Docket: 2010-1013(IT)G

BETWEEN:

ROBERT PELUSO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Joanne Peluso (2010-1016(IT)G);
9136-9702 Québec Inc. (2010-1017(IT)G);
Gestion Jonquière 412 Inc. (2010-1042(IT)G);
Rosanne Beraznik (2010-1044(IT)G);
Rosemary Peluso (2010-1046(IT)G; and
Hyman Beraznik (2010-1047(IT)G)
on April 11 and 12, 2012, at Montreal, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant:	Marc-Antoine Deschamps
Counsel for the respondent:	Pascal Tétrault

JUDGMENT

In accordance with the attached reasons for judgment the appeals from assessments with respect to the 2005 and 2006 taxation years are dismissed, with costs.

Signed at Montreal, Quebec, this 11th day of May 2012.

« Gaston Jorré »

Jorré J.

Docket: 2010-1016(IT)G

BETWEEN:

JOANNE PELUSO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Robert Peluso (2010-1013(IT)G);
9136-9702 Québec Inc. (2010-1017(IT)G);
Gestion Jonquière 412 Inc. (2010-1042(IT)G);
Rosanne Beraznik (2010-1044(IT)G);
Rosemary Peluso (2010-1046(IT)G; and
Hyman Beraznik (2010-1047(IT)G)
on April 11 and 12, 2012, at Montreal, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant:	Marc-Antoine Deschamps
Counsel for the respondent:	Pascal Tétrault

JUDGMENT

In accordance with the attached reasons for judgment the appeals from assessments with respect to the 2005 and 2006 taxation years are dismissed, with costs.

Signed at Montreal, Quebec, this 11th day of May 2012.

« Gaston Jorré »

Jorré J.

Docket: 2010-1017(IT)G

BETWEEN:

9136-9702 QUÉBEC INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Robert Peluso (2010-1013(IT)G);
Joanne Peluso (2010-1016(IT)G);
Gestion Jonquière 412 Inc. (2010-1042(IT)G);
Rosanne Beraznik (2010-1044(IT)G);
Rosemary Peluso (2010-1046(IT)G; and
Hyman Beraznik (2010-1047(IT)G)
on April 11 and 12, 2012, at Montreal, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant:	Marc-Antoine Deschamps
Counsel for the respondent:	Pascal Tétrault

JUDGMENT

In accordance with the attached reasons for judgment the appeals from assessments with respect to the 2005 and 2006 taxation years are dismissed, with costs.

Signed at Montreal, Quebec, this 11th day of May 2012.

« Gaston Jorré »

Jorré J.

Docket: 2010-1042(IT)G

BETWEEN:

GESTION JONQUIÈRE 412 INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Robert Peluso (2010-1013(IT)G;
Joanne Peluso (2010-1016(IT)G);
9136-9702 Québec Inc. (2010-1017(IT)G);
Rosanne Beraznik (2010-1044(IT)G);
Rosemary Peluso (2010-1046(IT)G; and
Hyman Beraznik (2010-1047(IT)G)
on April 11 and 12, 2012, at Montreal, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant:	Marc-Antoine Deschamps
Counsel for the respondent:	Pascal Tétrault

JUDGMENT

In accordance with the attached reasons for judgment the appeals from assessments with respect to the 2006 and 2007 taxation years are dismissed, with costs.

Signed at Montreal, Quebec, this 11th day of May 2012.

« Gaston Jorré »

Jorré J.

Docket: 2010-1044(IT)G

BETWEEN:

ROSANNE BERAZNIK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Robert Peluso (2010-1013(IT)G);
Joanne Peluso (2010-1016(IT)G);
9136-9702 Québec Inc. (2010-1017(IT)G);
Gestion Jonquière 412 Inc. (2010-1042(IT)G);
Rosemary Peluso (2010-1046(IT)G; and
Hyman Beraznik (2010-1047(IT)G)
on April 11 and 12, 2012, at Montreal, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant:	Marc-Antoine Deschamps
Counsel for the respondent:	Pascal Tétrault

JUDGMENT

In accordance with the attached reasons for judgment the appeals from assessments with respect to the 2005 and 2006 taxation years are dismissed, with costs.

Signed at Montreal, Quebec, this 11th day of May 2012.

« Gaston Jorré »

Jorré J.

