1954
Jan. 27, 28
June 17

BETWEEN:

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

AND

CONSOLIDATED GLASS LIMITED ....RESPONDENT.

Revenue—Income—Deduction of capital loss—The Income Tax Act S. of C. 1948, c. 52 as amended, s. 73A(1)(a)(iii), 95A(1) (c. 40, S. of C. 1950)—"Undistributed income on hand"—Computation of undistributed income—Capital loss sustained before 1950—Loss incurred over several years—"Capital losses sustained" do not have to be realized.

Respondent company held shares in another company which shares depreciated in value over a period of years. Respondent claimed deduction from income for capital losses accrued over a period of years prior to 1950 due to such depreciation in value. The Income Tax Appeal Board allowed an appeal from the assessment which had disallowed such deduction. From that decision the Minister of National Revenue appealed to this Court.

Held: That "capital losses sustained" in s. 73A(1)(a)(iii) of the Act do not have to be realized and the depreciation in value of the shares held by respondent over a period of years are capital losses sustained by respondent in those years prior to the 1950 taxation year.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Potter at Toronto.

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

J. G. Edison for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

POTTER J. now (June 17, 1954) delivered the following judgment:

This is an appeal by The Minister of National Revenue, hereinafter called the appellant, from a decision of the Income Tax Appeal Board dated March 26, 1953, and mailed March 31, 1953, allowing an appeal from an assessment by the appellant dated May 22, 1951, whereby the appellant disallowed a deduction of $114,510.25 claimed by the Consolidated Glass Limited, hereinafter called the respondent, in its statement of undistributed income on

hand at the end of the 1949 taxation year, as a capital loss arising out of an alleged depreciation in the value of 1,550 preference shares and 19,944 common shares of Canadian Libby-Owens Sheet Glass Company, Limited, purchased by the respondent in the years 1920, 1921, and 1922, for a total amount of $154,510.25 and which had been written down in the year 1948, in accordance with a resolution of the directors of October 5 of that year, to $40,000.

The respondent was incorporated under the name of The Consolidated Plate Glass Company of Canada, Limited by Letters Patent issued June 20, 1893, under The Companies Act, Chapter 119, R.S.C., 1886, with head office at Toronto in the Province of Ontario, and with a capital divided into 2,500 shares of a par value of $100 each.

There were some changes in the capital structure of the respondent and at the time of filing its income tax return for the year ending December 31, 1948, it consisted of 10,000 shares of a par value of $100, of which 4,500 shares were issued and fully paid up.

On January 2, 1947, the respondent's name was changed to Consolidated Glass Limited.

Canadian Libby-Owens Sheet Glass Company, Limited was incorporated by Letters Patent issued October 16, 1920, under The Companies Act, Chapter 79, R.S.C., 1907, as a subsidiary of Libby-Owens-Ford Glass Company of Toledo, Ohio, with a capital divided into 15,000 eight per cent cumulative preference shares of a par value of $100 each, and 36,000 common shares of no par value, and it erected a manufacturing plant in Hamilton in the Province of Ontario.

This latter company began business in the year 1921, and its first financial statement covered the period October 16, 1921, to September 30, 1922. It operated as a manufacturing company for about eighteen months only and its plant was closed down in April of the year 1923. With the exception of rentals received from time to time from the city of Hamilton for the use of its buildings, it for a period, received no other revenue. According to the evidence, competition from foreign manufacturers of glass, particularly those of Belgium, the franc of which had

1954

MINISTER OF NATIONAL REVENUE v. CONSOLIDATED GLASS LIMITED

Potter J.

depreciated to about two cents in Canadian money, had become so great that it was unprofitable to continue manufacturing operations.

