BETWEEN:

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

AND

KENNETH A. WHEELER ..... RESPONDENT.

Toronto 1965 Nov. 30
Ottawa 1966 Aug. 19

Income tax—Income Tax Act, R.S.C. 1952, c. 148, sections 3, 4, 10(1)(j), 83(3)—Proceeds from sale of "mining property"—Exemption for prospectors and grubstakers—Whether property acquired as a result of prospecting—Whether income exempt.

One must consider the application of sections 4, 83(3) and 139(1)(*e*) of the Act, when the taxability of profits derived from the sale of two parcels of mining properties was in issue.

One of the transactions related to the purchase and resale of property acquired from one Karfilis, as described in the concurrent reasons for judgment in *M.N.R. v. Karfilis ante* p. 129 in respect of which a profit of $52,300 was realized. This income had been considered exempt under section 83 by the Tax Appeal Board.

The Minister now appeals from that decision.

Kenneth A. Wheeler testified that he had first obtained a ten-day option to acquire this property and that during that interval he had discovered flaws in most of the titles of sufficient importance to enable him, if he had wished, to repudiate the purchase.

However, after hiring the services of a prospector to inspect the properties, he had decided to perfect the titles at his own expense and complete the transaction.

The other transaction related to the sale of claims that the taxpayer and a partner, Whalen, had had staked after learning that the existing claim holder was allowing them to lapse. These claims were sold shortly afterwards for $125,000 of which Wheeler's original half-interest (or $62,500) was considered exempt under section 83.

However, the Minister considered that the taxpayer had, in the meantime, acquired his partner's half-interest for a cash payment of $9,000. After allowing a deduction for that amount, the Minister treated the remaining portion of the profit as taxable in the taxpayer's hands on the ground that it arose not from prospecting but by purchase from his partner.

The Board confirmed that section 83 did not apply to render the second half of the taxpayer's profit exempt and the taxpayer now cross-appeals from that decision.

Held, That the property acquired from Karfilis was not acquired as a result of prospecting efforts that took place before the agreement was entered into and the exempting provision of section 83 did not apply.

2. That the other property had been acquired merely by staking, without any antecedent prospecting, and section 83 did not apply.

3. That as to the amount deductible in respect of the alleged payment to Whalen, the taxpayer failed to discharge the onus of proving the Minister's calculation incorrect.

4. That the appeal was allowed and the cross-appeal dismissed.

1966

MINISTER OF NATIONAL REVENUE v. WHEELER

APPEAL and CROSS-APPEAL from a decision of the Tax Appeal Board.

D. J. Wright, Q.C. and *J. E. Sheppard* for appellant.

R. M. Sedgewick, Q.C. and *D. G. Mathewson* for respondent.

KEARNEY J.:—We are here concerned with an appeal and a cross-appeal from what in effect were two separate decisions rendered in a single judgment by the Chairman of the Tax Appeal Board on September 13, 1963[1].

The Minister's appeal is from a judgment of the Board which held that the profits realized by the respondent on the sale to Vandoo Consolidated Explorations Limited (hereinafter sometimes referred to as "Vandoo") of certain mining claims located in the Township of Raglan, province of Ontario, and which were assessed to tax by the appellant were exempt from tax in virtue of section 83 of the *Income Tax Act*.

The respondent's cross-appeal is from the second part of the Board's decision which in confirming the reassessment of the Minister held that one-half of the profits realized by the respondent on the sale also made to the aforesaid Vandoo company of certain other mining claims situated in the North West Territories near Dismal Lake were not tax exempt under s. 83 and were subject to tax by reason of ss. 3, 4 and 139 (1)(*e*) of the Act.

As appears more fully by the notice of appeal, the reply thereto and the transcript, the present case is in part a sequel to *Minister of National Revenue* v. *James Karfilis*[2] in which I have this day rendered judgment, since the same Ontario Raglan claims are a subject-matter of litigation in both cases.

As set out in the judgment appealed from, the respondent, who was an employer of prospectors or a grubstaker, did not file any return for his taxation year 1956. By reassessment dated March 16, 1961, the Minister held the respondent taxable for 1956 on $103,731.05. Of this amount $52,301.05 was attributed to the taxable income which the respondent derived from resale of the aforementioned

[1] 33 Tax A.B.C. 231. [2] *Ante* p. 129.

Raglan claims and the remainder of $51,500 to the sale of what, for brevity's sake, is sometimes referred to as N.W.T. or Dismal Lake claims.

At the opening of the hearing, counsel for the appellant, by notice of motion, made an application to amend the notice of appeal by adding thereto a new paragraph reading as follows:

2A. Notwithstanding the assumptions in paragraphs 2(*a*) and 2(*b*) above on which the appellant acted when making the assessment of March 16, 1961, the appellant now alleges and states:

(*a*) the said agreement between the respondent and James Karfilis was not an agreement to grant an option, but was a firm agreement to purchase the property in or near Raglan Township;

(*b*) the said Anthony Plexman was not a prospector and was not employed by the respondent;

(*c*) alternatively, if the said Anthony Plexman was by profession a prospector, then he was not employed by the respondent.

In support of the amendment set out in paragraph 2A(*a*) of the motion, counsel for the appellant stated that it was by error that the agreement entered into between the respondent and James Karfilis was referred to in paragraph 2(*a*) of the notice of appeal as an option to purchase, instead of a firm agreement to purchase; that the error only came to light on examination of the respondent for discovery; and that everybody before the Board had proceeded on the basis of this erroneous assumption.

Counsel for the appellant concurred in the above statements and the amendment to paragraph 2A(*a*) was allowed by consent.

Counsel for the respondent, however, took exception to the amendment contained in subsections (*b*) and (*c*), and the Court suggested, if he so desired, that the case be adjourned for further hearing in order to afford him an opportunity to give additional consideration to his argument, but counsel for the respondent stated that he was ready to proceed immediately. After hearing the argument of the respective counsel, I allowed the proposed amendments with costs in any event in favour of the respondent.

I considered that their purpose was so that counsel for the appellant would not be estopped from submitting that, although Mr. Plexman's occupation was that of a prospector, it did not follow that he was necessarily acting in that capacity in the present instance; and similarly, so that he

1966

MINISTER OF NATIONAL REVENUE v. WHEELER

Kearney J.

would not be estopped from contending that the relationship between the respondent and A. Plexman was that of employer and independent contractor and not that of master and servant.

As amended, the relevant portions of the notice of appeal to the Raglan claims read as follows:

A. STATEMENT OF FACTS

1. By Notice of Re-assessment dated March 16, 1961, the Appellant added to the reported income of the Respondent for the 1956 taxation year the sum of $103,731 05; and assessed income tax thereon in the amount of $51,940 56.

2 In re-assessing the Respondent on the 16th day of March, 1961, with respect to his 1956 taxation year, the Appellant acted upon the following assumptions of fact:

(a) during the month of July 1956 the Respondent entered into an agreement with one James Karfilis whereby the Respondent paid to Karfilis $1,000 in consideration for an option to purchase 29 mining properties in or near Raglan Township in the Province of Ontario;

(b) after obtaining the option from James Karfilis, the Respondent employed a prospector, Anthony Plexman, to examine the mining properties in or near Raglan Township;

(c) upon receiving Anthony Plexman's report, the Respondent proceeded to pay the balance of the purchase price to James Karfilis and obtained title to the mining properties in or near Raglan Township;

(d) subsequently, in September 1956, the Respondent sold the above described mining properties to Vandoo Consolidated Mines Limited for a consideration of $60,000 and 200,000 shares of the capital stock of Vandoo Consolidated Mines Limited;

(e) by a letter to the Respondent dated June 2, 1955, one James A. Whalen acknowledged receipt of $250 from the Respondent as consideration for a one-half interest in the grub-staking of two prospectors named Ernest Boffa and Leonard E. Peckham;

2A Notwithstanding the assumptions in paragraphs 2(a) and 2(b) above on which the Appellant acted when making the assessment of March 16, 1961, the Appellant now alleges and states:

(a) the said agreement between the Respondent and James Karfilis was not an agreement to grant an option, but was a firm agreement to purchase the property in or near Raglan Township;

(b) the said Anthony Plexman was not a prospector and was not employed by the Respondent;

(c) alternatively, if the said Anthony Plexman was by profession a prospector, then he was not employed by the Respondent.