Docket: 2010-1046(IT)G

BETWEEN:

ROSEMARY PELUSO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Robert Peluso (2010-1013(IT)G;
Joanne Peluso (2010-1016(IT)G);
9136-9702 Québec Inc. (2010-1017(IT)G);
Gestion Jonquière 412 Inc. (2010-1042(IT)G);
Rosanne Beraznik (2010-1044(IT)G); and
Hyman Beraznik (2010-1047(IT)G)
on April 11 and 12, 2012, at Montreal, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant:	Marc-Antoine Deschamps
Counsel for the respondent:	Pascal Tétrault

JUDGMENT

In accordance with the attached reasons for judgment the appeals from assessments with respect to the 2005 and 2006 taxation years are dismissed, with costs.

Signed at Montreal, Quebec, this 11th day of May 2012.

« Gaston Jorré »

Jorré J.

Docket: 2010-1047(IT)G

BETWEEN:

HYMAN BERAZNIK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Robert Peluso (2010-1013(IT)G);
Joanne Peluso (2010-1016(IT)G);
9136-9702 Québec Inc. (2010-1017(IT)G);
Gestion Jonquière 412 Inc. (2010-1042(IT)G);
Rosanne Beraznik (2010-1044(IT)G); and
Rosemary Peluso (2010-1046(IT)G)
on April 11 and 12, 2012, at Montreal, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant:	Marc-Antoine Deschamps
Counsel for the respondent:	Pascal Tétrault

JUDGMENT

In accordance with the attached reasons for judgment the appeals from assessments with respect to the 2005 and 2006 taxation years are dismissed, with costs.

Signed at Montreal, Quebec, this 11th day of May 2012.

« Gaston Jorré »

Jorré J.

Citation: 2012TCC153
Date: 201205__
Docket: 2010-1013(IT)G

BETWEEN:

ROBERT PELUSO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2010-1016(IT)G

AND BETWEEN:

JOANNE PELUSO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2010-1017(IT)G

AND BETWEEN:

9136-9702 QUÉBEC INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2010-1042(IT)G

AND BETWEEN:

GESTION JONQUIÈRE 412 INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2010-1044(IT)G

AND BETWEEN:

ROSANNE BERAZNIK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2010-1046(IT)G

AND BETWEEN:

ROSEMARY PELUSO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2010-1047(IT)G

AND BETWEEN:

HYMAN BERAZNIK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Jorré J.

Introduction

[1] The issue in these appeals is whether certain parcels of land held by two limited partnerships were converted from inventory to capital property thereby giving

rise to capital gains rather than income on their disposition in the 2005 or 2006 taxation years.[1]

What is a Change of Use that converts Inventory to Property whose disposition results in a Capital Gain?

[2] It is useful to begin by recalling what kinds of property can give rise to a capital gain. Broadly speaking, there are three kinds of property whose disposition will give rise to a capital gain[2]:

1. An investment. An example would be a shopping centre held as a long-term investment for its income.
2. A capital asset of a business. An example would be the factory and the land under the factory of an automobile manufacturer.
3. In the case of an individual, a property held for the individual's personal use such as a cottage.

[3] As a result, the land dispositions in issue will give rise to a capital gain if it is shown that there has been a clear conversion of the property in issue from inventory to a use of the property that will give rise to a capital gain.

[4] Such a change requires “a clear and unequivocal positive act implementing” the change.[3]

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[1] Except in the case Gestion Jonquière 412 Inc. where the taxation years are 2006 and 2007.

[2] See *Principles of Canadian Income Tax Law* (Seventh Edition), Peter W. Hogg, Joanne E. Magee and Jinyan Li, at 11.1 (b) as reproduced in Tax Partner Main (2012 -- Release 3).

[3] See paragraph 10 of the decision of the Federal Court of Appeal in *Edmund Peachey Ltd. v. The Queen*, [1979] C.T.C. 51:

> … The passage relied on from the judgment of President Jackett (as he then was) reads as follows:
>
> > In my view, where one finds such a business, as long as there continues to be land of the original inventory of the business in the ownership of the company, it is reasonable to assume that the business has not been brought to an end in the absence of some evidence that something has been done to bring the business to an end, as, for example, where the corporation takes the land out of the business and dedicates it to the creation of some structure to be used as the capital asset of another business.