On February 1, 1925, the Canadian Libby-Owens Sheet Glass Company and the Libby-Owens Sheet Glass Company, as its name then was, of Ohio, United States of America, entered into an agreement with Compagnie Internationale Pour La Fabrication Mécanique Du Verre, a corporation of the Kingdom of Belgium, referred to as "Mecaniver", whereby the Belgian company agreed to furnish polished and unpolished glass to Canadian Libby-Owens Sheet Glass Company, Limited to fill orders obtained by it in Canada, at a commission of 7½ per cent, f.o.b. Antwerp, which agreement was to continue in force for a period of ten years from the date thereof and which was from time to time extended until Belgium was occupied by the German armies in 1940, when shipments of glass from Belgium were discontinued until they were resumed in the year 1945. Some commissions were, however, collected by the said company in the year 1941.

In the year 1941 the plant and buildings of the Canadian Libby-Owens Sheet Glass Company were sold to the Crown in the right of Canada, when proper entries were made in the accounts of that company.

According to copy of a ledger sheet of the respondent, it made purchases of the preferred shares of the Canadian Libby-Owens Sheet Glass Company, Limited as follows: December 7, 1920, $150,000; January 28, 1921, $5,000; January 12-13, 1922, $9,510.25; making a total of $164,510.25, but $10,000 worth of the first lot of stock, purchased on December 7, 1920, was sold on January 28, 1921, for $10,000, leaving the respondent with an investment of $154,510.25 in the preference stock of the said company. A number of common shares were acquired with the said preferred shares.

With the exception of the years 1927, 1928, 1929, and 1930, the Canadian Libby-Owens Sheet Glass Company, Limited operated at losses up to the year 1942, when there were some small profits arising out of operations, as also for the years 1942 to 1949 inclusive, but the manufacturing plant of this company had been sold, as already stated, to

the Crown in the right of Canada in 1941, and its revenue was from commissions on sales of glass manufactured elsewhere.

At a meeting of the directors of the respondent held October 5, 1948, the Board gave its approval to writing up the then book value of Montreal property from $45,000 to an appraised value of $164,423.82, or an increase of $119,423.82, and to the transfer of $113,785.21 from depreciation and property reserve account to the credit of the respondent's investment in Canadian Libby-Owens Sheet Glass Company, Limited, the effect of which would leave the value of the respondent's investment in that company at $40,000.

It will be noted that the difference between $40,000 and the figure at which the shares were carried on the ledger of the respondent, according to Exhibit C, was $114,510.25, a difference of $725.04 more than the amount mentioned in the minutes of the directors' meeting, which difference was explained by counsel, who said that there was a deficiency of a few dollars in the directors' minutes because they did not have the financial statements in front of them at the time.

The matter was evidently noticed by the auditors for, in their report dated April 30, 1949, attached to the income tax return for the fiscal period ending December 31, 1948, they say:—

> 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 Libby-Owens Sheet Glass Company, Limited, reducing this account to $40,000.

The values of real estate and buildings given in this section of the auditors' report evidently cover all real estate and buildings held by the respondent.

In the year 1949 the respondent had also acquired 16,296 common shares of the Libby-Owens Company at a nominal amount of ten cents a share or sixteen hundred-odd dollars, because there had been a discussion from time to time with a view of reducing the capital stock of that company and putting it on a basis whereby a small dividend might be declared.

1954

MINISTER OF NATIONAL REVENUE v. CONSOLIDATED GLASS LIMITED

Potter J.

By section 32 of chapter 40 of the Statutes of 1950, assented to June 30, 1950, it was provided in part as follows:—

32. The said Act is further amended by inserting immediately after Part I thereof the following:

"Part IA

"Tax on Undistributed Income.

"95A. (1) A private company may elect, in prescribed manner and in prescribed form, to be assessed and to pay a tax of 15 per cent on an account 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."

Then followed provisions with reference to the class of companies entitled to take advantage of these provisions and the method by which the election should be made, etc.

