, ownership and disposition of the Land constituted an adventure or concern in the nature of trade and therefore the gain resulting from the gift of the Land to the City of Ottawa was income of Mr. Staltari from a business. This raises the question as to whether an adventure or concern that involves an acquisition of land that is ultimately the subject of a bona fide charitable donation for no consideration can be characterized as an adventure or concern "in the nature of trade".

[84] Mr. Staltari testified that he purchased the Land to help out his father and that, at the time of the purchase, he had no particular purpose in mind for the Land other than perhaps tree farming. There are no objective circumstances that contradict or call into question Mr. Staltari's assertion regarding his intent at the time of the purchase. I reject the Respondent's assertion that I should draw a negative inference simply because Mr. Staltari's 86-year-old father did not testify in support of this fact. There are no objective circumstances that cast suspicion on Mr. Staltari's version of events.

[85] The Land was rural land purchased by his parents in 1983 for no particular reason other than to own land, and was occasionally used by his father for hunting with his friends. There is no evidence that Mr. Staltari initiated the purchase of the Land or that he approached the purchase of the Land in a business-like manner. For example, he did not conduct any due diligence other than to survey the MLS to determine a price to pay his father. He did not review the zoning of the Land, acquire a copy of the official plan or talk to anyone about the prospects for developing the Land in the future. He purchased the land personally and only bare legal title was held by a corporation. He did not secure outside financing, prepare any sort of plan of action or take action of any kind that would suggest that he had a profit-making plan in mind for the Land when he purchased it in 2000.

[86] Contrary to the assertion of the Respondent, the fact that Mr. Staltari agreed with his mother to pay the purchase price over a period of years without interest is

not evidence that he leveraged the purchase of the Land in a business-like manner. It is clear from the fact that he doubled the payment in one year that the payment schedule was flexible and tailored to the financial needs of his parents. Nor is the fact that he placed the bare legal title to the Land in the name of a corporation evidence of a particular intent. It appears Mr. Staltari often (if not always) used a corporation to hold the bare legal title to real estate, and no particular intent can be inferred from that practice given that land held in this manner had been used for both investment and personal purposes.[33]

[87] The notion urged by the Respondent that Mr. Staltari's actions must be judged on the basis that he was a real estate professional who must have had other plans for the Land must be tempered by the reality that he purchased from his father wetlands that in fact were not particularly suitable for development of any kind. As well, the fact that there may have been new houses on a street that ran north off Flewellyn Road some 2 km to the east of the Land is not in and of itself sufficient to suggest that Mr. Staltari's assertions with respect to the Land are suspect, particularly given that Mr. Staltari consistently denied any knowledge of that development at the time he purchased the Land. I also note that it appears that the development 1.5 km to the east of the Land did not even start until after the gift was made in 2009.

[88] The first objective evidence of an intention with respect to the Land arises in March 2003 when Mr. Staltari received a letter from a lawyer indicating that the Land might be subject to estate lot development restrictions by the City of Ottawa. At that point, Mr. Staltari did hire a consultant to file both an application for a plan of subdivision approval and a rezoning application for the Land, and he hired others to secure the studies and other materials required for those applications. He also had a gravel road built on the Land that was three-quarters of the length (south to north) of the property. The stated purpose for the road was to free a pick-up truck that had become stuck in the peat so that the individual that owned the truck could finish his work. The Respondent questioned why someone would build a $104,719 road to free a vehicle worth a fraction of that amount, but Mr. Staltari did not waver from his explanation. No doubt Mr. Staltari believed at the time that he would recover this cost at some point in the future.

[89] In light of the circumstances that gave rise to the steps taken by Mr. Staltari in 2003, the actions taken do not contradict Mr. Staltari's assertion that he had no particular primary intention with respect to the Land when he purchased it in 2000.

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[33] For example, the land acquired in 1996 was used to build a personal residence and four rental townhouses.

Quite the contrary, the circumstances surrounding his ownership of the Land changed unexpectedly and Mr. Staltari took steps to address the new circumstances. Any prudent individual could be expected to take steps to preserve the value of an asset if he or she was advised of pending changes that would adversely affect that value.

[90] As well, the timing of these actions accords with Mr. Staltari's version of events: he was advised of the change in the City of Ottawa's policy regarding estate lot development and he acted quickly to meet the deadlines imposed by the City. There was no evidence that he would have taken these actions if he had not become aware of the change in policy. Also, the fact that he was not aware of the estate lot issue sooner only serves to reinforce my conclusion that he did not approach the purchase (or ownership to that point in time) of the Land in a manner consistent with a primary profit objective.

