THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

CONSOLIDATED GLASS LIMITED ....RESPONDENT.

1955
*Oct. 13, 14

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Mar. 2
Jun. 11
**Oct. 15

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Jan. 22

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income Tax—Undistributed income of company—Capital losses and gains—The Income Tax Act, 1948 (Can.), c. 52, s. 73A(1)(a)(iii), enacted by 1950, c. 40, s. 32 (R.S.C. 1952, c. 148, s. 82).

The respondent, having elected under 95A of the *Income Tax Act*, 1948, as enacted in 1950, proceeded to compute its undistributed income in accordance with 73A(1)(*a*). In doing so it deducted some $114,000 representing a loss in value on shares owned by it in another company which was still in business. This deduction was disallowed by the Minister but restored by the Income Tax Appeal Board. The Minister appealed to the Exchequer Court and after service of his notice of appeal obtained, with the respondent's consent, an order permitting him to raise a new ground of appeal to the effect that if the respondent had sustained a capital loss in respect of these shares that loss was more than offset by a capital gain on other assets during the same period. The Exchequer Court held that it was too late to raise this new ground and affirmed the decision of the Income Tax Appeal Board.

Held (Taschereau and Cartwright JJ. dissenting): The judgment of the Exchequer Court should be set aside and the original assessment should be restored.

Per Kerwin C.J. and Locke J.: It was clear that the shares in question had depreciated to the extent claimed by the respondent and it was not necessary that they should actually have been sold before it could be said that a capital loss had been sustained. The capital gain alleged by the Minister, however, more than offset this capital loss and since capital losses and gains must be treated on the same basis the original notice of assessment was correct. In the circumstances it was not too late for the Minister to raise this ground on the appeal to the Exchequer Court.

Per Rand, Kellock, Fauteux and Nolan JJ.: While it was not necessary that an asset should have been sold or disappeared in order to constitute a capital loss, it was necessary that the loss be absolute and irrevocable. Such a loss was realized upon a sale or in the case of stock in a company which was hopelessly insolvent and had ceased business. If, however, the business was maintained and all that could be said was that the shares would probably never exceed a maximum value, this was still a mere estimate and not the actual determination of the loss. Partial but indeterminate loss in the value of stock could not be treated as absolute and irrecoverable under the language of section 73A(1)(*a*)(iii).

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke and Cartwright JJ.

**PRESENT: Kerwin C.J. and Taschereau, Rand, Kellock, Locke, Cartwright, Fauteux, Abbott and Nolan JJ.

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Per Abbott J.: So long as a capital asset remained in existence with the possibility of fluctuation in value up or down the owner of that asset could not be said to have sustained a capital loss or made a capital profit or gain within the meaning of the subsection. Such a loss or gain must be established by (i) a sale of the asset, (ii) proof that the asset was valueless, or (iii) proof that it was no longer susceptible of any fluctuation in value. Even, however, if this depreciation was to be interpreted as a capital loss within the meaning of the subsection, the original assessment was still right on the ground that the respondent had failed to discharge the onus of establishing that the capital losses sustained by it in the relevant period exceeded capital profits or gains made during that period.

Per Taschereau and Cartwright JJ., *dissenting:* While it was correct to say that a loss, to come within the meaning of the subsection, must be final in the sense of being irrecoverable, it was not necessary that it be total. On the evidence, the respondent had established not only that the shares in question had decreased in value to the extent claimed by it but also that there was no possibility of any increase in their value beyond that figure. By a parity of reasoning, it followed that for a capital gain in respect of an asset still held in specie by the taxpayer to come within the meaning of the subsection it must appear not only that there had been an increase in the value of that asset but that there was no possibility of a corresponding decrease while it continued to be so held. This was not established in the case at bar and there was therefore no proved capital gain to offset the capital loss.

APPEAL from the judgment of the Exchequer Court of Canada (1), affirming a decision of the Income Tax Appeal Board, which set aside a notice of assessment by the appellant. (The appeal was originally heard by a Court of five judges, and reasons for judgment were delivered (2), but subsequently an order was made for a reargument before the full Court.) Appeal allowed.

Peter Wright, Q.C., and *T. Z. Boles*, for the appellant.