Before this amendment became law a meeting of the directors of the respondent was held on June 6, 1950, the minutes of which contained the following:—

The Chairman pointed out that Part 1-A of the "Income Tax Act" presently being enacted by Parliament of Canada would permit the Company to elect to pay a tax of 15 per cent on its undistributed income on hand at December 31, 1949, with the result that the balance of the said undistributed income would be "tax-free undistributed income". After discussion a motion duly made, seconded and carried unanimously.

IT WAS RESOLVED THAT

(1) the Company does hereby elect to be assessed and to pay a tax of 15 per cent on an amount equal to its undistributed income on hand as at December 31, 1949.

(2) Mr. A. G. Hayes and Mr. J. M. Hobbs be and they are hereby authorized to execute all documents and do all things which are required to make the foregoing election on behalf of the Company, and to pay the amount of the tax estimated to be due to the Minister of National Revenue, including the execution of all forms evidencing the election of the Company in the manner prescribed by, in regulations, issued under the provisions of the "Income Tax Act".

Subsequently, the respondent prepared a form PC2—1949, together with schedules thereto, which was described by counsel for the appellant as "a return in lieu of a return called PC-2 which is made by a company which is electing to pay these taxes and in fact the return, which will be Exhibit 1 which I am submitting, is not actually in the form of the PC-2, but it has all the substance of it, and it has been accepted on that basis and no question raised with regard to it".

This document was received by the appellant on July 31, 1950, and in Schedule 2 thereof, entitled "Capital Losses Sustained", was shown an item, "1948 Loss on Canadian Libby-Owens Sheet Glass Company, Limited Shares, $114,510.25", and the net undistributed income shown was $79,439.07, on which the respondent paid or forwarded the amount of $11,915.86, being 15 per cent of the same, according to its calculation.

By Notice of Assessment by the appellant dated May 22, 1951, the following was shown:—

Undistributed Income Declared	79,439.07
ADD: Per Attached	142,099.05
	221,538.12
DEDUCT:	57,484.07
	$164,054.05

In the sheet attached to the Notice of Assessment the appellant disallowed as a deduction and added to the respondent's declared undistributed income the following item:—

Canadian Libby-Owens $114,510.25

On July 12, 1951, the respondent filed Notice of Objection, reiterating its claim to be entitled to deduct the sum of $114,510.25 from its undistributed income as a capital loss sustained.

Notification by the Minister dated November 13, 1951, was duly sent to the respondent, confirming the said assessment

as having been made in accordance with the provisions of the Act and in particular on the ground that in determining the undistributed income on hand at 31st December, 1949, under the provisions of subsection (1) of section 73A of the Act the loss sustained in the 1950 taxation year is not deductible.

It will be noted that the notification by the Minister refers to the loss as having been sustained in the 1950 taxation year, although the loss is shown on said Schedule 2 as having occurred in the year 1948, and the resolution of the Board of Directors authorizing that $113,785.21 be applied to the investment account was passed on October 5, 1948. The reply to the Notice of Appeal to the Income Tax Appeal Board, however, refers to the amount of $114,510.25 as not being a loss sustained by the appellant

1954

MINISTER OF NATIONAL REVENUE v. CONSOLIDATED GLASS LIMITED

Potter J.

(respondent) in the course of the years involved. This difference between the two documents was not mentioned in the arguments of counsel.

Following the receipt of the notification by the Minister, the respondent appealed on February 1, 1952, to the Income Tax Appeal Board, which appeal was heard on November 17, 1952, and judgment given on March 26, 1953, allowing the appeal of the respondent, vacating the assessment, and referring the matter back to the Minister for re-assessment.

From the judgment of the Income Tax Appeal Board the appellant herein appealed, and the matter was heard before this Court on the 27th and 28th days of January, 1954.

The sections of the Income Tax Act relevant to this appeal are 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:

(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,

95A.(1) A corporation (formerly a private company) may elect, in prescribed manner and in prescribed form, to be assessed and to pay a tax of 15 per cent 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.

