
BETWEEN:

M. COMPANY, LIMITED.....APPELLANT;

AND

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

1945
Feb. 8
1948
July 20

Revenue—Excess Profits Tax—The Excess Profits Tax Act, 1940, S.C. 1940, c. 32, as amended, ss. 2 (1) (h), 2 (1) (i), 5 (1), 5 (3), 5 (4), 13—Quantum of standard profits under section 5 exclusively a matter for Board of Referees—Statutory conditions for ascertainment of standard profits under section 5 (3)—Court may not substitute its opinion for advice of Board or satisfaction of Minister.

Appellant applied to the Minister for a reference to the Board of Referees to determine its standard profits. The application was first made under section 5 (1) of The Excess Profits Tax Act, 1940, and later under section 5 (3). The Minister referred the application to the Board for advice as to whether or not departure from capital standard was justified and, if such departure was justified, for determination of standard profits under section 5 (3), but if not, the Board was requested to ascertain standard profits under section 5 (1). The Board ascertained the standard profits under section 5 (1), the Minister approved its decision and appellant was assessed accordingly. Appeal from assessment dismissed.

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Held: That the appellant had a statutory right to have the Board of Referees advise the Minister whether a departure from the capital standard in determining its profits was justified or not.

2. That the decision of the Board of Referees to ascertain the appellant's standard profits under section 5 (1) must be read as its reply to the Minister's request for advice as to whether or not a departure from the capital standard was justified and the proper inference to be drawn from it is that the Board thus advised the Minister that in their opinion a departure from the capital standard was not justified.

3. That the quantum of the standard profits of a taxpayer determinable under section 5 of the Act is not a matter for the Court. Parliament has set up special machinery for its determination. If the provisions of the Act have been complied with the ascertainment of the amount of the standard profits, whether under section 5 (1) or under section 5 (3), is, subject to the provisions of the Act, within the sole discretion of the Board of Referees and the Court has no right to interfere with it. It was never intended by Parliament that the findings of the Board of Referees made within their sphere of function should be subject to review by the Court.

4. That the scope of the Court's function is confined to determining whether the requirements of the Act have been complied with.

5. That if the Board acted within the field of jurisdiction assigned by the Act and dealt with the appellant's application in a judicial manner, as they did, it is not within the jurisdiction of the Court to review their decision and substitute its opinion for the advice which the Act requires the Board to give and the Minister to have. Nor is it contemplated by the Act that the Court should substitute its opinion for the satisfaction of the Minister. It is not for the Court to determine whether the facts of the case are such as to warrant the ascertainment of standard profits under section 5 (3), but exclusively for the Minister on the advice of the Board.

APPEAL from an assessment under The Excess Profits Tax Act, 1940, as amended.

The appeal was heard by the Honourable Mr. Justice Thorson, President of the Court, at Hamilton.

F. Morison K.C. and *Hon. G. P. Campbell K.C.* for appellant.

H. H. Stikeman for respondent.

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

THE PRESIDENT now (July 20, 1948) delivered the following judgment:

This is an appeal from an assessment for excess profits tax for the year 1940 under The Excess Profits Tax Act,

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1940, Statutes of Canada, 1940, chap. 32, as amended. The assessment appealed against was in respect of the appellant's profits for the year 1940 in excess of its standard profits, as ascertained by the Board of Referees appointed under the Act and approved by the Minister. The appeal raises the important question whether the decision of the Board as to the appellant's standard profits and its approval by the Minister can be successfully attacked.

The relevant provisions of the Act are sections 5 (1), 5 (3) and 5 (4) which, at the time of the hearing before the Board and its decision, read as follows:

5. (1) If a taxpayer is convinced that his standard profits were so low that it would not be just to determine his liability to tax under this Act by reference thereto because the business is either of a class which during the standard period was depressed or was for some reason peculiar to itself abnormally depressed during the standard period when compared with other businesses of the same class he may, subject as hereinafter provided, compute his standard profits at such greater amount as he thinks just, but not exceeding an amount equal to interest at ten per centum per annum on the amount of capital employed in the business at the commencement of the last year or fiscal period of the taxpayer in the standard period computed in accordance with the First Schedule to this Act:

Provided that if the Minister is not satisfied that the business of the taxpayer was depressed or that the standard profits as computed by the taxpayer are fair and reasonable, he may direct that the standard profits be ascertained by the Board of Referees and the Board shall thereupon, in its sole discretion, ascertain the standard profits at such an amount as the Board thinks just, being, however, an amount equal to the average yearly profits of the taxpayer during the standard period or to interest at the rate of not less than five nor more than ten per centum per annum on the amount of capital employed at the commencement of the last year or fiscal period of the taxpayer in the standard period as computed by the Board in its sole discretion in accordance with the First Schedule to this Act, or the Minister shall assess the taxpayer in accordance with the provisions of this Act other than as provided in this subsection.

5. (3) If on the application of a taxpayer the Minister is satisfied that the business either was depressed during the standard period or was not in operation prior to the first day of January, one thousand nine hundred and thirty-eight, and the Minister on the advice of the Board of Referees is satisfied that because,

(a) the business is of such a nature that capital is not an important factor in the earning of profits, or

(b) the capital has become abnormally impaired or due to other extraordinary circumstances is abnormally low

standard profits ascertained by reference to capital employed would result in the imposition of excessive taxation amounting to unjustifiable hardship or extreme discrimination or would jeopardize the continuation of the business of the taxpayer, the Minister shall direct that the standard

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profits be ascertained by the Board of Referees and the Board shall in its sole discretion thereupon ascertain the standard profits on such basis as the Board thinks just having regard to the standard profits of taxpayers in similar circumstances engaged in the same or an analogous class of business.

5. (4) Notwithstanding anything contained in this section the decisions of the Board given under subsections one, two and three of this section shall not be operative until approved by the Minister whereupon the said decisions shall be final and conclusive:

Provided that if a decision is not approved by the Minister it shall be submitted to the Treasury Board who shall thereupon determine the standard profits and the decision of the Treasury Board shall be final and conclusive.

These sections were enacted in the above forms by an amendment of the Act in 1942, Statutes of Canada, 1942-43, chap. 26, sec. 3. By section 2 (1) (*i*), as enacted by the said 1942 amendment, sec. 1 (2), the term "standard profits" means, subject to certain provisoes, "the average yearly profits of a taxpayer in the standard period in carrying on what was in the opinion of the Minister the same class of business as the business of the taxpayer in the year of taxation or the standard profits ascertained in accordance with section five of this Act", and by section 2 (1) (*h*), as enacted by an amendment of the Act in 1941, Statutes of Canada, 1940-41, chap. 15, sec. 2, the term "standard period" means, subject to certain provisoes, "the period comprising the calendar years one thousand nine hundred and thirty-six to one thousand nine hundred and thirty-nine, both inclusive, or such years or parts thereof since the first day of January, one thousand nine hundred and thirty-six, during which the taxpayer was in business."

All of the amendments referred to were deemed to have come into force on and after the commencement of the Act.

Section 13 provided for the appointment of a Board of Referees as follows:

13. The Minister may appoint a Board of Referees to advise and aid him in excercising the powers conferred upon him under this Act, and such Board shall exercise the powers conferred on the Board by this Act and such other powers and duties as are assigned to it by the Governor in Council.

The Board of Referees was appointed by Order in Council P.C. 6479, dated November 16, 1940. *Vide* Canada Gazette, December 14, 1940, p. 2138.

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On August 8, 1940, the Minister authorized the Commissioner of Income Tax to exercise the powers conferred upon him by the Act. *Vide* Canada Gazette, September 13, 1940, p. 852.

The facts relating to the appellant's application for a reference to the Board of Referees to determine its standard profits are as follows.