3. With respect to the profit which the Respondent realized on the sale of the mining claims in the area of Dismal Lake, N.W.T., the Appellant assessed income tax on only one-half of such profit.

B. THE STATUTORY PROVISIONS ON WHICH THE APPELLANT RELIES AND THE REASONS WHICH HE INTENDS TO SUBMIT

4. The Appellant states that the Respondent did not acquire his interest in the mining properties in or near Raglan Township as a result of his efforts as a prospector; under an arrangement with a prospector made before the prospecting; or through the efforts of a prospector who was the Respondent's employee.

7. The Appellant relies, *inter alia*, on Sections 3, 4, 83 and 139(1)(*e*) of the *Income Tax Act*.

With respect to the respondent's reply and cross-appeal, the following are the relevant statement of facts and statutory provisions on which the respondent relies:

A. STATEMENT OF FACTS

1. The Respondent admits the allegations of fact contained in paragraph 1, clauses (*a*), (*b*), (*c*) and (*d*) of paragraph 2 thereof, and paragraph 3.

I will presume that the respondent admits sub-paragraph (*a*) and does not admit sub-paragraphs (*b*) and (*c*) of paragraph 2A.

B. STATUTORY PROVISIONS ON WHICH THE RESPONDENT RELIES AND THE REASONS WHICH HE INTENDS TO SUBMIT

3. The Respondent states that the learned Chairman of the Tax Appeal Board was correct in finding that the Respondent acquired his interest in the mining properties in or near Raglan Township through the efforts of a prospector who was the Respondent's employee and that as such, the proceeds of disposition of such interest are entitled to the benefit of the exemption created by subsection 2 of Section 83 of the *Income Tax Act*, and are not required to be included by the Respondent in including his income for the 1956 or any other taxation year.

5. The Respondent relies, *inter alia*, on Section 83 of the *Income Tax Act*.

I propose to deal first with the most important issue, namely, the acquisition of the mining properties located in Ontario.

The evidence applicable to the aspect of the case is to be found in the testimony of Kenneth A. Wheeler the respondent, Anthony Plexman and John S. Grant, the latter of the legal firm of Manley and Grant.

Counsel for the parties agreed that there is no dispute as to the figures involved in the reassessment and that the only issue is whether the instant transaction is exempt under s. 83 of the Act. If the Court finds that it is exempt, the appeal must be dismissed, and if not, the respondent must be held taxable on the profit of $52,231.05 as claimed by the appellant.

1966

MINISTER OF NATIONAL REVENUE v. WHEELER

Kearney J.

On examination in chief the respondent testified that he was engaged in the grubstaking and mining business. He described what was involved in the occupation of grubstaking by stating that it involved sending prospectors out to stake claims in various mining areas of the country and in turn disposing of those claims. And in so far as his dealings with the prospector were concerned he stated:

> Well, I finance him to go into these various areas I designate and stake certain claims in my behalf, pay his expenses in and pay him so much per claim for his work.
>
> When the prospector stakes claims they belong to me. He is acting on my behalf.

He had been in the grubstaking business since approximately 1950. The witness described how he first became interested in the Raglan Township area.

> Raglan Nickel, which is a mining company, in the summer of 1956 had properties in the Raglan Township and was pretty active in the area.

The witness learned that Mr. Karfilis had substantial holdings of mining claims in that area and he made a point to contact him. He had only known him casually before and had never previously transacted any business with him.

> Q. How far were they from Raglan Nickel properties?[1]
>
> A. Well, they were practically adjacent. I believe they were one group removed from Raglan Nickel.

Mr. Wheeler said that Mr. Karfilis had a total of 100 claims and "had a deal on with 30 of them with Mining Corporation and that he was free to deal on the balance of the 70".

The witness said that they talked about the whole of the claims initially, but that, as he recalls, it came down to one particular group that, locationwise, appealed to him, consisting of 29 claims, and Mr. Karfilis "had two offers to give me". The first of these, which was filed as Exhibit R-1, was a photostatic copy of the same agreement dated July 17, 1956, which was filed in the Karfilis case as Exhibit R-6, whereby the latter agreed to sell 29 Raglan Township claims for $29,000 and 75,000 shares of escrowed stock of Vandoo Consolidated Explorations Ltd. The respondent

[1] The evidence makes no reference to any relationship which existed between Raglan Nickel and Raglan Mining Co. Ltd, but, as appears later, the same two names are used to describe the mining property on which the copper discovery had been made previously.

accepted this offer, paid $500 on account and agreed to pay the balance on or before July 28, 1956. The other, which was filed as Exhibit R-2, consisted of an irrevocable option given by Mr. Karfilis to the respondent, which entitled the latter to acquire for one dollar, receipt of which was acknowledged, and $50,000 cash payable on or before July 23, 1956, all the mining claims, totalling not less than seventy, owned by Mr. Karfilis in the Townships of Raglan and Lyndock, save 30 claims in respect of which he was then carrying on negotiations with Mining Corporation.

Mr. Wheeler stated that he accepted the offer relative to the 29 claims mentioned in Exhibit R-1.

The witness had no personal knowledge about the Raglan area. He said:

> . . . The only thing I knew about Raglan was that Raglan Nickel were getting some very stimulating results and it had been a stock market feature. That is what attracted me to the—

Q. Had you ever been to the Raglan area yourself?

A. I had never been there.

Q. And why did you agree to buy 29 claims for $29,000 with so little knowledge on the subject?

A. Well, that is exactly what I would like to get to.

Following the meeting, the witness called Mr. Anthony Plexman in Burlington, who was a prospector whom he had been using for several years whenever there was any work relative to staking or prospecting. His evidence as to what happened during this period is reflected by the following extracts from his testimony:

> . . . my words to him were that I had acquired a ten-day option on 29 claims in Raglan Township, that I was fighting time, I wanted him to pick up his bush clothes. I asked him at the same time that I told him this was a copper-nickel situation, if he had any powder available for taking nickel tests. He said he had. It is called—I don't know whether it is of any interest to the court—dimethyl gloxian.

[He requested Plexman to pick up a geological map and a claim map of Raglan Township and to meet him as early as possible.]

Q. ... Did you have a meeting with him the next day?

A. Yes, the following morning, and we plotted these various lot numbers, etc. on the claim map, and I instructed him I wanted him to leave immediately for the property, and I specifically instructed him, No. 1, to go on the Raglan property proper, that is Raglan Nickel, see what kind of geology the property had, correlate that with these 29 claims I had under option. If he came across any outcrops to make a field test for nickel.

1966

MINISTER OF NATIONAL REVENUE v. WHEELER

Kearney J.

Q. Did you ask him to make any tests for sulphides?

A. Well, you can't—I don't think you can actually make a test for sulphides Sulphides are something that you can find on the surface. They would be apparent to a man like Mr. Plexman.

Q. Oh, you can recognize them if they are showing?

A. Yes.

Q. Now, what was he supposed to do after he completed this operation?

A. Well, as I explained to him I was fighting time, I only had ten days, and I impressed that on him that he had to be pretty diligent and go over this thing with a fine-toothed comb to the best of his ability within that period of time and he was to report to me within approximately a week if not sooner.

Q. What arrangements did you have or did you make with him for payment for his work?

A. I told him I would pay him $500 in cash for his work plus his expenses, and as I recall I gave him $250 the morning he left to defray his expenses. And he left to see the property the same day.

Q. Now, at that time did you take any steps or issue any instructions concerning the question of title to the 29 claims involved?