It was contended on behalf of the respondent herein that there was a loss with respect to the Canadian Libby-Owens Sheet Glass Company, Limited shares which was sustained prior to the end of the 1949 taxation year; that the deduction claimed does not represent a calculation of an apprehended future loss but represents an actual ascertained loss set up in its books, confirmed by its auditors, and shown in its balance sheet in accordance with good accounting practice; that the contention of the appellant herein that the respondent's loss cannot be taken into account because the shares were not sold or disposed of before the 31st of December, 1949, is wrong in law and that whether or not a capital loss was sustained is in each case a question of fact.

1954

MINISTER OF NATIONAL REVENUE v. CONSOLIDATED GLASS LIMITED

Potter J.

On behalf of the appellant it was submitted among other things that the words "capital losses sustained" are to be interpreted with the aid of the definition of "loss" contained in section 127(1)(*w*), formerly section 139(1)(*x*), which is as follows:—

127. (1) In this Act,

(*w*) "loss" means a loss computed by applying the provisions of this Act respecting computation of income from a business mutatis mutandis (but not including in the computation a dividend or part of a dividend the amount whereof would be deductible under section 27 in computing taxable income) minus any amount by which a loss operated to reduce the taxpayer's income from other sources for purpose of income tax for the year in which it was sustained;

It was also submitted by the appellant that no deductions for "capital losses sustained" were permitted unless the losses had actually been realized by the sale or destruction of the portion of the capital in question; that to permit a deduction as a capital loss sustained the depreciation in the value of the shares in question, which occurred over a period of years but claimed in a certain year, would in effect be permitting a taxpayer to use his own discretion as to when he would claim a loss, or in other words permit a taxpayer to put against actual ascertained receipts from his business in one period a loss which was neither suffered nor incurred in that period and that there is no authority for deducting anticipated losses or contingent liabilities.

Counsel for the appellant admitted that the cases on which he relied dealt with the computation of income and not capital losses as such, but he urged that the principle involved was that it was the actual loss and not the anticipated or inevitable loss expected to be suffered, that a taxpayer was permitted to deduct.

Counsel on both sides admitted that there was some dearth of authority on what are "capital losses sustained" as those words are used in section 73A(i)(iii).

The sections of the Income Tax Act under consideration deal exclusively with corporations, and section 127(1)(*h*) defines "corporation" as follows:—

(*h*) "corporation" includes an incorporated company and a "corporation incorporated in Canada" includes a corporation incorporated in any part of Canada before or after it became part of Canada.

1954

MINISTER OF NATIONAL REVENUE v. CONSOLIDATED GLASS LIMITED

Potter J.

It can be assumed that, in enacting these sections, Parliament had knowledge of the provisions of The Companies Act, chapter 27, R.S.C., 1927, and the Companies Acts of the various provinces of Canada.

Several of such statutes provide for the reduction of share capital by companies under certain circumstances and for certain reasons, one of which is by the cancellation of paid-up share capital which is lost.

The English Companies Act, 1948 (11 & 12 Geo. VI, Ch. 28) by section 66 provides as follows:—

66. (1) Subject to confirmation by the court, a company limited by shares or a company limited by guarantee and having a share capital may, if so authorized by its articles, by special resolution reduce its share capital in any way, and in particular, without prejudice to the generality of the foregoing power, may—

(*b*) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share *capital which is lost* or *unrepresented by available assets;*

The English Companies Act, 1877 (40 & 41 Vict., Ch. 26) provided by section 3 as follows:—

3. The word "capital" as used in the Companies Act, 1867, shall include paid-up capital; and the power to reduce capital conferred by that Act shall include a power to cancel any *lost capital,* or any *capital unrepresented by available assets,* or to pay off any capital which may be in excess of the wants of the company; and paid-up capital may be reduced either with or without extinguishing or reducing the liability (if any) remaining on the shares of the company, and to the extent to which such liability is not extinguished or reduced it shall be deemed to be preserved, notwithstanding anything contained in the Companies Act, 1867.