[91] Once Mr. Staltari embarked on this new course of action of rezoning and subdividing the Land, he pursued that course until what he considered to be a better option was presented to him, at which time he abandoned the rezoning and subdivision process entirely. Apart from the applications, he did not take steps to actually develop the Land. Nor did he seek out a purchaser for the Land. In the end, he donated the Land to the City of Ottawa for no consideration in order to obtain the favourable income tax consequences associated with the donation of ecologically sensitive land to a qualified donee. The ITA created a fiction that Mr. Staltari had received fair market value proceeds of disposition for the Land, but in fact he received nothing for the gift.

[92] In summary, I find as a fact that Mr. Staltari did not have a primary intention to profit from a disposition of the Land when he acquired the Land from his parents in 2000. Rather, he purchased the Land to help out his parents, without any particular objective in mind. As for a secondary intention, his subsequent actions do suggest that he believed that the Land had development potential and that he wanted to protect that potential and the value that resulted from it. Whether this anticipated potential was an operating motivation in the purchase of the Land in 2000 is unclear. In any event, for the reasons that follow, I find that any secondary intention that he may have had with respect to the Land was not carried out and that the adventure or concern was not "in the nature of trade".

[93] In *Taylor*, *supra*, the Exchequer Court recognized, in its seminal decision on the meaning of adventure or concern in the nature of trade, that what was being analyzed was the nature of the transaction itself with a view to determining

whether the "profit" from the transaction should be considered as income from a business as opposed to capital. The transaction is, of course, the disposition of the property which gives rise to the inquiry.

[94] President Thorson made it clear that, for an adventure or concern to be "in the nature of trade", it has to be imbued with the quality of trade, which can be the case even if the transaction is isolated, the property is unchanged, no organization has been set up to carry the adventure into effect and the adventure has no relationship to the other activities of the taxpayer. In *Robertson v. Canada*, [1998] F.C.J. No. 401 (QL), the Federal Court of Appeal explained this focus as follows:

> 25 As noted by W.E. Crawford and R.E. Beam, an "adventure", by the nature of that word, is likely to be an isolated transaction. Many isolated transactions are not, however, "in the nature of trade". There must be some activity, some features of business in the transaction dealt with which makes it an adventure in the nature of trade. What must be looked for is whether there are "badges of trade" or behavioral factors which might assist in tracing the course of conduct of the taxpayer. From these, inferences might be drawn as to whether a taxpayer was engaged in an operation of trade or simply investing.

[95] In my view, a bona fide gift of land is not a transaction that can be described as being "in the nature of trade" if it is otherwise unconnected with a business.[34] Although Mr. Staltari admitted that he was motivated by the favourable tax consequences that would result from the gift of the Land to the City of Ottawa, that fact does not impart a quality of trade to the disposition of the Land.

[96] The Respondent does not challenge the fact that the donation of the Land to the City of Ottawa was a bona fide gift, but contends that the gift was the culmination of an adventure or concern in the nature of trade and, therefore, that Mr. Staltari is not entitled to the benefit of paragraph 38(*a*.2) of the ITA. To use the phrase adopted by the Supreme Court of Canada in *Friesen*, the Respondent is saying that the gift was the culmination of a "scheme for profit-making" carried out by Mr. Staltari.

[97] In *Canada v. Zelinski et al.* (1999), 251 N.R. 252 [*Whent*], the Federal Court of Appeal addressed a circumstance where the taxpayers acquired art for a bargain

[34] A property that is held in the inventory of a business can of course be the subject of a gift, but that is not the situation here. The issue is whether the acquisition, ownership and disposition of the Land can be viewed as an adventure or concern in the nature of trade with the result that the adventure or concern itself constitutes a business under the definition of "business" in subsection 248(1) of the ITA.

purchase price and subsequently donated it to art galleries in order to obtain favourable income tax consequences:

> [34] In the circumstances of this appeal, the taxpayers' primary intention was not thwarted: they purchased their paintings either with no specific intention, or with the intention to donate them. Since they carried out that primary intention, any secondary intention they might have had is immaterial to whether they were engaged in an adventure in the nature of trade.
>
> [35] Finally, a secondary intention to resell at a profit only acquires importance where a taxpayer follows through on that intention. Again, the authors of **Principles of Canadian Income Tax Law** explain that a "transaction will be held to be on account of income rather than capital [...] if the secondary intention is carried out". Paragraph 5 of IT-218R also states that "if this secondary intention is carried out any gain realized on the sale usually will be taxed as business income". Since the taxpayers did not carry out any purported secondary intention they might have had, those intentions cannot transform their de facto decision to not follow through on that secondary intention so as to make it appear as if they did do so.