The Facts

[5] The first limited partnership in question is the Meander Limited Partnership. The Meander land sales in issue affect all the appellants.

[6] There second limited partnership in question is the JR Investments Limited Partnership. The JR land sales in issue only affect Joanne Peluso and Rosanne Beraznik.

[7] The appellants called as witnesses Mr. Steven Taylor, a builder who had dealings with Meander, and Mr. Hyman Beraznik; the respondent called Mr. Jean-Guy Boilard, who was the person responsible for day-to-day management of the development of the Meander land.

[8] With one exception, it turns out that there is no real controversy in the evidence. The one exception, which relates to the timing of a decision, does not affect the outcome. As a result, I will simply state the facts without reviewing the evidence.

[9] There is no dispute that the lands in question were all initially acquired as inventory.

[10] The Cliffton Group Inc. managed both limited partnerships.

[11] The Cliffton Group has been in operation for some 30 years; its focus is the acquisition and management of income producing commercial real estate as a long-term investment. Ownership of the real estate is carried out through other legal

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> It is, in my view, a proper statement of the law and the learned trial judge was right to rely on it. I agree with the learned trial judge that a clear and unequivocal positive act implementing a change of intention would be necessary to change the character of the land in question from a trading asset to a capital asset — and that on the facts here present, there was no evidence of such a positive or overt act. There was no documentary evidence to indicate that the new intention had been carried into reality, there was no dedicating of the land for another purpose. All that we have here is the expressed intention of the appellant to thenceforth hold the land as a capital asset. That is not, in my view, sufficient of itself to convert the proceeds of sale from trading proceeds to proceeds from the sale of a capital asset.

This approach was followed by Justice Rothstein, as he then was, in the *Estate of the Late George Duthie v. The Queen*, [1995] 2 C.T.C. 157 at paragraph 21 and more recently by Justice Sheridan in *Bodine v. The Queen*, 2010 TCC 426 at paragraphs 47 and 48.

entities with Cliffton managing the properties; the other entities pay management fees to Cliffton. Its head office is in Montreal.

[12] The real estate consists primarily of shopping centres although over time it has also included industrial and office properties.

[13] Mr. Hyman Beraznik and Mrs. Joanne Peluso jointly manage the Cliffton Group. Mr. Beraznik has the prime responsibility for the financing and acquisition of properties. Both have decades of experience in the business.

[14] During its existence the Cliffton Group has been involved with the acquisition of and development of land for sale in only three instances.

[15] The first was in the city of Laval, Quebec. The second was the land held by JR Investments Limited Partnership in the Charlesbourg borough of Quebec City. The third was the land held by the Meander Limited Partnership in the Les Rivières borough of Quebec City.

[16] The first two projects were related to the shopping centre leasing activities of the Cliffton Group. In both of those cases the land was adjoining or near a shopping centre owned by the Cliffton Group; Cliffton sought to develop the land so that residential neighbourhoods would develop near their shopping centres thereby increasing the amount of business at the shopping centres and their profitability.

The Meander Limited Partnership Property[4]

[17] In the case of Meander there was no link to the shopping centres. As the JR project was coming to an end Mr. Jean-Guy Boilard, who had been managing the JR project, brought the Meander project to the Cliffton Group.

[18] The Cliffton Group eventually decided to buy the land on behalf of an entity to be formed. The ownership was transferred to the Meander Limited Partnership.

[19] The intention was to develop the purchased land by putting in services and selling off lots to builders. This was to be done in several phases.

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[4] Nothing turns on i) the exact ownership shares of the different appellants in the Meander LP, ii) the interposition of the Hyman Beraznik Trust in the case of Mr. Beraznik or on the existence of the company Développement Les Méandres Inc. which acted as a prête-nom (see Tab 37 of Exhibit A-2, page 4 at Clause 4.1(a)). They may safely be ignored.

[20] It is very clear from the testimony of all three witnesses that there were great difficulties in carrying out the development of phase 1 and in delivering serviced lots on the dates contracted for to the builders.

[21] A major factor in this was the decision by the city that all the wiring in the development should be underground. This was a new requirement.

[22] When Hydro Quebec was approached they advised that they had not done underground wiring for several years and they could not do the wiring within the required timeframe.