The original application, dated December 10, 1940, was made pursuant to section 5 of the Act, as it then stood, on Form S.P. 1 (Exhibit 1), and the reason given for it was that the appellant's business, while not being one of a class which was depressed during the standard period, was itself abnormally depressed during such period. The application was accompanied by a statement of particulars, dated December 6, 1940, in which it was stated that the appellant had sustained losses in the years 1936, 1937 and 1938, and a small taxable profit in 1939, and that it would be unjust to base the excess profits tax on one fourth of the amount of the profit in 1939. The history of the appellant was given showing operating losses for seven years prior to the commencement of the standard period, which had greatly depleted its previous surplus. It was claimed that the standard profit should be fixed on the basis of an adjusted capital, giving the capital employed on December 31, 1938, at a stated amount, which included $182,230.63 for depreciation at 50 per cent of normal rates during the years of loss, from which it was contended no benefit had accrued. It was then urged: "In view of the heavy losses sustained and the heavy liabilities thus carried the Company considers that the standard profit fixed at $45,000 would be a conservative amount to allow before it becomes liable to the tax at 75 per cent." Supplementary to Form S.P. 1, the appellant, on September 18, 1941, gave further particulars on a form called S.P. 1. Questionnaire. Both of these documents related to the appellant's claim to have its standard profits fixed on the basis of the amount of capital employed by it.

Before this application had been referred to the Board of Referees a departure from the standard of the amount of capital employed as a basis for determining standard profits was authorized in certain cases by section 5 (3) of

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the Act, as enacted in 1941, Statutes of Canada, 1940-41, chap. 15, sec. 6. Moreover, section 4 (1) (*d*) of the Act, as originally enacted, had provided:

> 4. (1) The Minister may in his discretion make the following adjustments in the standard profits of a taxpayer:
>
> (*d*) adjust the standard profits by reference to any increase or decrease in depreciation allowances or other charges to such a basis that the said charges during the standard period are comparable with similar charges during the taxation period.

By section 5 of the amending Act of 1941, already referred to, this paragraph (*d*) was repealed. Under this state of the law the appellant's chartered accountants, on November 4, 1941, wrote to the Inspector of Income Tax at Hamilton, after an interview with him, that they were instructed to maintain the appellant's claim for $45,000 as its standard profit. The letter contained the following statement:

> When the Statement of Particulars was prepared on December 6th last, this claim was well within the 10 per cent of Capital set up in accordance with the Rulings at that time, but the later amendment of the Act disallows Depreciation from which no benefit is derived thus reducing the Capital by $182,230 63 which was the depreciation for seven years 1929 to 1935 inclusive when the losses were in excess of the depreciation.

It also repeated that the appellant had sustained operating losses for 10 years up to the end of 1938 and said that these were in excess of the remaining capital employed after disallowing depreciation from which no benefit was derived, and that in view of this they were instructed by the appellant to "maintain its claim of $45,000 as a standard profit, as under the amended Act a reasonable amount is not available either on average profits or the remaining capital employed". The letter concluded with the sentence:

> In view of the foregoing the Company authorizes us to maintain its claim of $45,000 as standard profit under the Excess Profits Tax Act under section 5 (3) (*b*) of the Act.

This is the first reference on behalf of the appellant to section 5 (3).

On December 22, 1941, the Commissioner of Income Tax referred the appellant's application to the Board of Referees as follows:

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The Secretary,
Board of Referees, Excess Profits Tax Act,
Ottawa.

Dear Sir:

Pursuant to Section 5 of the Excess Profits Tax Act, 1940, reference to the Board of Referees is hereby made

For advice as to whether or not departure from capital standard is justified and if such departure is justified for determination of Standard Profits under Section 5 (3). If not, the Board is requested to ascertain Standard Profits under Section 5 (1).

The following documents are enclosed herewith:

1940 T. 2; T. 20; S.P. 1; S.P. 1 Questionnaire; financial statements.
T. 2's 1936 to 1939 inc.

Any additional data that the Board requires will be furnished on request or explanations given on consultation.

In due course you will please advise us of the conclusions of the Board.