The Companies Act, chapter 27, R.S.C., 1927, by section 61 provides as follows:—

61. Subject to confirmation by supplementary letters patent, a company may by by-law reduce its share capital in any way, and in particular, without prejudice to the generality of the foregoing power, may

(*b*) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share *capital which is lost* or *unrepresented by available assets;*

A number of English cases decided on petitions to the Court to approve resolutions reducing the capital of companies, all of which were made under the Companies Act, 1877, are of assistance.

In *Re Barrow Haematite Steel Company* (1), Cozens-Hardy, J., had dismissed a petition for the confirmation by the Court of special resolutions for the reduction of capital

(1) [1901] 2 Ch. 746.

on the ground that the evidence given by valuers did not prove a loss of capital to the extent alleged in the petition.

On appeal to the Chancery Division, Vaughan Williams, L. J., at page 749 said:—

> It must not be assumed that, if I had been hearing this case by myself, I should have thought that the evidence of the loss was insufficient, and I feel some doubt whether Cozens-Hardy, J., really decided the case on that ground. Indeed, I doubt whether he had quite made up his mind as to what conclusion he ought to draw from the evidence. Be that as it may, my brethren think that the evidence is insufficient, and under those circumstances it is not for me to differ from them.

In *Re Hoare and Company Limited and Reduced* (1), it was proposed to reduce the capital of a company which had recently caused a valuation to be made of its brewery premises, public houses and loans, and had ascertained that these items were of less value than the amounts at which they stood in the company's balance sheet by the sum of £591,707 13s. 7d., and it was proposed to deal with the loss as follows: £396,000 to be written off by extinguishing a corresponding amount of the preferred ordinary shares and deferred ordinary shares, and £195,707 13s. 10d. to be met by writing off the like amount part of the reserve fund of the company. Vaughan Williams, L. J., at page 216 said:—

> We have to see whether there is any lost capital, and to what extent.

He then discussed the circumstances and, after dealing with the propriety of using part of the reserve fund, said:—

> . . . Unless the company by a proper resolution determined to do otherwise with it, I should have said that under such circumstances, in the event of a loss arising such as has occurred in this case, namely, by the reduction of the market value of the tied houses, the whole of that loss was a loss which for the purpose of this statute ought to be written off capital properly so called entirely.

And at page 218:—

> Under those circumstances, inasmuch as there has been an undoubted loss of capital in this case, and we think that loss has been properly allocated as a commercial matter between the share capital and the reserve fund, we may sanction this scheme.

Cozens-Hardy, L. J., after discussing the decision of Buckley, J., in the court below, said:—

> We have to deal here with a large loss—that is to say, the net assets, after payment of debts, which represent the share capital and the reserve fund, are insufficient.

(1) [1904] 2 Ch. 208.

1954

MINISTER OF NATIONAL REVENUE v. CONSOLIDATED GLASS LIMITED

Potter J.

and, after discussing the proposal of the directors, said:—

That being so, it seems to me we are entitled to say it has been established in the present case that capital has been lost, and lost to the extent to which it is proposed to be written off by this order.

He then referred to his decision in *Re Barrow Haematite Steel Company (supra)*, and said that he had meant that in considering the loss of capital you must have regard to the fact that the assets include a reserve fund.

In *Re Rowland and Marwood's Steamship Company (Limited and Reduced)* (1), the petition said that the company was carrying on a profitable business and the loss (of capital) was entirely due to the depreciation in value of the company's ships. The amount of the reduction (of capital) which was sought to be effected was the amount by which the present real value of the fleet (of ships) was less than that shown in the last balance sheet of the company.

Having regard to the decision of the Court of Appeal in *Re Hoare and Company* His Lordship (Warrington, J.) thought he was justified in sanctioning the proposed reduction although no part of the reserve funds was touched.