A Yes, I instructed my solicitor, Mr. Manley, I advised him that I had already dispatched Mr. Plexman to the property and that I wanted him to make a title search of these various claims that I had optioned, or properties. And as I recall he retained a firm of Chown and Cooke who were located in Renfrew, for that purpose.

Q Now, when did you hear back from Plexman?

A. Well, I didn't hear from him directly, I was out of town, and while I can't pinpoint the date, I would assume it was approximately a week later, and Mr. Grant of the firm of Manley, Grant and Armstrong advised me that Mr. Plexman had phoned him from this Raglan area, that he was pretty excited, he had found a sulphide—

Q. He Plexman or he Grant?

A. Well, Plexman was excited but I think Mr. Grant was a little enthused too because of what Plexman had told him. And the message he relayed to me was that Mr. Plexman had said that the geology was identical with what they were getting the results in in the Raglan Nickel He had found a significant sulphide showing on the south end of the property.

Q. Is a sulphide showing significant in the grubstaking or mining business?

A. Well, it is. It is indicative of mineralization. It is a good indicator.

Q. Now, you were answering a question about the same time that Mr. Manley had a telephone conversation with someone?

A. Well, apparently he had also advised Chown and Cooke that time was of the essence, we had to have an answer on these things within ten days or my option would have expired, and they advised him that—

MR SEDGEWICK:

Q. Did you receive advice from Mr. Manley in relation to the title of the properties?

A. Yes, sir.

MR. SEDGEWICK: I think I can go that far.

Q. And based upon the advice that you received were you under the impression that you were obliged to complete the purchase in the letter of July 17th or otherwise?

A. Not at all.

Q. Did you subsequent to the 26th of July, Mr. Wheeler, complete the purchase of these claims from Mr. Karfilis?

A. Well, the sequence of events that followed was that I had been advised by my attorneys that there was a fault in every one of the titles with the exception of one claim—

THE WITNESS: But on the strength of what I had heard from Mr. Plexman in my humble opinion this had the nucleus of a good mining bet. So I instructed Mr. Manley to contact, I believe it was, a Mr. Montgomery who was acting for Mr. Karfilis, explain to him that the titles were in a mess, you might consider hopeless, but nevertheless I was prepared to go ahead and acquire that property if he would give me a further ten-day extension, I would go ahead at my own expense and try to put the titles in shape.

The respondent added that a further $350 was paid by Mr. Manley to Mr. Karfilis to give him a further extension, which payment Mr. Karfilis acknowledged on July 27 (Ex. R-3). The purchase was closed, the witness said, on August 3. In answer to the question

> In the interval between July 26 and August 3 what did you do or what instructions did you give that action be taken?

the witness said that he talked to Mr. Manley and that pursuant to Mr. Manley's advice he sought the aid of the late James Maloney, who was a Member of Parliament for Renfrew. His evidence concerning Mr. Maloney's part in the matter is as follows:

Q. Do you know whether Maloney took some steps in the interval?

A Yes, Maloney was responsible for putting these various documents in shape, getting their necessary signatures in order to make them—so that they could deliver title.

Q. And what was involved as far as the landowners were concerned? Did they receive any additional consideration?

A. Yes, Maloney apparently knew them all personally or most of them and he got them together and he advised Manley that it would cost $3,000, which was $500 for each landowner, and that if the property was sold into a mining company he wanted them each to receive 5000 shares of stock in whatever company acquired these claims.

Q. Was the $3,000 paid?

A. I paid the $3,000.

Q. To whom?

1966

MINISTER OF NATIONAL REVENUE v. WHEELER

Kearney J.

A. Mr Maloney.

Q And at a subsequent date were the landowners issued 5,000 shares?

A. They all received 5,000 shares of stock.

Q Did this take place before August 3rd or after?

A. They received the $3,000 as I recall August 1st, because this was all a condition that he couldn't clear the claims or guarantee that he could get us proper conveyances without this money, plus Manley's representations that they would get stock. They got the money on August 1st and subsequently they got 5,000 shares of stock.

Subsequently, a transfer of the various properties concerned from Mr. Karfilis was made to Mr. Hutchison, who was a nominee of the respondent.

As appears by Exhibit R-4 dated August 7, 1956, Geo. S. Hutchison as nominee of the respondent offered to sell the 29 Raglan mining claims to Vandoo Consolidated Explorations Limited for $60,000 and 200,000 shares of the said company's stock, which was accepted by the company and attested under seal with two signatures. In this connection, the following portion of his evidence is of interest:

Q Now, when did you first make the decision to resell the claims you acquired from Karfilis to Vandoo?

A. After I received Plexman's report, which was a bullish one, I had a problem because my attorney had reported to me that all these documents had a defect in the title with the exception of the claim that Karfilis had staked. But nevertheless I approached Mr. Bishop who was the president of Van Doo, told him I had this certain property and that I was making attempts to acquire it subject to clearing up title and asked him if he would have any interest if I was successful in getting title and acquiring it. So he told me to make a written submission to the board for their consideration, if, as and when I had title.

The witness later stated:

I had no guarantees that Van Doo would acquire these claims.

Q. No, I didn't say whether you had any guarantee—as a matter of fact that is my point, I don't think you did have a guarantee, but I am suggesting that you knew perfectly well that you were going to make every effort to turn these claims over to Van Doo at a profit at the time you acquired them from Karfilis?

A. Well, Van Doo or other companies.

Further relevant testimony was given by the appellant on cross-examination:

Q. All right, then, I will ask you if you were asked these questions and made these answers on your examination for discovery.

Question 190, my lord, at page 27. Does your lordship have that?

"Q. Were these claims—he showed you what he had and you picked these out as being particularly attractive?

A. No, I couldn't pick them out I said as far as I knew it could have been a sugar bush. It was merely something that was relatively close in to this particular find, and the fact that Mining Corporation evinced interest according to him or had optioned a group of his, I figured if it was good enough for a major it was good enough for me."

Were you asked that question and did you make that answer?

A. Yes, I guess.

Q. Was it true?

A. Well, I think your question is kind of unfair Your original question asked me if my desire to acquire these claims was predicated wholly upon the fact that Mining Corp was in there and it was not That was a contributing factor.

Q. Just a minute, Mr. Wheeler. Would you answer my question first and then you can have an opportunity to explain it. I said were you asked that question and did you make that answer?

A. Yes.

Q. And was it true?

A. I have no alternative but to say yes.

Q All right Well, then, would you like to make your explanation to his lordship?

A Well, in any camp when a major evinces interest it is just natural that it is going to stimulate thinking and interest in the area. The reason that I was interested in these particular claims—that was a contributing factor certainly—the fact was that the thing that—and the only reason I went through with this deal was the fact that Plexman went up there and found something.

Q. Well, I know that is your story now, Mr. Wheeler, but what my point is, that when you were dealing with Mr. Karfilis you couldn't care less about those claims. You knew there was a strike in there, you knew the area was hot, you knew that Karfilis had some claims and you wanted to get your hands on them, isn't that right?

A. True

Re-examined, the respondent testified as follows:

Q. When you closed your deal with Mr. Karfilis, Mr. Wheeler, how did you pay him the moneys that were due him under the July 17th agreement?

A. That was paid in cash.

Q. Did you get any receipt from him?

A. No, sir.

Anthony Plexman, aged 50, in answer to the question as to his occupation, stated:

Presently I work for Butler manufacturing in Burlington in the welding department. I was a prospector up until about three years ago.