[23] As a result the development costs were much higher than planned and there was a very difficult and stressful situation: for example, at times it was necessary to rent generators, temporary above ground electric wiring had to be installed at great expense, some home purchasers had to move in without power while others had to move in without a telephone line and there were also purchasers who had to stay in hotels for a period.

[24] The net result was that profits were only about a quarter of what was expected and that is without taking account of the costs that may arise out of litigation regarding phase 1 that is still pending.

[25] The evidence is quite clear that because of these difficulties the Meander Limited Partnership decided not to proceed with any of the phases after phase 1.

[26] This decision was made, at the earliest, in August of 2004 and, at the latest, in December 2004.[5]

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[5] The timing of this decision is the one area where there is some dispute. Mr. Beraznik testified that in August of 2004 he told Mr. Boilard that he, Mr. Boilard, would have to convince Meander that they should proceed with additional phases; Mr. Beraznik did not want to live through the experience he had just had a second time. In September, Meander had financial results and they were very disappointing. Mr. Boilard kept talking to city hall about further phases and providing new projections about costs; Mr. Boilard was also continuing to incur small-scale expenses on behalf of Meander. There were continuing discussions between Mr. Beraznik and Mr. Boilard; as Mr. Beraznik described it, during these discussions, Mr. Boilard would not accept that there would not be further phases. Finally at the very beginning of December, just before going on holiday, Mr. Beraznik categorically told Mr. Boilard that it was over; they were going to shut down the development of the land other than Phase 1. According to note 1 of Meander's financial statements for the year ending 31 December 2006 (See Exhibit A-2, Tab 62, P.3): "In 2005 the partnership abandoned the land development business, except to finish off the project already started, and is

[27] What was this decision? It was a decision not to carry out any of the phases after the completion of phase 1. In direct examination Mr. Beraznik was quite clear that as of the beginning of December, just before he went on holiday, he had made no decision as to what the Meander Limited Partnership should do next.

[28] In re-examination he indicated that at that point he had not spoken to his partner, Mrs. Joanne Peluso, but if they had spoken they would have probably agreed that they would like to sell the land. He also stated that they might well have been open to other possibilities such as a joint venture with someone else to develop rental properties or a joint venture with someone else where they would put up the land and the other party would take care of all the work including having services put in.

[29] When at the beginning of December he informed Mr. Boilard that it was over, Mr. Boilard asked: what would he do? Would he sell? They also discussed what the land might be worth. Mr. Beraznik said that they could discuss this further after he came back from his vacation.

[30] Shortly after Mr. Beraznik left on his vacation he received three messages from his office about callers. He said the he would call them back once he reached San Francisco.

[31] He called all three from San Francisco. All three calls were about possible purchases of the Meander land planned for phase 2. Possible prices were raised in the calls. He told all of them he would think about it if they made an offer.

[32] Mr. Beraznik then called Mrs. Peluso and they agreed that they would decide what to do once offers came in.

[33] Two offers came in before he returned from San Francisco and Mrs. Peluso started examining them. Eventually, they decided to accept an offer from a numbered company which, they later learned, was owned by Mr. Stéphan Huot.

[34] That offer was accepted by Meander on 17 December 2004[6].

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selling off the remainder of the land in bulk." Given the view I have reached on this matter, I do not need to decide exactly when this decision was made but, if I had to decide, given that there was some small-scale continuing activity in regard to continuing development of the phases subsequent to phase 1, I would have concluded that the development of those other phases ceased in December 2004.

[6] See last page of Tab 42 of Exhibit A-2.

[35] Soon after that the construction companies who made the other offer sued Meander. That lawsuit had the effect of delaying the closing of the sale of phase 2. Both the Québec Superior Court and, at the end of May 2008, the Québec Court of Appeal held in favor of Meander.

[36] During a discussion that Mr. Beraznik had with Mr. Huot when they were at the courthouse because of the lawsuit, Mr. Huot said to Mr. Beraznik that he wanted to buy all of the Meander lands.

[37] It was agreed that Mr. Huot would buy the land in phases and that because he was to pay cash those phases would be staged over a number of years.

[38] Accordingly, Meander accepted an offer to purchase for what would have been phase 3 on 4 May 2005; the act of sale for phase 4 is dated 15 August 2006.[7]

[39] Meander never listed the land for sale with a broker.