In *Poole and Others* v. *National Bank of China, Limited* (2), the respondent, the National Bank of China, Limited, petitioned the Court for approval of a resolution reducing its capital on the ground that capital had been lost. The company had been incorporated in 1862 with a capital of one million pounds, divided into 750 founders' shares of £1 each, and 99,925 ordinary shares of £10 each. All founders' shares had been issued and fully paid up and 40,453 of the ordinary shares had been issued, upon which £8 per share had been paid. The remainder of the shares were not taken. The capital of the company had been taken to Hong Kong and converted into Hong Kong dollars at the rate of three shillings per dollar. It was established that the Hong Kong dollar had been steadily falling for some years and was not likely to exceed, in the future, 1s. 8d. English money. Based on this information, the financial statement showed a loss of £142,866 which it was proposed to write off.

(1) (1906) 51 Sol. Jo. 131. (2) [1907] A. C. 229.

Farwell, J., who heard the petition, was of the opinion that the company had lost the amount of capital stated in the petition and made an order that the resolution be confirmed, and the Court of Appeal affirmed that decision. On appeal to the House of Lords, Lord MacNaughton at page 240 spoke of the loss actually proved, saying:—

> So far as loss is actually proved, the case is one of those cases specially mentioned in the Act of 1877.

The House of Lords dismissed the appeal.

In none of these cases was it necessary to establish that the loss had been realized. In *Re Barrow Haematite Steel Company* (*supra*) the evidence was that its iron ore mines and plant had depreciated in value. The petition was not granted because the Court was of opinion that the loss had not been actually proved to the amount set out in the petition. In *Re Hoare and Company Limited* (*supra*) the facts were that brewery premises, public houses, and loans had recently been valued and found to be of less value than the amounts at which they stood on the company's balance sheet by over half a million pounds, but the loss had not been realized. In *Rowland and Marwood's Steamship Company* (*supra*) the company was carrying on a profitable business, and the alleged loss was entirely due to the depreciation in value of the company's ships, but the loss had not been realized. In *Poole and Others* v. *National Bank of China* (*supra*) the Hong Kong dollar had depreciated in value, but the holdings of such dollars had not been converted into sterling, and the loss thereby realized.

If I am right in assuming that the words "capital which is lost", as used in the several Companies Acts, have the same meaning as "capital losses sustained" in section 73A(1)(iii) and that it can be deduced from the cases cited that such capital losses do not have to be "realized", it follows that the depreciation in the value of the shares in Canadian Libby-Owens Sheet Glass Company, Limited held by the respondent, and which occurred over a period of years, were capital losses sustained by the respondent in those years before the 1950 taxation year.

1954

MINISTER OF NATIONAL REVENUE v. CONSOLIDATED GLASS LIMITED

Potter J.

It was strongly urged on behalf of the appellant that the definition of "loss" contained in section 127(1)(*w*) should be applied in determining what is a "capital loss sustained".

Section 12 (1) is as follows:—

12. (1) In computing income, no deduction shall be made in respect of

(*b*) an outlay, loss or replacement of capital, a payment on account of capital on allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this part.

In other words, loss of capital, or capital losses sustained, are entirely different from losses incurred in earning and computing income.

Section 2, subsection (3), is as follows:—

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

Section 11 by its various subsections allows certain deductions, and Division C, which includes sections 25 to 29 inclusive, provides for certain exemptions and deductions in computing income, but none allow deductions for capital losses.

According to section 127(1)(*w*), "loss" means a loss computed by applying the provisions of this Act respecting computation of income from a business *mutatis mutandis*—.

It is difficult to understand how, in a case such as the one under consideration, the definition of "loss" contained in section 127(1)(*w*) can be applied in determining a capital loss sustained, unless the section is taken to mean that, in determining whether or not capital which is made up of the shares in another corporation such as the Canadian Libby-Owens Sheet Glass Company, Limited has actually depreciated in value from $154,510.25 to $40,000, the provisions of the Act are to be applied to the financial statements of such a company.