J. J. Robinette, Q.C., J. G. Edison, Q.C., and *D. A. Berlis*, for the respondent.

THE CHIEF JUSTICE:—This is an appeal by the Minister of National Revenue from a judgment of the Exchequer Court (1) affirming a decision of the Income Tax Appeal Board. Section 95A (1) of the *Income Tax Act*, 1948 (Can.), c. 52, enacted by s. 32 of c. 40 of the statutes of 1950, provides:

95A. (1) A private company may elect, in prescribed manner and in prescribed form, to be assessed and to pay a tax of 15% on an amount equal to its undistributed income on hand at the end of the 1949 taxation year minus its tax-paid undistributed income as of that time.

(1) [1954] Ex. C.R. 472. (2) (1956), 2 D.L.R. (2d) 529.

The respondent prepared a form, P.C. 2-1949, which together with the schedules thereto has been accepted by the appellant as an election by the respondent "in prescribed form" under this provision. This document was prepared in accordance with a resolution of the directors of the respondent at a meeting held on June 6, 1950 (before the amendment to the statute was assented to on June 30, 1950), and was received by the appellant on July 31, 1950. In schedule 2 under the heading "Capital Losses Sustained", appeared the following item—"1948 loss on Canadian Libbey-Owens Sheet Glass Co. Ltd. shares, $114,510.25" and the net undistributed income was stated to be $79,439.07 on which the respondent paid 15 per cent. or $11,915.86.

Subsection (8) of s. 95A provides:

(8) The Minister shall, with all due dispatch, examine each election made under this section, assess the tax payable and send a notice of assessment to the company.

In accordance therewith the appellant examined the election, disallowed the deduction of $114,510.25 and added that amount to the total of the respondent's undistributed income on hand at the end of the 1949 taxation year and sent a notice of assessment accordingly. The disallowance of the sum of $114,510.25 was made on the appellant's construction of the definition of "undistributed income on hand" as it appears in s. 73A, enacted by s. 28 of the statutes of 1950, c. 40, reading, so far as applicable, as follows:

73A. (1) In this Act

(a) "undistributed income on hand" of a corporation at the end of, or at any time in, a specified taxation year means the aggregate of the incomes of the corporation for the taxation years beginning with the taxation year that ended in 1917 and ending with the specified taxation year minus the aggregate of the following amounts for each of those years:

(i) each loss sustained by the corporation for a taxation year,

(ii) each expense incurred or disbursement made by the corporation during one of those years that was not allowed as a deduction in computing income for the year under this Part other than an expense incurred or disbursement made in respect of the acquisition of property (including goodwill) or the repayment of loans or capital,

(iii) the amount by which all capital losses sustained by the corporation in those years before the 1950 taxation year exceeds all capital profits or gains made by the corporation in those years before the 1950 taxation year,

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Kerwin C.J.

(iv) the amount by which all capital losses sustained by the corporation in those taxation years after the 1949 taxation year exceeds all capital profits or gains made by the corporation in those years after the 1949 taxation year.

The argument has proceeded mainly upon the meaning to be attached to the words "all capital losses sustained" in clause (iii).

The history of the investments by the respondent in Canadian Libbey-Owens Sheet Glass Company Limited shares has been detailed in the reasons for judgment in the Exchequer Court. It is unnecessary to repeat it because undoubtedly the shares were not disposed of before the election was made and it is for that reason that the appellant argues that no capital losses with respect thereto were sustained. Reliance is placed upon the decisions in the United States where a tax is imposed on the net balance of capital gains and losses and particularly upon the judgment in *DeLoss v. Commissioner of Internal Revenue* (1), where Learned Hand J., at p. 804, states the established rule:

> However, while the security remains in esse and its value may fluctuate, it is well settled that only by a sale can gain or loss be established. *Eisner v. Macomber*, 252 U.S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A.L.R. 1570; *Miles v. Safe Deposit Co.*, 259 U.S. 247, 253, 42 S. Ct. 483, 66 L. Ed. 923; *N.Y. Life Ins. Co. v. Edwards*, 271 U.S. 109, 116, 46 S. Ct. 436, 70 L. Ed. 859; *U.S. v. White Dental Mfg. Co.*, [274 U.S. 398 at 401, 47 S. Ct. 598].
>
> Moreover, we understand this to be not merely a rule of convenience, but to inhere in the essence of income arising from capital gains or losses. Nevertheless, we think it inapplicable when the security can no longer fluctuate in value, because its value has become finally extinct. In such cases a sale is necessarily fictitious; it establishes nothing, and cannot be intended to do so, for there is no variable to determine.