[40] The Meander financial statements for 2004 simply show the land sales as being income whereas the financial statements for 2005 and 2006 distinguish between "land sales – development" that correspond with sales of Phase 1 lots and "gain on sale" for the sale of land that was originally destined for phases other than phase 1. Note one of the financial statements for 2006 contain the statement "In 2005 the partnership abandoned the land development business, except to finish off the project already started, and is selling off the remainder of the land in bulk."[8]

[41] According to Mr. Beraznik the accountant made this distinction between the phase 1 land and the other land on the financial statements for 2005 and 2006 as a result of attending a course where the accountant learned about changes of use.

Analysis -- Meander

[42] Part of the Appellant's argument was devoted to arguing that vacant land could change from inventory to a use which would give rise to a capital gain on

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[7] See Tabs 45, 46, 48 and 49 of Exhibit A-2.

[8] See Exhibit A-2, Tab 60 at pages 2 and 3, Tab 61 at page 2 and Tab 62 at pages 2 and 3. We do not know when these statements were prepared but normally financial statements are prepared somewhat after the end of the year in question.

disposition. The Respondent did not argue the contrary and I accept that it is possible to convert vacant land from inventory to a use which will give rise to a capital gain.[9]

[43] These facts do not show that there was a change of use of the property from inventory to a use which would give rise to a capital gain on the disposition of the land in issue, the land other than the Phase 1 land.

[44] There is nothing in the evidence that shows that there was a conversion of the land to an investment. There is nothing in the evidence to show a conversion of the land to a capital asset to be used by the business.

[45] There was a clear decision to stop further development; there was no action or decision to do anything else before the sales. One could perhaps qualify this as a "change of plan" but that is not a change of use to the kind of use which would result in a capital gain on disposition of the land.

[46] There was simply a sale in bulk of each phase.

[47] These facts fall squarely within the principles illustrated by the decision of the Federal Court of Appeal in *Edmund Peachey Ltd. v. The Queen*[10].

[48] In *Peachey,* farm land, known as the Codlin Farm, was acquired for development into serviced residential lots in 1956. In 1960 an application was made to rezone the farmland for residential development and in 1961 the land was zoned industrial preventing residential development. As a result *Peachey* abandoned its plan to develop the Codlin Farm and, more generally, decided to wind down its other house building activities.

[49] Nothing else was done with the Codlin Farm and, in 1971, the Farm was sold as a result of an unsolicited offer, the first offer received for the farm land.

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[9] Given my conclusion for other reasons, it is unnecessary for me to analyse this question further. I would note however, that the majority decision (Justices Major, L'Heureux-Dubé, and Sopinka) in *Friesen v. Canada,* [1995] 3 S.C.R. 103 at paragraphs 20 to 24, seems to suggest that that inventory can not be converted – a view the minority (Justices Iacobucci and Gonthier) disagree with, see paragraph 136.

[10] [1979] C.T.C. 51.

[50] The Federal Court of Appeal held that the disposition was on income account because nothing was done to change the use to a use which would result in a later disposition of the property giving rise to a capital gain. At paragraph 10 the Court stated, in part:

> … [The Court referred to the following passage of the decision of President Jackett (as he then was) in *Les Entreprises Chelsea Limitée v. MNR*, [1970] C.T.C. 598, 70 D.T.C. 6379:]
>
> > In my view, where one finds such a business, as long as there continues to be land of the original inventory of the business in the ownership of the company, it is reasonable to assume that *the business has not been brought to an end in the absence of some evidence that something has been done to bring the business to an end, as, for example, where the corporation takes the land out of the business and dedicates it to the creation of some structure to be used as the capital asset of another business.*
>
> It is, in my view, a proper statement of the law and the learned trial judge was right to rely on it. I agree with the learned trial judge that a clear and unequivocal positive act implementing a change of intention would be necessary to change the character of the land in question from a trading asset to a capital asset — and that on the facts here present, there was no evidence of such a positive or overt act. There was no documentary evidence to indicate that the new intention had been carried into reality, there was no dedicating of the land for another purpose. All that we have here is the expressed intention of the appellant to thenceforth hold the land as a capital asset. That is not, in my view, sufficient of itself to convert the proceeds of sale from trading proceeds to proceeds from the sale of a capital asset.
>
> (Emphasis added to the quote from *Les Entreprises Chelsea Limitée*).