The witness stated that he was a prospector almost continually, about 80 per cent of the time, from about 1937,

1966

MINISTER OF NATIONAL REVENUE v. WHEELER

Kearney J.

except for the war, when he served in the Air Force as a navigator until three years before the trial and explained what was involved as follows:

Q. What is involved in being a prospector? What work do you do?

A. Well, primarily it is looking for minerals and staking of claims and looking at showings and things like that.

Q. On whose behalf did you carry on these activities?

A. Many people. I have worked for companies, I worked for individuals and I have worked for myself.

The witness went on to say that during a period of over seven or eight years he had worked for Mr. Wheeler about fifteen or twenty times in Quebec, Ontario, North West Territories, Saskatchewan, Manitoba, New Brunswick. He testified in that connection as follows:—

Q. And without directing your mind specifically to the Raglan Township property, can you tell the court the type of work that you would normally perform for Mr. Wheeler?

A. It would be staking or going into—say going into a property and investigating it for him and advise him whether it was worth something or perhaps actually prospecting on the one property.

Q. Are you a geologist by any chance?

A. No, but I have studied mineralogy and geology. I was in arts course at Queen's for awhile, I took courses outside, and my background is such that I come from up north, I was born there, and I worked in many, many mines—not many, many mines, but I worked in, I would say, 10, 15 undergrounds, you know, hardrock mines and had considerable experience in prospecting.

He generally got $500 a month plus expenses out of Toronto.

Dealing specifically with his work on the property in Raglan Township in July of 1956 and as to how he first became involved in it, the witness stated:

A. Well, I used to do a lot of work, like I say on my own, I would be cruising around the country and prospect. Anyway the Raglan claims came along and I found myself in a place or somehow or I was here, anyway somehow it came along and Mr. Wheeler called me and asked me to go up there and look at the Raglan showing and see what the possibility was of acquiring claims Now, in this particular area most of the ground is patented, it belongs to farmers, and the chances of staking a group on Crown lands were, you might say, negligible, you couldn't get enough. You might get a claim here and perhaps a claim there.

And I went in and I saw the showing on Raglan Mines Limited, a surface showing, and very little work had been done on it. But it was an impressive showing. It was probably about 20 or 30 feet of mineralization, chalco-pyrite in gabbro, and there was a couple of trenches on it which showed a length of say 30 to 50 feet and a width say of 20 feet. Subsequently of course after it was drilled this

showing lay in about this angle (indicating) possibly 15 degrees from the horizontal, and what we were looking at in a cross-section, say 20 feet, actually turned out to be much narrower. I mean this is a condition that happened a few months later, I mean during the diamond drilling, at the time we didn't know.

Speaking about the instructions he received from Mr. Wheeler in relation to this trip, the witness said:

He told me to look at the Raglan showing To assess it and get an idea of whether it had a potential and if so that he had an option on some claims and I was to look at those during the same trip.

Q And did you look at those?

A. Yes, I did.

Q What did you do on those claims?

A. I walked around, as you do, with a hammer and you are looking for sulphides, you are looking for this same basic intrusive that is gabbro which was present on the Raglan property. And this area had been mapped geologically, on the geological maps, and it showed bits of intrusive in several places. In other words, the potential of the area was centred around this intrusive and it had an aerial extent of probably, I would say, six, eight square miles. This was the potential on the outside of this gabbro body.

The witness stated that he probably spent four or five days in examining the properties. Concerning the results of his examination, he testified as follows:

Q. And did you make a report on what you had found from your examination?

A. What I did do was suggest that—whether it was a report or not I mean at this time I am not certain.

Q. I am talking about an oral report, not written?

A. Yes, and I suggested that this Raglan Mine had a big potential, apparently it appeared that way on top Of course since that it was not proven as a mine, so you never can tell. But suggested being so close and in this area, it was such a good showing—I mean you can walk the bush for years and not see anything at all—and you can only know this showing was there, it was on top, and you didn't see enough of it, and this being an impressive thing, and it did impress me that it had a potential at that time.

Q. Would you say you were enthusiastic about it?

A. I was.

Q. Do you remember to whom you spoke on your findings.

A. It is a long time, I wouldn't want to commit myself on that.

Mr. SEDGEWICK:

Q. Do you recall whether the ground that you looked at was Crown land or patented land?

A. It was patented land, Crown land. It was farms and actually there were buildings, farmers living in them at that particular time.

Q. What do you have to do in relation to prospecting on patented land?

1966

MINISTER OF NATIONAL REVENUE v. WHEELER

Kearney J.

A. Well, you have to ask the owner if you can go on it.

Q. That is the owner of the land?

A. Yes, or get permission from whoever has the option to do it or sometimes, however, it is, you have to have permission someway, you cannot trespass on private land.

Q In relation to the work you were doing up there did you ask permission of the landowners to go on the property?

A. Some of them I did, yes.

Q. How did you know which properties you were to examine for Mr. Wheeler?

A. Well, I was told somewhere along the line. I mean I was given instructions, if they have an option, or you see in that particular area it is the lot and concession and you pick up a blueprint and you see what concession this is and so on. I mean this is your guide and this is all you need. You don't need the claim numbers or anything else.

Q Did you have a map?

A. I did.

Q And were these properties marked on the map?

A. Well, they were, yes, they were on the blueprint.

Q. Were you ever told how long a period of time you had to complete this work?

A. Well, the work involved many things and I imagine from one end to the other, from examining the Raglan to looking at this ground, to the actual prospecting, would probably take a month, five weeks, somewhere in that range, three weeks to five weeks.

Q. But when Mr Wheeler gave you his instructions did he give you any time limit within which you had to report back?

A. This is something I don't want to commit myself on this, I don't know I imagine there was but like I say—

Q. Well, don't guess at it Thank you, my lord.

Cross-examined, the witness was asked:

Q. Mr Plexman, I guess you have pretty well given his lordship the extent that you can recall of the instructions from Mr. Wheeler in connection with this transaction?

A. I believe so.

John Stewart Grant, a lawyer, testified that he acted for Mr. Wheeler in relation to the acquisition of certain properties in Raglan Township in 1956 and received from him certain instructions to have the title to certain properties in Raglan searched. In answer to the question "Did you give advice to Mr. Wheeler concerning the state of the title to the properties?" the witness said:

> My best recollection, Mr Sedgewick, is that Mr Manley and I discussed this letter and I wouldn't want to be sure that I gave the opinion to Mr. Wheeler that the titles needed correcting I am satisfied however that Mr. Manley and I discussed that and I am satisfied

that Mr. Manley conveyed that to Mr. Wheeler. I may have been present at the time. It was within the office and I don't exactly recall who told the client that we had this search which showed certain deficiencies I wouldn't want to take credit for that personally.

Q. And what was your opinion concerning the state of the title?

A. There were paper deficiencies. The prior search indicated that, to our knowledge at that time, there were no bars of dower. This was common to a great number of the lots. They purport to be made by farmers, property owners up in the area, and there was no evidence that the wife had barred dower. They were patented land and we had to have a deed. There were other deficiencies which I would not presume to remember now ten years after the fact, but I can recall that both Mr. Manley and myself were quite upset about this search and it didn't seem to be one that was going to be able to be resolved without some remedial work, the title itself, that is.

Q . . . was the title matter discussed with Mr. Wheeler with reference to his obligations under that agreement? [Karfilis agreement Ex. R-1]

A. Yes, Mr. Manley and myself discussed this and one of us, I wouldn't say who again, certainly conveyed to Mr. Wheeler that he could back out of that transaction if he wanted to without bothering to remedy the title and have it come back, by reason of deficiencies.

Q. Did he nevertheless complete the purchase of the property?

A. Yes, he did, sir.

Q Did you receive instructions from him with respect to completing?

A. Yes, I did.

Q. Can you tell me what those instructions were?

A. To do what we could to perfect the title, if it was perfectable and as quickly as possible, so that he could make title again if he chose to resell them.

Q. And can you tell me whether or not the title matters were clarified by the time the purchase was concluded?

A Yes, they were. We wouldn't have let him buy it I don't think in view of our previous opinion unless he had wanted to waive our opinion, sir So my recollection is that we did remedy the deficiencies.