It will be noticed that even in the United States an exception is made where the value of a security has entirely disappeared, but, in any event, we are concerned with the proper construction of an entirely different enactment.

In my opinion the Exchequer Court and the Income Tax Appeal Board came to the right conclusion that an actual sale of assets was not necessary in order that it might be said that a capital loss was sustained. The evidence is clear that the value of the shares had depreciated to a sum less than the $40,000 at which the respondent valued them. I am unable to gain any assistance in coming to

(1) (1928), 28 F. (2d) 803.

this conclusion from the decisions relied upon by the late Mr. Justice Potter in connection with applications under various *Companies Acts* where the enquiries were as to "capital which is lost", but I am of opinion that, upon a fair reading of all the relevant provisions, the capital losses to the extent mentioned were sustained by the respondent in the years before the 1950 taxation year.

The appellant has an alternative claim as to which nothing was said until he filed an amended notice of appeal to the Exchequer Court from the decision of the Income Tax Appeal Board. This is based upon the circumstance that within the meaning of s. 73A(1)(*a*)(iii) capital profits or gains had been made by the respondent in the years before the 1950 taxation year in the value of its share-ownership in Bennett Glass Company Limited and in the value of certain fixed assets. The latter appears in the respondent's books after a reappraisal of certain real estate and buildings. The Exchequer Court decided that it was too late for the appellant to take this position but with deference I am unable to agree. There is no suggestion that any available evidence was not produced and therefore this Court is in a position to dispose of the matter finally. Capital losses and gains must, I think, be treated on the same basis and the former being more than offset by the latter the notice of assessment by the appellant stands although for a different reason from that advanced by him at the time of assessment or before the Income Tax Appeal Board.

The appeal should be allowed and the assessment restored. The appellant is entitled to his costs in this Court but under the circumstances there should be no costs in the Exchequer Court.

The judgment of Taschereau and Cartwright JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—Two questions arise in this appeal. The first is whether the decrease in value of certain shares of Canadian Libbey-Owens Sheet Glass Company Limited acquired by the respondent in the years 1920, 1921 and 1922 at a cost of $154,510.25 and written down in its books to $40,000 in 1948 was a capital loss

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Cartwright J.

sustained by the respondent within the meaning of s. 73A (1)(*a*)(iii) of the *Income Tax Act*. The second is whether the appreciation in value of certain shares of Bennett Glass Company Limited and certain fixed assets owned by the respondent and written up in its books during the same period was a capital profit or gain made by the respondent within the meaning of the same subsection.

The relevant facts and statutory provisions are set out in the reasons of other members of the Court.

The main submissions of the appellant are (i) that a decrease or an increase in the value of a capital asset still retained in specie by a taxpayer does not constitute a capital loss sustained or a capital gain made until the amount of such loss or gain is established by the sale of the asset and (ii) alternatively, that if a decrease in value of one unrealized capital asset is to be treated as a loss then an increase in value of another unrealized capital asset must be treated as a gain; that is to say, the taxpayer cannot blow hot and cold.

I agree with the conclusion of my brother Rand that a loss to come within the meaning of the subsection must be final in the sense of being beyond doubt irrecoverable; but in my opinion a loss in value of a retained asset may be shown to be final although it is not total. On the evidence, it appears to me that the respondent established not only that the shares of Canadian Libbey-Owens Sheet Glass Company Limited had decreased in value to $40,000 but also that there was no possibility of any increase in their value beyond that figure. To make such proof in regard to the shares of a company still carrying on business will usually be difficult and may often be impossible but in the case at bar it is shown that the company had parted with all its fixed assets, that its liabilities substantially exceeded its assets and that its only source of income was a commission contract expiring in 1961 yielding a revenue such that an increase in value of the stock above the figure mentioned was beyond the bounds of practical possibility. Proof that, at the critical date, the shares had decreased in value to $40,000 would not have been sufficient to establish a loss within the meaning of the subsection; but, in my opinion, the respondent has satisfied the further onus of negativing

the possibility of an increase beyond that figure. I conclude that the first question should be answered in favour of the respondent.