[51] In the absence of a conversion to some other use of the property such that its disposition would give rise to a capital gain it is clear from the principles in *Peachey* the disposition of the land in issue remains a disposition on income account; a mere bulk sale of inventory, which is what we have here, does not convert the gain on disposition from an income gain to a capital gain.[11]

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[11] This is illustrated in *Sunrise Park Development Limited v. MNR*, [1981] C.T.C. 2863 as well as in *The Queen v. Randall Park Development*, [1978] C.T.C. 826, 78 DTC 6545 (FC-TD). In *Randall Park* 400 acres of land were acquired for development in 1966. In 1969 the amalgamation of the area with the land into the city of Halifax resulted in zoning making it impossible to go ahead with the development and the land was sold en block in 1973. The Federal Court stated at paragraphs 5 and 6:

> 5. On the facts, which I have sketched very briefly, I am of the opinion that the Spryfield property was, in the defendant's hands, at all material times an asset of an inventory or trading nature and that the proceeds realized on its disposition were also of a trading

[52] Had the Meander partnership entered into a joint venture with another company or partnership to develop rental properties on the land and then, at some later time, because of intervening events, disposed of, say, a portion of the land that had gone into that joint venture, depending on the circumstances, it might well be that that disposition would be on capital account. That is a very different situation from the situation here.[12]

[53] The Appellant put a certain amount of emphasis on the treatment of the property in issue in the financial statements and on the fact that the sales resulted from unsolicited offers.

> nature. The property was not acquired for the purpose of establishing a manufacturing plant or to realize rental income from it. It was not a mere investment of idle funds. Its acquisition was an incident of the defendant's trading activity. It was at no time of a capital as opposed to a trading nature. And, while the transaction in which it was disposed of was not characteristic of the defendant's business in that it was not a disposition by sale in building lots but more comparable to a sale of inventory in bulk, there is nothing in the case which would serve to characterize the transaction as other than a disposition or realization in the course of business of a trading asset which was no longer to be used for the purpose for which it was acquired. …
> 6. It was submitted that, because of the frustration of the defendant's plans, the property had somehow lost its character as a trading or income asset and taken on the character of a capital investment. Without planning board approval for the defendant's projects, the asset itself was perhaps of a different nature from what the defendant had expected or hoped for but there is, in my view, no basis for holding that its character as a trading or income asset ever changed.

I note that in *Jodare Ltd. v. The Queen*, [1986] 1 C.T.C. 250, the property in question, parcel c, was acquire by a partnership belonging to the Appellants', Rice Holdings Company, in 1966. There was evidence that between 1966 and 1973 there was quite a bit of work toward developing a townhouse development and apartment buildings. In 1973 a decision was made to suspend development because **prevailing market rents** would be insufficient to sustain the cash flow needed – see paragraphs 13 and 14. In 1974 the property was sold. Clearly if rents were insufficient the project was a rental project, an investment, and not a project to sell lots. (I note that the land was originally acquired for a different purpose by Rice Construction, a different but related company, with the intention of building and reselling an industrial building. The decision in the *Jodare* turned on the character of the land in the hands of Rice Holdings, however.)

[12] The decision of *Watkins v. MNR*, [1985] 2 C.T.C. 2023, illustrates such a circumstance. In *Watkins* this Court found that houses built for sale were in fact converted to an investment; they were held for rent and rented out for 4 to 6 years. Then as a result of certain circumstances the decision was made to sell the houses -- see *inter alia*, paragraphs 10, 44 and 48.

[54] Whether disposition of a property will give rise to an income gain or a capital gain depends on the reason for its acquisition or, where the issues is a change of use, the existence of a change of use. In evaluating the reason for acquisition or the existence of a change of use the courts look not only to stated intention but also to all the surrounding circumstances, *inter alia*, to see if there is objective evidence that will confirm the stated intention.[13]

[55] It is in this context that factors such as unsolicited offers or the way in which the financial statements treat a property may be considered for the purpose of evaluating the character of the property. Neither the fact that an offer is unsolicited nor the fact that there was a particular treatment in the financial statements can *in themselves* convert property that is inventory to property that will give rise to a capital gain on disposition.[14]

[56] Accordingly, the Meander gain was on income account.[15]

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[13] Here, there is not even a stated intention to convert into the kind of use such that upon disposition of the property there would be a capital gain.

