1959
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CAINE LUMBER COMPANY LIMITED ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Capital cost allowance—Timber limit purchased by taxpayer in non-arm's-length transaction—Timber limit not operated by vendor—Whether "depreciable property"—The Income Tax Act, 1958 (Can.), c. 52, ss. 11, 17, 20.

In the course of his operations of a saw-mill and planing-mill, C purchased for $250 a timber limit on which he did no cutting and made no claim for capital cost allowance. In 1951 he sold the limit for $15,000 to the appellant company, a person, within the meaning of the Act, with whom he was not dealing at arm's-length. In 1952 the appellant cut timber on the limit and claimed a capital cost allowance which was calculated on the price of $15,000 paid to C. The minister reduced the allowance to an amount based on the cost

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

of the limit to C plus the expenditures made by him upon the limit. The appellant contended that since no timber had been cut by the vendor the limit did not become "depreciable property" as defined by s. 20(3)(*a*) of the *Income Tax Act* until operations were commenced on it in 1952. The Income Tax Appeal Board ruled in favour of the appellant, but this judgment was reversed by the Exchequer Court.

Held: The appeal of the taxpayer should be dismissed. The minister had properly used the cost of the limit to the vendor as the basis for determining the capital cost allowance to which the appellant was entitled.

Per curiam: The expression "depreciable property of a taxpayer" is defined in s. 20(3)(*a*), but the words "depreciable property", standing alone, are not defined anywhere in the Act. Consequently, the words "depreciable property" in s. 20(2)(*a*) must be construed without the assistance of a statutory definition, and they clearly refer to property such as a timber limit, the value of which depreciates as the timber is cut.

Per Cartwright and Martland JJ.: The result would be the same even if the definition of "depreciable property of a taxpayer" in s. 20(3)(*a*) were applied to construe the words "depreciable property" in s. 20(2)(*a*), as the latter section applied if the property constituted depreciable property vested in the taxpayer who claimed the allowance, irrespective of whether or not the property was "depreciable property" for the vendor from whom the taxpayer acquired it by a transaction not at arm's-length.

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

J. L. Lawrence, for the appellant.

W. R. Jackett, Q.C., F. J. Cross, and *G. W. Ainslie,* for the respondent.

The judgment of Locke, Fauteux and Abbott JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of Dumoulin J. delivered in the Exchequer Court[1] by which a judgment of the Income Tax Appeal Board, allowing the appeal of present appellant from a ruling of the Minister, was set aside and the assessment restored.

The appellant is a lumber manufacturer and during the taxation year 1952 carried on its business at Prince George, B.C.

[1] [1958] Ex. C.R. 216, [1958] C.T.C. 132, 58 D.T.C. 1086.

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Martin S. Caine, prior to the year 1949, operated a saw mill and planing mill at Prince George and in the course of his operations purchased a timber limit for $250. The appellant was incorporated for the purpose of taking over his business and in the year 1951 Caine sold the limit to the company for the sum of $15,000. In the interval between the date of the purchase of the limit by Caine and the sale to the company, the former had expended on the property a sum of $2,678.60. Caine had never claimed or been allowed any capital cost allowance in connection with the property. The parties agreed for the purpose of the trial that the company was a person with whom Caine was not dealing at arms-length with the meaning of s. 17 of the *Income Tax Act,* 1948 (Can.), c. 52.

During the year in question the appellant cut timber on the limit and, under the provisions of the Act and the regulations made under it, was entitled to claim a capital cost allowance. This was claimed, calculated on the price paid by it to Caine. The Minister allowed the claim based on a purchase price of $2,928.60, being the aggregate of the amount paid by Caine for the limit and the amount expended on it by him while it was his property.

Section 11(1) provides that there may be deducted in computing the income of a taxpayer in a taxation year:

(*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;

(*b*) such amount as an allowance in respect of an oil or gas well, mine or timber limit, if any, as is allowed to the taxpayer by regulation.

The regulations, in so far as they affect the present question, read as follows:

1100. (1) Under paragraph (*a*) of subsection (1) of section 11 of the Act, there is hereby allowed to a taxpayer, in computing his income from a business or property, as the case may be, deductions for each taxation year equal to

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(*e*) such amount as he may claim not exceeding the amount calculated in accordance with Schedule C to these Regulations in respect of the capital cost to him of a timber limit or a right to cut timber from a limit.

Schedule C reads in part as follows:

1. For the purpose of paragraph (*e*) of subsection (1) of section 1100 of these Regulations, the amount that may be deducted in computing the income of a taxpayer for a taxation year in respect of a timber limit is the lesser of

(*a*) an amount computed on the basis of a rate (computed under section 2 of this Schedule) per cord or board foot cut in the taxation year, or

(*b*) the undepreciated capital cost to the taxpayer as of the end of the taxation year (before making any deduction under section 1100 of these Regulations for the taxation year) of the timber limit.

2. The rate for a taxation year is

(*a*) if the taxpayer has not been granted an allowance in respect of the limit for any previous year, an amount determined by dividing the capital cost of the limit to the taxpayer *minus* the residual value by the total quantity of timber in the limit (expressed in cords or board feet) as shown by a *bona fide* cruise.