As to the second question, I think that, by parity of reasoning, it follows that for a capital gain in regard to an asset still held in specie by the taxpayer to come within the meaning of the subsection it must appear not only that there has been an increase in the value of such asset but that there is no possibility of a corresponding decrease while it continues to be so held. Whether this could in any case be made to appear I do not stop to inquire, as, in the case at bar, the evidence as to the nature of the assets in respect of which it is alleged by the appellant that a capital gain has been made shows that it is possible, and indeed probable, that their value will fluctuate so long as they are retained. I conclude therefore that the second question should also be answered in favour of the respondent.

For the above reasons I would dismiss the appeal with costs.

The judgment of Rand, Kellock and Fauteux JJ. was delivered by

RAND J.:—The narrow issue in this appeal is whether in the determination of "undistributed income" as defined by s. 73A of the *Income Tax Act*, as enacted in 1950, the amount by which the value of a capital investment has depreciated can be deducted under subs. (1)(*a*)(iii) which reads:

> the amount by which all capital losses sustained by the corporation in those years before the 1950 taxation year exceeds [*sic*] all capital profits or gains made by the corporation in those years before the 1950 taxation year.

The deduction is one of a number to be made from the aggregate of incomes for the tax years from 1917 to 1949, including, among others, under cl. (i) income losses and cl. (vi) all dividends paid. The phrase "capital losses sustained" or its equivalent appears in several provisions of the statute in a context from which it is apparent that, within the conceptions of accountancy underlying the Act, it means actually realized. For example, in s. 26 (*d*) "business losses sustained"; s. 39 (1)(*a*) "loss sustained"; s. 75, subss. (6) and (7) "losses sustained".

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Rand J.

These instances, however, afford only a limited assistance to the question raised. What is much more significant, if not decisive, is that the capital losses sustained under cl. (iii) are the net capital losses, those that exceed the "capital profits or gains made" during the same period. "Losses sustained" and "profits and gains made" are clearly correlatives and of the same character; but how can profits and gains be considered to have been made in any proper sense of the words otherwise than by actual realization? This is no inventory valuation feature in relation to capital assets. That the words do not include mere appreciation in capital values is, in my opinion, beyond controversy. It is difficult if not impossible to say that where only value is being considered in which a variable inheres you can have any other than a fluctuating estimate. The word "loss" in the context means absolute and irrevocable, finality. That state of things is realized upon a sale; it can also be said to be realized in the case of stock in a company which is hopelessly insolvent and has ceased business. When, on the other hand, the business is maintained and all that can be said is that in the most likely prospect the value of the shares cannot exceed a maximum, there is still no more than an estimate: the actual loss cannot in fact be so determined and unless there is that determination the statute is not satisfied. The element of appreciation illustrates the quality of fluctuation more clearly perhaps than that of depreciation, but they are essentially of the same nature. If, then, appreciation must be ruled out, as I think it must be, similarly mere loss of some value while a company remains in business must be treated in the same manner.

A number of authorities were cited from the Courts of the United States where capital losses are deductible from taxable capital gains. So far as these decisions are helpful, they seem to support the contention of the Crown. For example, *The People of the State of New York ex rel. Conway Company v. Lynch et al.* (1), a case of insolvency and worthlessness of the stock. In the course of his reasons

(1) (1932), 258 N.Y. 245.

Lehman J., speaking for the Court which included Cardozo C.J., used this language (1):

> True, even with that variable factor [the price obtainable on a sale] taken into consideration, the taxing authority may be able to determine that some loss is inevitable, yet when the variable factor affects the *amount* of the inevitable loss, it may be difficult or even impossible to devise a practical test to determine that any definite part of that loss has been sustained till by complete liquidation or sale the loss is definitely established . . . No variable factor enters into the determination of loss which is inevitable.

DeLoss v. Commissioner of Inland Revenue (2) likewise was an instance of worthless stock. Learned Hand J., giving the reasons of the Circuit Court of Appeals, says:

> It might have been possible to regard fluctuations in the value of securities as present losses or gains, regardless of any sale. The power immediately to realize their value in money might have been considered as equivalent to possession of the money itself, though this would, it is true, have resulted in much difficulty in administration. However, while the security remains in esse and its value may fluctuate, it is well settled that only by a sale can gain or loss be established. . . .
>
> Moreover, we understand this to be not merely a rule of convenience, but to inhere in the essence of income arising from capital gains or losses. Nevertheless, we think it inapplicable when the security can no longer fluctuate in value, because its value has become finally extinct. In such cases a sale is necessarily fictitious; it establishes nothing, and cannot be intended to do so, for there is no variable to determine.