The witness confirmed that to have the title matters cleared up it cost $3,000 and 5,000 shares to each of the parties concerned. And he added:

> We relayed this to Mr. Wheeler. It was also our opinion that he didn't have to make those payments because really it was perfecting the vendor's title, but he seemed very anxious to have the claims and stand the extra charge.

The witness said that he received a phone call from Mr. Plexman during the period that the titles were being worked on. His memory was a bit hazy on it but he thought it was in the last two weeks of July 1956.

1966

MINISTER OF NATIONAL REVENUE v. WHEELER

Kearney J.

A. I certainly had a telephone call from Mr. Anthony Plexman, I recall it vividly, one afternoon in my office, and he was calling from Renfrew, and I would place it any time—certainly between the time that Mr. Wheeler made his agreement with Mr. Karfilis and the closing of the transaction.

The subject matter was that he didn't know where to get Mr. Wheeler to report to him and that he had been sent up there and wanted me to know that he had found something that was highly interesting and I had to get Mr. Wheeler to get in touch with him, which I did. I told Wheeler about it, I presume he got in touch with him.

The facts, in so far as they are necessary for the determination of the question relating to the profit from the purchase and resale of the Raglan properties, as I view the matter, may be stated—in a manner that is as favourable to the respondent as possible—quite simply, as follows:—

1. The respondent having entered into certain agreements whereby he was entitled to certain rights falling within the definition of "mining property" in s. 83 of the *Income Tax Act*, in July, 1956, entered into an agreement to purchase such properties from Mr. Karfilis.

2. After entering into such agreement, the respondent employed a prospector (whether as an employee or as an independent contractor, I need not decide) to examine the mining properties that were the subject matter of the agreement. Concurrently, the respondent had his solicitors search the titles to these properties and received certain advice as a result of which he believed that he was entitled to repudiate the agreement with Mr. Karfilis.

3. After receiving a favourable report from the prospector, the respondent decided not to repudiate the agreement and proceeded to acquire the mining properties in accordance with it at some expense to himself in addition to the consideration contemplated by the agreement.

4. The respondent subsequently, i.e. a few weeks later, resold the mining properties at a profit, being the amount that I have already referred to as being in dispute.

On these facts, the respondent claims that he is exempt from income tax on the profit in question by s. 83 of

the *Income Tax Act*. It is to be noted that s. 10 (1)(*j*) reads:

10 (1) There shall not be included in computing the income of a taxpayer for a taxation year

. . .

(*j*) an amount received as a result of prospecting that section 83 provides is not to be included,

and s. 83 stipulates in part:

83 (1) In this section,

. . .

(*b*) "mining property" means a right to prospect, explore or mine for minerals or a property the principal value of which depends upon its mineral content, and

(*c*) "prospector" means an individual who prospects or explores for minerals or develops a property for minerals on behalf of himself, on behalf of himself and others or as an employee.

(2) An amount that would otherwise be included in computing the income of an individual for a taxation year shall not be included in computing his income for the year if it is the consideration for

. . .

(3) An amount that would otherwise be included in computing the income for a taxation year of a person who has, either under an arrangement with the prospector made before the prospecting, exploration or development work or as employer of the prospector, advanced money for, or paid part or all of, the expenses of prospecting or exploring for minerals or of developing a property for minerals, shall not be included in computing his income for the year if it is the consideration for

(*a*) an interest in a mining property acquired under the arrangement under which he made the advance or paid the expenses, or, if the prospector was his employee, acquired by him through the employee's efforts, or

. . .

In my view, apart from certain other possible objections to this claim for exemption, with which I do not propose to deal, the claim fails because it cannot be said the mining properties that the respondent agreed, in July 1956, to purchase were acquired as a result of prospecting efforts that took place before the agreement was entered into. The waiver of a right to repudiate an agreement to purchase certain properties is, in my opinion, not the acquisition of the properties and, therefore, even if such waiver were caused by the report of a prospector, it cannot be regarded as acquisition of the properties as a *result* of efforts of a prospector.

I will now proceed to consider the respondent's cross-appeal, which concerns his dealings and those of the late

1966

MINISTER OF NATIONAL REVENUE v. WHEELER

Kearney J.

Mr. Whalen in respect of the North West Territories claims, sometimes referred to as the Dismal Lake or Copper Mine area claims.

With one or two exceptions (referred to later), there is little dispute as to the facts in respect of this aspect of the case and the issues can be reduced to rather narrow proportions.

Apart from the documentary proof produced which speaks for itself, the evidence in the case consists of the respondent's own testimony and that of Mr. John Stuart Grant, Attorney-at-law. Mr. C. R. Duncanson of the Taxation Division of the Department of National Revenue was called for the appellant in relation to this cross-appeal.

As appears by two letters dated June 1 and 2, 1955, respectively (Ex. R5), Mr. Whalen, acting on his own behalf and on behalf of Mr. Wheeler, entered into a grubstaking agreement relating to a so-called expedition being undertaken by two prospectors named Ernest Boffa and Leonard E. Peckham, of Yellowknife, N.W.T., wherein it was provided that, in the event of the expedition being successful, Messrs. Boffa and Peckham, in consideration of approximately $11,000 and an interest in Vandoo shares later referred to, would transfer all such mining claims to Mr. Whalen and an unnamed partner (Mr. Wheeler) and each of them would be entitled to an equal share therein. The prospectors obtained title to five groups of mining claims and, on May 1, 1956, Messrs. Boffa and Peckham assigned the said claims to Mr. James A. Whalen (Ex. R7) for $11,000 and 15% of any share consideration for which the said claims, or any part thereof, may be sold by the purchaser.

On May 10, an agreement was entered into between Messrs. Whalen and Wheeler, called the assignor and the assignee respectively, whereby the former acknowledged that he was holding the said mining claims in trust as to a full and undivided one-half interest in the same for the assignee (Ex. R6).

As appears by paragraph 2(*h*) and (*i*) of the notice of appeal, the appellant alleges:

> (*h*) subsequent to May 10, 1956, the respondent paid $9,000 to James A Whalen as consideration for Whalen's remaining one-half interest in the mining claims referred to in paragraphs (*f*) and (*g*) above;

(*i*) in the summer of 1956, the respondent sold the mining claims, acquired through the grubstaking arrangements with James A. Whalen, to Vandoo Consolidated Mines Limited for a consideration of $125,000

As may be seen by the reply and the cross-appeal, the respondent, while neither admitting nor denying paragraph (2)(*h*)(*i*) of the notice of appeal, alleges, *inter alia*, that

(*d*) By an unwritten arrangement between the said James A. Whalen and the respondent concluded during the spring of 1956, it was agreed that each of them would endeavour to sell the said mining claims and that whichever of them succeeded in so doing would be entitled to receive an additional 30% of the net consideration received in the sale.

(*e*) In the summer of 1956 the respondent, acting for himself as to an undivided half interest, and for James A. Whalen as to the balance, sold the mining claims to Vandoo Consolidated Mines Limited for a consideration of $125,000. The said consideration was divided and paid after expenses 80% to the respondent and 20% to the said James A. Whalen.

In paragraph 2 of his reply to the notice of cross-appeal, the appellant denied the allegations set out in paragraph 2(*d*) of the notice of cross-appeal and denied the respondent only received 80% after expenses of the total consideration of $125,000.

The respondent's position was, if his submission as contained in subsection (*e*) is accepted, that the amount which Mr. Whalen was entitled to receive and did receive for his 20% interest was the sum of $25,500 and not $9,000 as claimed by the appellant.

It is to be noted that the basis on which the Minister assessed Mr. Wheeler was as follows:

Proceeds from sale of Dismal Lake Claims	$ 125,000
Deduct Kenneth A. Wheeler's ½ interest exempt from tax under Section 83. Per agreement dated May 10, 1956	62,500
Balance of Proceeds from Sale subject to tax	$ 62,500
Less amount paid to James A. Whalen for his ½ interest in Dismal Lake Claims	9,000
	$ 53,500

Note:

In the schedule attached to the Notice of Re-assessment dated March 16, 1961, the Minister of National Revenue—through an oversight—added only $51,500 in respect of the Dismal Lake (Mountain Area) Claims

Counsel for the Minister agreed that the amount of the taxable profit claimed, instead of $53,500, should remain at $51,500.