In this case it must be assumed that was done, for it is not denied by the appellant that the shares of Canadian Libby-Owens Sheet Glass Company, Limited which represented an investment made in the years 1920, 1921, and 1922, of $154,510.25, had fallen in value to $40,000 in 1948. The evidence adduced by the respondent established that in fact, and no evidence was offered by the appellant to the contrary.

The only question in this connection is, therefore, whether or not the respondent is entitled to deduct that amount as a capital loss sustained before the end of the 1949 taxation year.

In addition to the rulings in the cases already cited, there is an additional reason for not accepting the assessment of the appellant by which the undistributed income of the respondent was determined to be $164,054.05, including $114,510.25 which the respondent had deducted as the loss in value of the shares held by it in the Canadian Libby-Owens Sheet Glass Company, Limited.

It is common practice for companies having tax-paid undistributed income on hand to capitalize the same and increase the capital of the company accordingly, if necessary, or to issue shares not already issued in that amount and allot them to shareholders in proportion to their then holdings as fully paid shares. If, in the case of the respondent, it were decided to capitalize the undistributed income of $164,054.05 determined by the appellant and to issue redeemable preference shares having a total value of $164,054.05, the assets which such shares would represent would be over-valued by $114,510.25, the amount by which the shares in Canadian Libby-Owens Sheet Glass Company, Limited had fallen in value.

If, within a few months or years after the preference shares were issued to the then shareholders, the company decided to redeem the issue, it is quite evident that the respondent would not be in a position to pay $164,054.05 without using resources other than those represented by its supposed undistributed income.

By paragraph A13 of the amended Notice of Appeal the appellant claims that if the amount of $114,510.25 is held to be a capital loss sustained by the respondent up to December 31, 1949, then the respondent 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, and paragraph 18 claims in the alternative that, according to the books of the respondent, profits or gains made by it exceed all capital losses sustained and there is no amount by reason of these capital losses, profits or gains which can be deducted from the undistributed income on hand.

1954

MINISTER OF NATIONAL REVENUE v. CONSOLIDATED GLASS LIMITED

Potter J.

On July 31, 1950, the appellant received the respondent's statement of undistributed income on hand at the end of the 1949 taxation year, which by Schedule 2 showed its capital losses sustained, including its said loss on the Canadian Libby-Owens Sheet Glass Company, Limited shares, to be $243,835.81 and its capital gains realized to be $14,142.18. The appellant dealt with those figures and, in his assessment of May 22, 1951, deducted $114,510.25, claimed as capital loss sustained by the respondent on its Canadian Libby-Owens Sheet Glass Company, Limited shares, to which the respondent objected and filed a Notice of Objection. Notification by the Minister, dated the 13th of November, 1951, was given, confirming the assessment.

On February 1, 1952, the respondent appealed to the Income Tax Appeal Board, and on October 21, 1952, the appellant delivered a reply to that notice of appeal which dealt with the claim of the respondent that the $114,510.25 had been improperly disallowed as a deduction, but raised no issue with regard to alleged capital gains, and in that position the matter went before the Income Tax Appeal Board.

In other words, the question of being allowed to increase the capital profits or gains made by the respondent in the years in question above those set out in the Notice of Assessment was first raised in the amended notice of appeal dated October 14, 1953.

While I express no opinion on the merits of this claim of the appellant, I do not think that the assessment can be varied or a new assessment made by such procedure.

For the reasons given, I hold that the amount of $114,510.25 was properly deducted by the respondent in its statement of undistributed income as capital losses sustained by it in those years before the end of the 1949 taxation year, within the provisions of section 73A(1)(iii) of the Act.

The appeal will, therefore, be dismissed and the assessment varied by deducting from the undistributed income of $164,054.05, assessed by the appellant, the sum of $114,510.25, and by reducing accordingly the tax of 15 per cent payable, and the respondent will have its costs.

Judgment accordingly.