Several other cases from similar Courts were cited but they also involved insolvency and worthlessness.

These decisions, of course, are on different statutory language directed to a different purpose, *i.e.*, the ascertainment of capital income. As is frequently the case, the language of the provisions has, in the course of the years, been modified in the light of experience, and as it appears in Montgomery's Federal Taxes on Corporations, 1945-46, vol. 1, at pp. 361 and 383, federal corporate income taxation law in the United States by 1945 had reached the point of crystallizing the rulings of the Courts in a precise specification of losses resulting from sale or exchange of capital assets and from shares of stock having become worthless, as being deductible items.

The statute clearly indicates that the time of sustaining a loss or making a profit is of primary importance and in my opinion that means the time when an entry embodying

(1) (1932), 258 N.Y. at pp. 255-6. (2) (1928), 28 F. (2d) 803.

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Rand J.

the loss sustained or the gain made must, in proper accounting, be made in the accounts. Until then, entries in the accounts appear to be irrelevant. Here, if the commencement date under s. 73A had been 1924 instead of 1917, the loss, on the view of the respondent, would have been excluded although the same entries would have been continued until 1949 when the changes were made. In the case of the gain, it happens that an appraised value made in 1920 was continued in the accounts until the reappraisal in 1949: but if the cost-prices paid before 1917 had been maintained, as in ordinary accounting they generally are, the increased value up to 1917 would have been deductible from the total increase to 1949, a computation which seems to me to be beyond any contemplation of the statute. What an allowance of both loss and gain in this case means is that the capital assets are dealt with on an inventory basis which makes the actual time of the happening of either irrelevant and makes optional or voluntary accounting entries controlling. If, for example, in 1960 a loss or both a loss and an appreciation in value are entered for capital assets, will it be necessary to inquire whether that loss or increase did or did not accrue prior to 1950? And if in 1970 an appraisal takes place, what of an asset that was maintained throughout the years at its original cost? If one asset only is sold or appraised at a loss over cost and over subsequent appraisal and they are different, which is to be taken as the measure? And must all assets at that time be dealt with to ascertain whether there have been gains? Is cost superseded by appraisal as a basis of determining loss or gain? If mere appraisal is sufficient, the selection of the time for claiming a loss could nullify the purpose of the statute. All of these difficulties point clearly to the conclusion that only an actual or virtual extinction of the asset, including disposal, necessitating an appropriate alteration of the accounts, is what the section provides for.

Partial but indeterminate loss in the value of stock cannot, then, under the language of cl. (iii) be treated as absolute and irrecoverable. Any other view would, apart from all other considerations, introduce substantial administrative anomalies that cannot have been contemplated. The amount of undistributed income must be determined

not only for the purpose of election for distribution but also in cases of liquidation, reorganization, stock dividends and redemptions as provided in the present ss. 81 and 82 of the *Income Tax Act,* R.S.C. 1952, c. 148: and the conceptions underlying losses and gains in their application to these cases are incompatible with any other interpretation.

But whatever may be said of the loss here, on any basis other than that of inventory it is quite impossible, in my opinion, to treat the appreciated value of the fixed assets as "profits or gains made" by the company. Beyond any doubt, the value written up by the company is a fluctuating value, in its essence it is variable, and being so, no part of it comes within the area of "profit or gain made".

I would, therefore, allow the appeal, set aside the judgments below, and restore the assessment of the Minister with costs in this and the Exchequer Court.

LOCKE J.:—The sole question to be decided by Mr. Fordham, Q.C., by whom the appeal to the Income Tax Appeal Board was heard, was as to whether the present respondent, in computing the amount of its "undistributed income" at the end of the taxation year 1949 (within the meaning of that expression in s. 73A (1)(*a*) of the *Income Tax Act* of 1948), was entitled to deduct the amount by which its investment in the preference and common shares of Canadian Libbey-Owens Sheet Glass Company Limited had decreased in value by that date.