[98] As in *Whent*, Mr. Staltari had no ascertainable primary intention to profit when he purchased the Land and any secondary intention to profit that he may have had became irrelevant once he chose to donate the Land to the City of Ottawa. His decision to donate the Land cancelled any "nature of trade" that his acquisition and ownership of the Land may have had because of a secondary intention. In short, where only a secondary intention is in issue, the character of the adventure or concern as a capital transaction and not as being "in the nature of trade" is dictated by the absence of any profit motive associated with a bona fide gift.[35]

[99] The courts have recognized that it is possible to make a "'profitable' gift"[36] because of the favourable income tax consequences of certain gifts, particularly where the donated property is acquired for a bargain price.[37] However, favourable income tax consequences do not, in and of themselves, vitiate the existence of a gift, nor do they give rise to a profit for the purposes of the ITA. In my view, it is wrong to suggest that a gift of the Land is akin to an unsolicited offer to purchase

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[35] In *Friesen*, it was accepted that the taxpayer had a primary intention to profit from the purchase and sale of the land in issue, and that led to the conclusion that the adventure was a business even though no sale had taken place.

[36] *Friedberg v. Minister of National Revenue* (1991), 135 N.R. 61 at paragraph 9.

[37] This observation was made in the context of art certified by the Canadian Cultural Property Export Review Board that was purchased for a bargain price and donated at its fair market value.

the Land or that the "profit" from the gift (in the sense of the favourable income tax consequences) imbues the transaction with the quality of trade.

[100] In *Marcoux-Côté v. Canada*, [2000] F.C.J. No. 1805 (QL), 266 N.R. 36, 2000 DTC 6615, the Federal Court of Appeal considered the impact of the taxpayer's motivation in making a gift and observed at paragraph 8:

> 8 . . . Relying on the decision of this Court in *Friedberg v. Minister of National Revenue*, (1991), 135 N.R. 161; 92 D.T.C. 6031 (F.C.A.), [the trial judge] held that even though obtaining a tax advantage was the principal motivation of the respondents in this case, that did not nullify the donors' intent to give. He also was of the view that obtaining a receipt from the charitable organization could not be viewed as consideration that would eliminate the gratuitous and liberal nature of the transaction.
>
> 10 In my view, the judge directed himself properly as to the legal principles that apply to this case. . . .

[101] It is therefore clear that the nature of the gift as a transfer of property for no consideration is not changed simply because there are favourable income tax consequences to the donor. This is so even though the donor is deemed to have received fair market value proceeds of disposition because of a gift *inter vivos*.

[102] As for the so-called profit, the Federal Court of Appeal held in *Moloney v. Canada*, [1992] F.C.J. No. 905 (QL) and *Canada v. Loewen*, [1994] 3 F.C. 83 that an advantage that flows exclusively from the provisions of the ITA is not a profit and that a business cannot consist of a transaction whose sole purpose is to reduce the tax that would otherwise be payable. Stated another way, income tax is calculated and paid after the income-earning process is complete and therefore a reduction of income tax because of a non-refundable income tax credit is not "profit" for the purposes of the ITA: *Roenisch v. M.N.R.*, [1931] Ex. C.R. 1, *First Pioneer Petroleums Ltd. v. M.N.R.* (1974), 43 D.L.R. (3d) 722, [1974] F.C.J. No. 2 (QL) and *Teck Corp. v. British Columbia*, 2004 BCCA 514.[38] Accordingly, a profit motive cannot be attributed to Mr. Staltari simply because the gift of the Land yielded favourable income tax consequences.

[38] Interest on an income tax refund has been held to be income from a business: *The Queen v. 3850625 Canada Inc.*, 2011 FCA 117, *Munich Reinsurance Co. (Canada Branch) v. The Queen*, 2001 FCA 365 and *The Queen v. Irving Oil Ltd.*, 2001 FCA 364. However, that finding does not detract from the principle that the tax refund itself is not profit for the purposes of the ITA.

[103] Here, Mr. Staltari did not dispose of the Land for a commercial profit.[39] The fact that, for the purposes of the ITA, Mr. Staltari was deemed to have received proceeds of disposition equal to the fair market value of the Land does not alter the fact that, consistent with a true gift, he received no consideration for the Land. Accordingly, he did not consummate a scheme for profit making as he did not carry-out any secondary intention he may have had to earn a profit from the sale of the Land.

[104] For the foregoing reasons, the appeal is allowed with costs to the Appellant and the reassessment of the Appellant's 2009 taxation year is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the gift of the Land to the City of Ottawa yielded a capital gain to the Appellant and that the taxable half of that capital gain is deemed to be equal to zero by paragraph 38(*a*.2) of the ITA.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated May 13, 2015.

Signed at Ottawa, Canada, this **5th** day of **June** 2015.

"J.R. Owen"

Owen J.

[39] As to what is profit in the context of a single item of property, the majority in *Friesen* stated:

> 21 Reduced to its simplest terms, the income or profit from the sale of a single item of inventory by a sales business is the ordinary tracing formula calculated by subtracting the purchase cost of the item from the proceeds of sale. . . .

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