The provisions of s. 11 of the Act and of the regulations above referred to are required in order to afford a means of properly ascertaining the trading profit of persons engaged in such businesses as mining and lumbering, where capital assets are depleted by the operations. Section 14(2) provides for other cases and declares that for the purpose of computing income the property described in an inventory shall be valued at its cost to the taxpayer or its fair market value, whichever is lower, or in such other manner as may be permitted by regulation.

Subsection 1 of s. 17 provides that where a taxpayer has purchased anything from a person with whom he was not dealing at arms-length at a price in excess of the fair market value, the fair market value thereof shall, for the purpose of computing the taxpayer's income of the business, be deemed to have been paid. Subsection (2) provides for the case where, in similar circumstances, the purchase is for a price less than the fair market value.

Section 20, with some slight differences which do not affect the present matter, first appeared in the *Income Tax Act* by an amendment made in 1949 (s. 7, c. 25). Subsection (1) as applicable to the year 1952 reads:

Where depreciable property of a taxpayer of a prescribed class has, in a taxation year, been disposed of and the proceeds of disposition exceed the undepreciated capital cost to him of depreciable property of that class immediately before the disposition, the lesser of

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(a) the amount of the excess, or

(b) the amount that the excess would be if the property had been disposed of for the capital cost thereof to the taxpayer

shall be included in computing his income for the year.

Subsections (2) and (3), so far as they need be considered, read:

(2) Where depreciable property did, at any time after the commencement of 1949, belong to a person (hereinafter referred to as the original owner) and has, by one or more transactions between persons not dealing at arms-length, become vested in a taxpayer, the following rules are, notwithstanding section 17, applicable for the purposes of this section and regulations made under paragraph (a) of subsection (1) of section 11:

(a) the capital cost of the property to the taxpayer shall be deemed to be the amount that was the capital cost of the property to the original owner.

(b) where the capital cost of the property to the original owner exceeds the actual capital cost of the property to the taxpayer, the excess shall be deemed to have been allowed to the taxpayer in respect of the property under regulations made under paragraph (a) of subsection (1) of section 11 in computing income for taxation years before the acquisition thereof by the taxpayer.

(3) In this section and regulations made under paragraph (a) of subsection (1) of section 11,

(a) "depreciable property of a taxpayer" as of any time in a taxation year means property in respect of which the taxpayer has been allowed, or is entitled to, a deduction under regulations made under paragraph (a) of subsection (1) of section 11 in computing income for that or a previous taxation year.

The assessment complained of applied the provisions of subs. (2).

The case for the appellant is that the words "depreciable property" in the first line of subs. (2) should bear the meaning assigned to the expression "depreciable property of a taxpayer" in subs. (3). Accordingly, it is said that since Caine, during the time he owned the limit, did not cut any timber from it and was never allowed and never became entitled to a deduction under the regulations, s. 2 was improperly applied by the Minister in refusing to allow for depreciation based on the full cost of the limit to the company.

Counsel for the Minister agrees with the contention that the words "depreciable property" are to be given the meaning assigned to the expression "depreciable property of a taxpayer" in subs. (3).

The factum filed for the respondent contends that if the definition of the phrase "depreciable property of a taxpayer" is applied *mutatis mutandis* in regard to the expression "depreciable property" in subs. (2), the subsection would read:

> Where *the property in respect of which a taxpayer has been allowed, or is entitled to, a deduction under regulations made under paragraph (a) of subsection (1) of section 11 in computing income for that or a previous taxation year,* did, at any time after the commencement of 1949, belong to a person, (hereinafter referred to as the original owner), and has, by one or more transactions between persons not dealing at arm's length, become vested in the taxpayer, the following rules are, notwithstanding section 17, applicable for the purposes of this section and regulations made under paragraph (*a*) of subsection (1) of section: . . .

The expression depreciable property of a taxpayer, as it appears in subs. (3)(*a*) is contained in quotations and it is these words when used together that are defined. The words depreciable property, standing alone, are not defined anywhere in the Act. The expression depreciable property of a taxpayer appears in subs. (1) of s. 20 and in subs. 4(*g*) of that section and is to be there construed in accordance with the definition.

It will be seen that other expressions used in the section are also defined, namely, "disposition of property", "proceeds of disposition", "total depreciation allowed to a taxpayer" and "undepreciated capital cost to a taxpayer of depreciable property" in paragraphs (*b*), (*c*), (*d*) and (*e*) of subs. (3). Since the words "depreciable property of a taxpayer" do not appear in subs. (2), subs. (3)(*a*) does not apply.

The words "depreciable property" in subs. (2) are accordingly, in my opinion, to be construed without the assistance of a statutory definition. The words clearly refer to property such as a timber limit, the value of which depreciates as the timber is cut and, as the operation of s. 17 is excluded, the assessment complained of was properly made.

I would dismiss this appeal with costs.

The judgment of Cartwright and Martland JJ. was delivered by

MARTLAND J.:—I agree with the conclusions of my brother Locke and merely wish to add that, in my opinion, the result of this appeal would be the same even if the

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definition of "depreciable property of a taxpayer" in subs. (3) of s. 20 of the *Income Tax Act* were to be applied in construing the meaning of the words "depreciable property" in subs. (2) of that section. It seems to me that subs. (2) applies if the property in question constitutes depreciable property vested in the taxpayer who claims the allowance provided under s. 11(1)(*b*), irrespective of whether or not the property was "depreciable property" in the hands of the person from whom the taxpayer acquired it by a transaction not at arm's length.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Wilson, King & Fretwell, Vancouver.

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