The respondent, a private company, claimed to deduct the sum of $114,510.25 from the total amount paid by it for these shares as a capital loss. By the notice of assessment dated May 22, 1951, the respondent was informed that this deduction had been disallowed. Some other changes were made in the figures submitted by the company in computing the amount of its undistributed income but no question arose as to these in the proceedings before the Income Tax Appeal Board. The respondent filed its notice of objection on July 12, 1951, complaining only of the disallowance of the amount of the loss claimed in respect of these shares and, in the notice of appeal to the Board dated February 1, 1952, the objection to the assessment was limited to this ground alone.

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Locke J.

It was the contention of the Minister that there could be no allowance for capital losses under the provisions of para. (*a*)(iii) of s. 73A(1), unless the loss had theretofore been ascertained by the sale or realization upon the assets. In my opinion, this position is untenable and the matter was rightly decided by Mr. Fordham, Q.C., when the appeal of the taxpayer was allowed.

The amendment to the *Income War Tax Act,* which first permitted private companies to pay a tax on their "undistributed income", as defined, and to distribute it in the form of dividends free of tax to the shareholders, was enacted as ss. 94 and 96 by c. 23, s. 8, of the statutes of 1945. If there were ambiguity in the language of para. (*a*)(iii) of s. 73A(1) of the *Income Tax Act* or doubt as to the meaning to be assigned to the expressions "all capital losses sustained" or "capital profits or gains made", and I think that, read in the context, there is none, the history of the external circumstances which led to the enactment of the legislation might be considered to assist in ascertaining the evil or defect which the amendment was intended to remedy as an aid to interpretation: *The Eastman Photographic Materials Company, Limited v. The Comptroller-General of Patents, Designs and Trade-Marks* (1); *The River Wear Commissioners v. Adamson et al.* (2).

The 1945 legislation was enacted following the report of the Royal Commission on the Taxation of Earned Surpluses of Private or Closely Held Corporations, presided over by Mr. Justice Ives and commonly known as the Ives Report. The nature of the problem which the Commissioner was directed to consider was described in the report in the following terms:

> The problem with which we have to deal relates to the combined effect of income taxes and succession duties arising on the death of any of the principal shareholders of closely-held corporations with accumulated surpluses. In many instances the principal asset of the deceased is represented by his equity in the company and, in order to pay succession duties, it is found necessary to distribute a substantial part, if not all, of the accumulated surplus as a dividend. The impact of the income taxes at the prevailing rates on such a distribution is extremely serious and when combined with Federal and Provincial Succession Duties may result in the confiscation of almost the entire estate.

(1) [1898] A.C. 571 at 575. (2) (1877), 2 App. Cas. 743 at 764.

The "undistributed income" of the 1945 amendment might have been more appropriately called "undistributed gains" since it included not only accumulations of income, as that expression was defined by s. 3 of the *Income War Tax Act,* but capital profits which did not fall within the definition and, in making the computation, capital losses, not otherwise deductible in computing income, might be deducted. Clearly, a loss has been sustained when a capital asset has permanently lost all or part of its value. In my opinion, what was contemplated by the section as enacted in 1945 and as re-enacted in substantially the same language as para. (*a*)(iii) of s. 73A (1) of the *Income Tax Act* of 1948, was that the capital losses or gains, the amount of which had not already been ascertained by realization upon the asset, should be determined by making a valuation. Indeed, if this were not so, I think one of the main purposes of the legislation would be defeated since, in order to take advantage of the privilege afforded by the section, it might well be necessary to sell capital assets actively used in carrying on the company's business which might have either lost their value in part or appreciated in value. This would, no doubt, mean that, in the case of many private companies where the estate of a deceased majority shareholder wished to obtain the moneys necessary to pay succession duties from the undistributed income, this could be done only by having the company realize upon a material part of its capital assets and cease operations. In the case of the present respondent, where it is contended for the Crown that its capital assets consisting of real estate and buildings had increased very largely in value and that this increase must be taken into account in computing its "undistributed income", it would be necessary to sell them to determine the amount of the appreciation. This, presumably, would mean a cessation of operations. I cannot think that any such construction of the legislation was intended by Parliament. The fact that the shareholder here concerned is a corporation is, of course, an irrelevant circumstance in determining the meaning to be assigned to the language of the Act.