[14] Here the financial statements reflect the understanding of the taxpayer after the accountant took a course. Nothing in *Jacobson Holdings Ltd. v. The Queen*, [1986] 1 C.T.C. 87 suggests that financial statements are more than a factor to be considered.

The appellant suggested that the "Unsolicited nature of offers can create a conversion of inventory to capital in real estate matters for taxpayers involved in the real estate development" – see Appellant's written summary of law and cases; in support of this the appellant cites *Woodbine Developments Ltd. v. The Queen*, [1984] C.T.C. 616. I can find nothing in *Woodbine* that goes as far as the appellant suggests. In *Woodbine* there was no question of change of use; the question was what was the character of the 7 properties which were acquired between 1973 and 1976 and sold between 1976 and 1979 – five of which were sold in 1979. As I understand the facts, except for one of the properties in issue, *Woodbine* either bought properties with buildings or had a building constructed; they were acquired with the intention of obtaining investment income in the form of rents and except for the one property that was vacant land the properties were indeed rented. The court accepted that the properties had been acquired to generate investment income; the fact that the offers were unsolicited was evidence consistent with all the other evidence of the properties being acquired for investment.

[15] Given my conclusion it is unnecessary for me to deal with the question whether, if there were a change of use to an investment (for example, by building and renting homes) subsection 23(1) of the *Income Tax Act* would have any application.
I would note the following on a separate point, however. Subsection 23(1) reads as follows:

> Where, on or after disposing of or ceasing to carry on a business or a part of a business, a taxpayer has sold all or any part of the property that was included in the inventory of the

JR Investments Limited Partnership

[57] The issue in the case of the JR Partnership is the sale of four parcels of land in Charlesbourg, specifically:

- a sale in 2005 to Fondation de la Faune for an amount of $180,000,
- a sale in 2006 to Centre Jardin Hamel for $58,500,
- a sale in 2006 to Développement de la Capitale for $401,315 and
- a second sale in 2006 to Développement de la Capitale for $360,000.

[58] The Cliffton group had been developing the Charlesbourg land for many years. As previously explained it had originated in an effort to increase the number of residents near one of the shopping centres of the group, thereby helping to increase business at the shopping centre.[16] Most of the Charlesbourg land sold by the partnership consisted of serviced lots and was reported on income account.

[59] The four lots I have referred to above were reported as capital gains.

[60] The partnership wanted to develop the first parcel of land in question but was unable to and was sold to Fondation de la Faune. It was not serviced land.

[61] With respect to the land sold to Centre Jardin Hamel, at some point it was discovered that a small triangular parcel of land owned by the partnership had been used by the garden centre for its business for many years. After some negotiations, the partnership sold the land to the garden centre for its municipal valuation. It was also unserviced land.

[62] Finally, the two sales to Développement de la Capitale were also sales of unserviced land.

Analysis JR Land

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business, the property so sold shall, for the purposes of this Part, be deemed to have been sold by the taxpayer in the course of carrying on the business.

Even if the case law did not lead to the conclusion I have reached, I find it hard to imagine how the mere sale of the land en block, as happened here, could fall outside the clear words of subsection 23(1), thereby being a disposition on income account.

[16] The JR Partnership was not the original owner of the land; it became owner after certain financial difficulties. Nothing turns on this.

[63] The applicable principles are the same as I have previously described in dealing with the Meander property.[17]

[64] The four sales in question may not have been the usual sale of serviced lots but there is nothing in the evidence to suggest that at any point these lots were to be held as an investment or otherwise converted from inventory to a kind of use that would result in these properties producing a capital gain on their disposition.

[65] The mere fact that the parcels of land in question were sold unserviced does not in itself convert these sales into sales producing capital gains.

[17] I again note paragraph 5 of *The Queen v. Randall Park Development*, [1978] C.T.C. 826, 78 DTC 6545 (FC-TD), quoted in footnote 11 above.

Conclusion[18]

[66] For these reasons the appeals will be dismissed with costs.

Signed at Montreal, Quebec, this 11th day of May 2012.

« Gaston Jorré »

Jorré J.

[18] Given the conclusion I have reached it is unnecessary for me to deal with certain other subsidiary legal issues which would only arise if their were a change of use.

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