1966

MINISTER OF NATIONAL REVENUE v. WHEELER

Kearney J.

The above-mentioned assessment of $51,500 was maintained by the judgment of the Board on the ground that the profit realized by Mr. Wheeler through the acquisition of Mr. Whalen's half interest in the N.W.T. claims was subsequent to prospecting and as a result of a business transaction between him and Mr. Whalen.

Counsel for the respondent submitted that the learned Chairman of the Board erred in not finding that the entire proceeds of the sale of the Dismal Lake claims were amounts received as consideration for mining properties or interests therein acquired as a result of his efforts or the efforts of a prospector employed by him and are amounts not required to be included in computing income for the year 1956 or any other taxation year by reason of the provisions of s. 83(3) previously cited of the *Income Tax Act*.

As an alternative argument, counsel for the respondent submitted that if the Court should find that the additional profit realized by the respondent arose from a business transaction with Mr. Whalen, and not as the result of the prospecting efforts of Messrs. Boffa and Peckham, nevertheless the reassessment of $51,500 was unjustified and should be reduced by the amount of $25,500, which he paid to Mr. Whalen from the proceeds of the sale, instead of the sum of $9,000 as allowed by the appellant as a deduction.

In support of his main submission counsel for the respondent stated that the applicability of s. 83(3) is admitted in the sense that the original 50% to which the respondent was entitled to receive from the proceeds of the sale of the claims, which amounted to $62,500, was treated as exempt from tax in the appellant's reassessment; consequently, we are here concerned only with the other half of the proceeds.

With regard to the aforesaid remaining half interest, counsel for the appellant observed that, while conceding that the Minister is precluded from opening up for reconsideration the taxability of the $62,500 which he did not assess to tax in his reassessment of March 16, 1961,* he is in no way estopped or restricted from pleading that the remaining $62,500 is subject to tax.

* In view of what follows, the respondent might well consider himself fortunate that this issue is closed.

1966

MINISTER OF NATIONAL REVENUE v. WHEELER

Kearney J.

In support of this contention it was submitted that Messrs. Boffa and Peckham did not at any time prospect the N.W.T. claims, but even conceding that prospecting was carried out, it was unavailing, because the additional interest was acquired as the result of a business transaction entered into between the respondent and Mr. Whalen after the prospecting had been completed and not beforehand as stipulated in s. 83(3).

It is claimed, in addition, that the respondent is not entitled to any exemption because no employer-employee relationship between the respondent and the aforesaid prospectors existed as required by s. 83(3).

In respect of the respondent's alternative argument concerning the deductibility of either $25,500 or $9,000, which I will leave for later consideration, counsel for the appellant submitted that the only deduction to which the respondent is entitled is the sum of $9,000 as assessed by the Minister.

I propose to deal first with the evidence in connection with prospecting.

The following evidence is relevant to the ascertainment of whether or not any prospecting was carried out on the N.W.T. claims. It also indicates the nature of the work performed by Messrs. Boffa and Peckham and when it was completed.

The respondent, when asked to explain, generally speaking, his dealings with prospectors, stated:

> Well, I finance him to go into these various areas I designate and stake certain claims in my behalf, pay his expenses in and pay him so much per claim for his work.

In regard to the N.W.T. claims and how he first became involved in them, the witness stated that "on June 2, 1955, Mr. Whalen, a mining promoter, since deceased, approached me and told me that he had knowledge of five groups of claims located in the Copper Mine area, North West Territories."

As appears by the letter written by Mr. Whalen to Mr. Wheeler on June 2, 1955 (Ex. R5), the writer stated:

> I hope that the staking and recording will be completed during this summer and when we come to prepare a proper assignment from Messrs. Boffa and Peckham to myself I will call on you for your one-

1966

MINISTER OF NATIONAL REVENUE v. WHEELER

Kearney J.

half share of the additional money as agreed upon by us and will give you at that time a more formal acknowledgment of your one-half interest

BY THE COURT: What date was that?

A That was June 2nd, 1955, my lord. He explained to me that the claims in reference were currently at that time being held by a major mining company, American Metals; that he had been advised by one Dr. C P Jenny, who was their chief geologist, that they were going to abandon these claims when the expiry date came about, which was sometime later that fall. They had developed a small tonnage high grade ore body that was not of sufficient interest to American Metals but in Jenny's words it could be of great interest to a small mining company.

Asked what happened in respect of the above-mentioned claims after June 2, 1955, the witness replied:

> They were staked apparently in the fall of that year although I wasn't aware of it. The next I knew was that Whalen approached me in May of '56, explained that he had these claims, they had been staked, and we had a formal document made up and I advanced him $2,750 which was my end under the particular grubstake at that time

Again the witness was asked:

Q In whose name were the claims registered, Mr Wheeler?

A. Mr. Whalen.

Q. Around what date did the transfer to Mr. Whalen take place?

A. I am not sure I believe it would be in the fall of '55 after they were staked

As appears by the two letters dated June 1 and 2, 1955 (Ex. R5), no mention whatsoever is made in regard to prospecting but solely to staking and recording.

The above evidence indicates that we are not dealing with a situation where prospectors are sent out to prospect or search for minerals, since the claims in question had already been mined and the task given to Messrs. Boffa and Peckham was to acquire title to a developed mining property, by means of restaking and recording, as soon as possible after the existing mining rights had been allowed to expire.

Counsel for the parties agree, and as I observed in the *Karfilis* case *supra*, staking is one thing and prospecting is another, and in my opinion since nowhere in s. 83(3) of the Act can be found any reference to staking, it alone, in the absence of any regulation to the contrary, is insufficient to constitute prospecting and entitle the respondent to obtain the benefit of the exemption claimed.

I will pass on to the additional submission of counsel for the respondent, namely that the taxpayer cannot invoke the provisions of s. 83(3) even conceding that prospecting has been carried out. In this latter connection, it is important to determine when the oral agreement was entered into and the respondent testified that it occurred "sometime between May 10 and June 27, 1956", being the date on which the claims were sold to the Vandoo Company. Since, as we have seen, Messrs. Boffa and Peckham had completed their task long before, namely, prior to the end of 1955, it follows that the provisions of s. 83(3) are inapplicable.

In the course of argument, counsel for the respondent claimed that according to the evidence given by the respondent he did not, at any time after June 22, 1955, *buy* the whole of Mr. Whalen's original half interest in the claims, as alleged by the appellant, or any part thereof, and that the verbal agreement did not alter the original 50% interest of the respective parties thereto but only altered the proportional interest which they were entitled to receive upon the sale of the claims.

Even if I were disposed to accept the respondent's version of the nature of the verbal agreement rather than that of the appellant, in my opinion, it would be immaterial whether or not the verbal arrangement is called a sale agreement, because it is admitted that, as a result of it, the respondent automatically became entitled to receive 30% additional profit, which amounted to about $50,000, for the services he rendered in disposing of the claims. Moreover, it constituted a trading agreement which occurred in 1956 in the ordinary course of the type of business carried on by himself and Mr. Whalen and in which any prospecting which had been carried out in the previous year could play no part.

In any event, the respondent failed to establish that Messrs. Boffa and Peckham were engaged under employer-employee relationship and not as independent contractors. The respondent on cross-examination said in this connection:

> Q Then, as far as your arrangement with these prospectors is concerned, the way, the method how they do their work and the hours that they work and when they take their meals and whether they work on Sundays or not, that is entirely up to them?
>
> A Well, I give them specific jobs to do I exercise as much control as I can but I can't control a man in the bush

1966

MINISTER OF NATIONAL REVENUE v. WHEELER

Kearney J.