It was proven on the appeal before the Income Tax Appeal Board that the value of the Canadian Libbey-Owens

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shares was not more than $40,000 at the end of the fiscal year of the company in 1949. That the investment in the shares of this company was a capital investment on the part of the taxpayer was not questioned. I respectfully agree with Mr. Fordham, Q.C., that, since this capital investment had depreciated in value to at least the amount claimed by the taxpayer and there being clearly no hope of any appreciation in value thereafter, the loss had been sustained within the meaning of the section.

This, however, does not dispose of the present appeal. Had the appeal before Potter J. been limited to the question considered before the Income Tax Appeal Board, it should properly have failed. However, other matters were put in issue on the appeal from that decision. Following the judgment of the Board, the Minister gave a notice of appeal to the Exchequer Court on July 27, 1953. The ground of appeal, as stated by that notice, was that no loss had been sustained on the investment in the Canadian Libbey-Owens shares prior to December 31, 1949. Thereafter, however, the respondent consented to an order being made under subs. 3 of s. 91 of the *Income Tax Act*

> directing that the appellant be permitted to plead further facts and refer to a further statutory provision in the terms of the document attached hereto and entitled "Further Facts and Statutory Provisions upon which the Appellant Relies" and permitting the appellant to amend its Notice of Appeal accordingly and on condition that the respondent be permitted to make a reply to the amended Notice of Appeal.

In the attached document further grounds of appeal were set out which raised, in the alternative, the ground that, if the respondent had suffered the capital loss referred to, it had made capital profits in those years exceeding the amount claimed:

> and particularly made capital profits or gains in the value of its share ownership of Bennett Glass Company Limited and in the value of its fixed assets as shown by an appraisal in 1948 and in its books and accounts for that year.

A further ground raised was that, in consequence of the foregoing, there was no amount which could be deducted from the undistributed income on hand under s. 73A(1)(*a*)(iii) of the *Income Tax Act*.

While the respondent had consented to this amendment being made, by its reply it contended that the matters referred to were irrelevant. The case for the Minister was

put in first at the hearing before Potter J. As part of that case, the income tax return of the respondent for the year 1948 was put in, together with the report of the company's auditors. That report dated April 30, 1949, said in part:

> The real estate and buildings were appraised during the year by the Dominion Appraisal Company Limited, at depreciated replacement value of $414,199.75. The book value of these assets has been increased by $217,309.22 to give effect to this appraisal. Of this sum $114,510.25 has been applied to the book value of the investment in Canadian Libbey-Owens Sheet Glass Co. Limited reducing this account to $40,000.
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> The investment in Bennett Glass Company Limited is shown at cost $32,177.39 plus $84,688.14 for profits earned since acquisition of the capital stock and $26,286.38 surplus resulting from appraisal of Real Estate and Buildings in 1948.

The balance-sheet of the company for that year showed the Canadian Libbey-Owens shares at the reduced valuation and the real estate and buildings at the appreciated value assigned to them by the Dominion Appraisal Company.

The respondent called as a witness Mr. A. G. Hayes and, during the course of his examination-in-chief, produced a copy of the minutes of a directors' meeting of the respondent held on October 5, 1948, approving what was called the "writing up" of the book value of its Montreal property by an amount in excess of $119,000, the increase to be carried to the depreciation and property reserve account, and the charging against that account of the amount of the loss in value of the Canadian Libbey-Owens shares. This resolution was passed subject to the approval of the auditors, who later approved the entry in the company's books as the value of its real estate and buildings of the figure fixed by the appraisal company, which represented an increase of $217,309.22 in the book value of these assets. The financial statements giving effect to these changes were thereafter approved at a shareholders' meeting held on June 16, 1949.

While I think the reference to the investment in Bennett Glass Company Limited is not clear, there can be no doubt that the directors, the auditors and the shareholders were all of the opinion that the value of the real estate and buildings of the company had by the end of 1948 increased by an amount considerably in excess of the loss claimed upon the Canadian Libbey-Owens shares. Just as, in my

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view, the investment in the shares of Canadian Libbey-Owens was capital investment, I think the investment in the real estate and buildings acquired, it may properly be assumed, for the purpose of carrying on the company's business activities, was a capital investment and, its appreciation in value thus recognized, a capital profit or gain within the meaning of the subsection.