Q. You don't attempt to control how they do the job, do you?

A. Well, everything—time is of the essence in all these things. I will pinpoint a certain group of claims in a certain area and then—

Q. And tell them to go out and stake them?

A. Yes.

After the witness stated that he remembered being examined for discovery, counsel for the appellant read to him the following questions and answers from p. 78 of the discovery proceedings:

Q. So far as how the prospector carries out work or what hours he works or anything of that nature, do you concern yourself with that?

A. No, that is of no relevance. I usually make a deal whereby I place a certain evaluation on him acquiring me a certain number of shares.

it says—I think that should be "claims", should it not?

A. Yes, I think so.

MR. WRIGHT: It should be "claims", my lord.

Q. And how he goes about doing it, that is his business?

A. Yes.

Now, were you asked those questions and did you make those answers?

A. Yes.

Q And were they true?

A. If I said it, they must be true.

Q All right. Now then, the same would apply with regard to Mr. Boffa and Mr. Peckham. I don't think you had any dealings with them at all, did you, personally?

A. No, they were dealing strictly with Whalen, I never met them.

Q. They had a job to do, to go out and stake some claims and how they did it and how they got there and what hours they worked and so on, that was their business, you just wanted the results of having those claims staked, is that right?

A. In that particular instance, yes.

For the foregoing reasons, I find that any profits realized by the respondent as a result of this disposition of the N.W.T. claims to Vandoo Consolidated Explorations Ltd. are not exempt under s. 83(3) and are subject to tax under the provisions of ss. 3, 4 and 139(1)(*e*) of the Act.

Having found that the profits realized by the respondent are subject to tax, there remains to be dealt with the question concerning the amount of the profit after allowance for properly deductible expenditures.

As we have seen by his alternative argument, counsel for the respondent submitted that the deduction of $9,000 allowed by the appellant should be made to read $25,000—and I will now consider the evidence and surrounding circumstances concerning this issue.

The witness, in his examination in chief, described the manner in which it came about that, as he alleges, he acquired an 80% interest in the N.W.T. claims as follows.

He recounted that, under duress by Mr. Whalen, he had agreed that whichever of them was successful in effecting a sale of the Dismal Lake claims would be entitled to an 80% share of the proceeds, whether of cash or shares, leaving 20% as the share of the other party. According to the respondent, Mr. Whalen's attempts were unsuccessful but the respondent succeeded, on June 27, 1956 in selling the claims to Vandoo Consolidated Explorations Limited for $125,000 cash. As a result, he says, he received $125,000, out of which he paid to Mr. Whalen $25,500 for the 20% interest and a further $5,500 to be remitted to Messrs. Boffa and Peckham, being the final payment owing to them. Thus, according to the respondent, he realized a net profit of $94,000 on the transaction. He testified as follows:

> Q. Did you ever make any arrangement with Mr. Whalen for the purchase of any part of his interests?
>
> A. None whatsoever.

The respondent says that he was aware that the $5,500 which he paid to Mr. Whalen was sent by the latter the next day, June 28, 1956.

Asked on cross-examination if it were not true that Mr. Whalen agreed to accept repayment in cash about the sum of $9,000, the respondent stated:

> A. That most certainly is not true.
>
> Q. And if that was said by Mr. Whalen that was an untrue statement, is that right?
>
> A. Exactly.

When asked, on cross-examination, what he did with the cash payment, the respondent's story was that he received the money in hundred dollar bills and that he put it in a safety deposit box. He then took $31,000 which was the amount to be paid to Mr. Whalen, put it in a package, took it to the legal office of Manley and Grant and asked Mr. Grant to hold it for him as the respondent was going to

1966

MINISTER OF NATIONAL REVENUE v. WHEELER

Kearney J.

contact Mr. Whalen and they would come in to straighten out the matter. Later, when Mr. Whalen went to Manley and Grant's office, he handed the money to him in the board room. He says that nobody else was present when he did so and that he did not receive any receipt from Mr. Whalen. He further testified as follows:

Q Why didn't you get a receipt?

A It was a gentleman's deal. I have made deals like that before. He was satisfied That was our arrangement

Q Why was the change to 80% and 20% not in writing?

A Just a gentleman's agreement, at his instigation, not mine

Q. And then you turn over a rather large amount of money like $31,000 cash to him and you get no receipt from him?

A No.

Q There is no writing, no cancelled cheques, no nothing, is that right?

A No, sir

Q And you say you just cannot account for that. You say it is just because you give people $31,000 quite often, do you, without any receipt or anything in writing or anything at all from them?

A I won't do it again after this

After correcting previous statements made on his examination for discovery as to when the verbal change was made in the original agreement of May 10, 1956, the respondent stated that it was made between May 10 and the date of sale to the Vandoo Company on June 27, 1956.

The witness Grant was the lawyer in whose office, according to the respondent's story, the money was paid by the respondent to Whalen. He says that he received a parcel from Mr. Wheeler but he could not recollect the date on which it was received. He was also able to recall the surrounding circumstances of the occurrence. Mr. Wheeler told Mr. Grant he was getting Mr. Whalen to come to Mr. Grant's office because he had to make a payment to him of his portion of certain monies to which he was entitled as a result of the resale of these claims to the Vandoo Company. Mr. Grant was advised by the respondent that Mr. Whalen would be coming in and either the day before or that morning the respondent asked him to keep an envelope until he and Mr. Whalen got together. His testimony reads in part as follows:

Q Did he tell you what was in it?

A Money

Q Did he say how much money was in it?

A I wish I could I don't think so

MR. WRIGHT: I wonder—we are not getting the answer to that question.

A I don't recall it was cash and I wouldn't know.

Q Then what did you do with the parcel?

A I locked it in my desk drawer

Q. Until when?

A Until, I think, it was the very same afternoon when Mr. Wheeler came in and said "Whalen is coming down from upstairs and he will come in", and I gave the envelope back to Mr. Wheeler and he went down the hall and met Mr. Whalen who I saw come in and they both went into the board room and closed the door.

Q Did you see them come out?

A Yes I did I didn't see them both come out I went back into my own office and Mr Wheeler then came back into my office I didn't see Mr. Whelan come out but he isn't still there.

Q. At that time did you have any information of any description on the question of whether or not Mr Whelan had disposed of his interest in the Dismal Lake claims other than in connection with the Vandoo sale?

A. No

Messrs. Manley and Grant addressed a letter dated June 27, 1956 (Ex. R13), to Mr. Staples, who was acting on their behalf, in which was enclosed a cheque for $5,500 from Mr. Whalen, requesting him to distribute this amount between Messrs. Boffa and Peckham.

The witness produced as Exhibit R14 a letter dated February 28, 1957, *re* James A. Whalen and Boffa and Peckham. This letter contained, *inter alia,* a release to be signed by Messrs. Boffa and Peckham as regards the 15,000 shares of stock of Vandoo Company which they had not received because the said Company was not satisfied with the staking done by Boffa and Peckham.

The witness stated that at the date the letter was written, Mr. Whalen was still interested in this property and that "he was in a rather precarious position perhaps legally of acting for Mr. Wheeler and Mr. Whalen", but that at all times he had addressed his correspondence to Mr. Staples on behalf of Mr. Whalen, because he had made the original agreements and that was the way it was done. The witness did not know whether Mr. Staples knew Mr. Wheeler.

Mr. C. R. Duncanson, called on behalf of the appellant, stated that he had occasion to inquire from Mr. Wheeler with regard to a transaction which he had with Mr. Whalen dealing with the Dismal Lake claims and that Mr. Wheeler

1966

MINISTER OF NATIONAL REVENUE v. WHEELER

Kearney J.

had stated that he had made certain payments to Mr. Whalen in connection therewith amounting to $25,500.

Q. Did you ask him for any evidence that he had to support such payment?

A. Yes, I did.

Q. Did he produce any?

A. No, he did not.

Q. Did you make any further investigations? Did you speak to Mr. Whalen to inquire as to the amount of payment, if any, that had been made by Mr. Wheeler to him in connection with these claims?

A. Yes. I had a number of conversations at his office with Mr. Whalen as to the amount of money.

Q. . . . I want to know what you did as a result of what Mr. Whalen told you following your conversations with Mr. Whalen?

A. I asked Mr. Whalen to go to his bank with me that I might check certain accounts which he had there.

Q. As a result of your investigation of Mr. Whalen's account and your conversation with him, then what did you do with regard to Mr. Wheeler, if anything?

A. I assessed Mr. Wheeler on the basis of the information which I had secured from Mr. Whalen.

By the Court:

Q. What did you find in the account.

A. Well, I did not . . . . I could not find anything in respect to the money that was supposedly paid by Wheeler to Whalen.

Q Of any amount, $25,500, or anything else?

A. That is correct.

The witness went on to say that following his investigation and conversations with Mr. Whalen he assessed Mr. Wheeler, allowing him a deduction of $9,000.

The witness was then asked if he could identify a letter addressed to the Minister of National Revenue, dated September 9 and signed by Mr. J. A. Whalen. Requested to say how he came to receive the letter, the witness stated:

> Well, following several conversations with Mr. Whalen, I asked him to give me a letter in writing addressed to the Department setting forth what he had actually told me and as a result this letter was received.

Objection was taken by counsel for the respondent on the ground that it was hearsay and that it relates to Mr. Whalen's tax affairs, not to the tax affairs of the respondent. Counsel for the appellant submitted that the letter was admissible, as it constituted a declaration against the inter-

ests of the late Mr. Whalen. The letter was admitted under reserve of objection and reads as follows:

70 Front Street,
Oakville, Ontario,
September 9th, 1959

C. R. Duncanson, Esq.,
Department of National Revenue
Taxation Division
1 Front St. W.
Toronto, Ontario

Re: Mineral Claims—
Coppermine N.W.T.

Dear Mr. Duncanson:

You have requested me to recount the history of my interest in certain mining claims located in the Coppermine area of the Northwest Territory in which claims I formerly held an undivided one-half interest, with Kenneth A. Wheeler holding the remaining interest.

I have searched the records at the office of my solicitors, and I have made all of these records available to you. From a study of these records, and from my best recollection, I am setting out the facts surrounding my interest.

Mr. Wheeler and I had knowledge of a potentially interesting copper showing near the Dismal Lakes, in the Coppermine area. In June 1955, acting on our joint behalf I advanced funds to prospectors to grubstake them in the staking of a known copper deposit which I knew was to be abandoned by one of the larger mining companies The prospectors were to receive additional cash if the expedition secured the desired ground and they were also to get a stock interest. In fact, as I recall, these prospectors moved into the area during late summer 1955 and later advised us that they had staked sufficient ground to cover the known deposits.

In the spring or early summer of 1956, we paid the prospectors $11,000 to satisfy their cash consideration and the delivery of their stock was deferred pending some mining company evincing an interest. As I recall, the claims were then transferred to my name, to prevent the prospectors dealing with them.

I executed and left with my solicitors transfers in blank covering these claims in keeping with standard practice. Attempts were made by me to interest certain companies in a purchase of this ground, but I was unsuccessful. Mr. Wheeler then agreed to take over the full interest in the claims, and I accepted from him repayment in cash of the *sum I had invested (about $9,000)*. In addition I understood that I would get one-half of any share consideration which any company purchasing the ground might issue (after giving effect to the commitment to the prospectors).

I later learned that the claims had been bought by a listed mining company, Vandoo Consolidated Mines. I did not enter into any direct agreement with that company to transfer title, but assume that delivery of title was handled by the ultimate vendor, using the blank transfers I had previously signed. I did not know at the time who the vendor was, nor did I know what consideration he received. Later on I learned that a considerable sum had been spent by the company to diamond drill the ground, during which it was learned that the prospectors had not staked the known deposit, at all. As all dealings with the prospectors had been in my name, I permitted my solicitors to use my name in recounting to the

1966

MINISTER OF NATIONAL REVENUE v. WHEELER

Kearney J.

prospectors the situation regarding the faulty staking, and the sale to the company and the consequences thereof. As a result no stock was ever delivered to the prospectors

I never received any consideration of any type for my former interest in these claims, other than the above-stated cash.

I recall being extremely upset about the trend of events as I had hoped to realize something from my share entitlement. The bad staking cost me that, and I realized I had no chance of any action against the prospectors I consequently forgot about the whole matter until I was asked to answer questions and explain my position. Then for the first time I learned some of the facts of the acquisition of these claims by Vandoo Consolidated.

I do not consider in the circumstances that I have any enforceable right to demand any shares of that company from anyone, and I do not intend to make any claims. I have no further cash entitlement, as I was pleased at the time to recover my investment and to hope for the best on the stock.

This is my recollection of the matter and I believe is substantiated by the documents which I have been made available for your examination

Yours very truly,

(signature) J. A. Whalen
James A. Whalen

In respect of the admissibility of the Whalen letter of September 19, 1959 (Ex. A5) it might be said that, since under his original one-half interest in the N.W.T. claims, he would have been entitled, on their resale, to receive $62,-500, he was acting against his own interest in admitting that he was only entitled to $9,000. It must be borne in mind, however, that we are here dealing with the impact of income tax where it is in the taxpayer's interest to minimize his profits and, consequently, his letter would constitute a self-serving declaration. In the circumstances, I consider that Exhibit A5 was inadmissible and if admissible has no weight as against the respondent and I disregard it. Part of the contents of the letter, however, is already in the record, as appears from the following cross-examination of the respondent by counsel for the appellant:

Q . Now, I want to put to you a state of facts and I want to ask you whether or not you agree with them: that following the acquisition of these claims by you and Mr. Whalen attempts were made by him to interest certain companies in the purchase of those claims in the Dismal Lake area, but he was unsuccessful, is that true?

A That is true.

Q Then that you and he then agreed to take—no, I am sorry—you agreed to take over the full interest in the claims and he accepted from you repayment in cash of the sum you had invested, about $9,000 Is that true?

A. That most certainly is not true

Q. And if that was said by Mr. Whalen that was an untrue statement, is that right?

A. Exactly.

The witness also stated that, as set out in the original agreement, Mr. Whalen was a 50 per cent partner.

Q Well, was that true after the arrangement, under the arrangement which you said you made with him I think you said it was an 80 per cent, 20 per cent sharing?

A. Well, that would apply to stock and cash.

Q Well, then, it wouldn't be true to say that you were to get one half the share consideration, that he was too?

A. No, that is not correct.

The burden of rebutting the Minister's assumption as to the nature of the transaction between the respondent and Mr. Whalen was on the respondent. Due to the manner in which he deliberately arranged to carry out the transaction, which was tantamount to what has been sometimes referred to as "an under the table payment", and as a result, the respondent has none of the documentary evidence or the evidence of corroborating witnesses that would be available to him if the transaction had been carried out in the manner which is customary among businessmen engaged in transactions of the magnitude of this particular transaction. That being so, the respondent has had to undertake the burden of disproving the validity of the Minister's assumption by his own unaided testimony of a transaction between himself and a person who is now dead.

Notwithstanding the fact that his testimony is not directly contradicted by other evidence, verbal or documentary, after the most anxious consideration of his story, which was completely unsupported, as I have already indicated, and taking the evidence as a whole and the circumstances surrounding it, I am not satisfied that the respondent, in fact, paid $25,500 to Mr. Whalen and I consider that he has failed to discharge the burden of proof which rests upon him to do so.

For the foregoing reasons the appeal by the Minister in respect of the Ontario claims will be maintained with costs and the cross-appeal in respect of the North West Territories claims by the respondent Kenneth A. Wheeler will be dismissed with costs.