Mr. Justice Potter, pointing out that the question as to whether there had been capital profits or gains in the value of the shares of the Bennett Glass Company Limited and of its fixed assets had not been considered in making the assessment and, consequently, not dealt with by the Income Tax Appeal Board, considered that he should not deal with the matter, saying that, while he expressed no opinion on the merits of the claim, he did not think that the assessment could be varied or a new assessment made by such procedure.

Had it been proposed on behalf of the Minister that a new assessment be made, or one varying that of which notice had been given on May 22, 1951, I would be in agreement with this, but that is not what was proposed. It was with the consent of the respondent that the order was made permitting the Minister to raise the issue on the appeal as to the appreciation in value of the real estate and buildings and, as shown, evidence was tendered both by the Minister and the respondent on the point. The issues were tried by the learned judge, not on the facts disclosed on the appeal to the Income Tax Appeal Board but on the evidence adduced before him, which appears to me to demonstrate that the loss in value of the Canadian Libbey-Owens shares had been more than made up by the appreciation in value of the other capital assets. The objection that the evidence was irrelevant cannot be supported, in view of the course of the proceedings.

In the result, I would allow the appeal and restore the assessment of May 22, 1951. I would allow the appellant his costs in this Court and, in my opinion, there should be no costs allowed of the appeal to the Exchequer Court.

ABBOTT J.:—Pursuant to s. 95A of the *Income Tax Act*, 1948, as enacted by 1950, c. 40, s. 32, appellant elected to pay a tax of 15 per cent. on its undistributed income on hand at the end of the 1949 year as prescribed in the Act. In its election it claimed as a deduction from total income the sum of $114,510.25, as being a capital loss alleged to have been sustained with respect to shares still owned by it in another company which was still in existence and still operating.

In making his assessment the Minister disallowed this deduction and the sole issue in this appeal is whether he was right in so doing. This turns upon the interpretation to be given to s. 73A(1)(*a*)(iii) of the said Act, which reads as follows:

> (iii) the amount by which all capital losses sustained by the corporation in those years before the 1950 taxation year exceeds all capital profits or gains made by the corporation in those years before the 1950 taxation year.

This subsection authorizes one of a number of deductions which are permitted from the aggregate of the incomes of a corporation for a period, beginning with the taxation year that commenced in 1917, and ending with the year in which election is made to pay the 15 per cent. tax under s. 95A of the Act.

I have had the advantage of considering the reasons given by my brother Rand and I agree with the view which he has expressed that so long as a capital asset remains in existence, with the possibility of fluctuation in value up or down, the owner of such asset cannot be said to have sustained a capital loss or made a capital profit or gain within the meaning of the subsection. Such loss or gain, as the case may be, must be established by (i) a sale of the asset, (ii) the asset being proved valueless, or (iii) the asset being proved to be no longer susceptible of any fluctuation in value.

If I am mistaken in this view and the subsection in question is to be interpreted as providing that for the purpose of claiming the deduction in question, a capital loss or gain with respect to a particular asset still owned by a taxpayer can be established by a revaluation and the making of an appropriate bookkeeping entry to record such loss or gain, the appeal should still be allowed.

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The evidence in the present case showed that on the "write up write down" basis of establishing capital gains or losses used by the respondent, the respondent's "gains" exceeded its "losses" in the relevant period prior to 1950. In my opinion the respondent failed to discharge the onus imposed upon it by the subsection, of establishing that the capital losses sustained by it prior to the 1950 taxation year exceeded capital profits or gains made during that period.

I would allow the appeal with costs here and in the Exchequer Court; declare that the deduction of $114,510.25 claimed by respondent was properly disallowed by appellant; and restore the assessment.

NOLAN J.:—My first view was (1) that a capital loss had been sustained, even though the investment was not completely written off, but (2) that this was more than offset by capital gains. However, in order that there may be a majority in favour of one view of the relevant statutory provisions, I have finally decided to agree with my brother Rand that, for the reasons given by him, the appeal should be allowed, the judgments below set aside and the assessment of the Minister restored with costs here and in the Exchequer Court.

Appeal allowed with costs, TASCHEREAU *and* CARTWRIGHT JJ. *dissenting.*

Solicitor for the appellant: T. Z. Boles, Ottawa.

Solicitors for the respondent: Edison, Aird & Berlis. Toronto.