It does not appear whether the letter of November 4, 1941, was referred to the Board or not, unless it is included in the "financial statements" mentioned in the reference. In any event, the question is unimportant for on December 24, 1941, the secretary of the Board wrote to the appellant stating that its standard profits claim had been referred to the Board and would be considered at an early date, enclosing a copy of "Instructions to Taxpayers filing Standard Profits Claims", asking the appellant, if any of the information requested had not been provided in its statement of particulars, to file complete details with the Board, and informing it that when its claim had been considered it would be given an opportunity to appear before the Board at Ottawa if it desired to make personal representations to it. The instructions included paragraph 4 relating to depressed businesses or new businesses carried on by taxpayers who request under section 5, ss. 3, that the standard profits be determined by the Board of Referees on the basis other than that of capital employed and setting out what information must be supplied in such cases.

On January 8, 1942, the appellant's chartered accountants prepared a Supplementary Statement of Particulars (Exhibit 4), in which they set out the history of the appellant and its predecessor, referred to the claim originally made in December 1940, in which the amount of capital stated to be employed included depreciation from

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which no benefit accrued in the years 1929 to 1937 which later was disallowed. It was also stated that in thus reducing the allowable capital the claim to have a standard profit of $45,000 established was in excess of 10 per cent of the capital, that the appellant maintained its claim for $45,000 and that it came under clause 4 (1) of the instructions to taxpayers. The statement then set forth the appellant's reasons for its claim including its operating losses for the ten year period up to December 31, 1938, that these were far in excess of the remaining capital in 1940 after two years of profits and giving particulars of such losses and a comparison between its financial position as at December 1, 1928, and that as at December 31, 1938. It was contended that this comparison indicated that the result of excessive taxation would very seriously jeopardize the continuation of the business and the conclusion was stated that the appellant authorized them to maintain its claim of $45,000 as standard profit under the Excess Profits Tax Act under section 5 (3) (*b*) of the Act. As part of this supplementary statement information was given for every year from 1921 to 1940 of Sales, Capital Employed at commencement of year, Net taxable income and Rate Earned on Capital Employed.

On August 18, 1942, the appellant was notified that a date for the hearing of its Standard Profits Claim had been set for September 16, 1942, and asked to arrange to have a representative appear before the Board of Referees at that time. At the hearing before the Board the appellant was represented by Mr. B. E. James, its secretary, and Mr. S. G. Richardson, its chartered accountant. It appeared that the amount of capital employed as at December 31, 1938, as estimated by the Department, was $3,450 less than that shown by the appellant on Exhibit 4, and when the chairman of the Board, the Honourable Mr. Justice W. H. Harrison, asked the appellant's representatives to accept the Department's figure they did so. Otherwise they made no oral representations to the Board, contenting themselves with the written material submitted. At the trial Mr. Richardson admitted that between the written submissions and the oral hearing all the relevant facts were made available to the Board.

On September 22, 1942, the Board reported its decision to the Minister as follows:

To:

The Minister of National Revenue,
Ottawa, Ontario

Re: (name of appellant)

The Standard Profits Claim of the above-mentioned taxpayer was referred to the Board of Referees under date of 22nd December, 1941, in accordance with the provisions of The Excess Profits Tax Act, 1940, as amended.

The Board of Referees having examined the claim report as follows:

Under the provisions of subsection one of section five of The Excess Profits Tax Act, 1940, as amended, the Board of Referees

(*a*) Find that the business of the taxpayer was depressed during the Standard Period.

(*b*) Compute the *Capital Employed* by the taxpayer at 1st January, 1939, at .....$ 357,240 32

(*c*) Ascertain *Standard Profits* of the taxpayer at .....$ 21,434 42 being an amount equal to interest at 6 per cent per annum on the Capital Employed as above.

Dated at Ottawa this twenty-second day of September, 1942.

Board of Referees

W. H. Harrison.....Chairman
C. P. Fell.....Member
Courtland Elliott.....Member

The decision of the Board of Referees was approved by Mr. C. F. Elliott, Commissioner of Income Tax. On September 29, 1942, the appellant was advised of the Board's decision and its approval and given a copy of the decision.

On March 17, 1943, the appellant was given notice of its assessment for 1940, from which it appealed to the Minister. The Notice of Appeal does not state the grounds of appeal clearly but the general tenor of complaint is that the Board erred in principle in fixing the standard profits under section 5 (1) and should have acted under section 5 (3). The Minister affirmed the assessment on the ground that he had approved the decision of the Board of Referees as provided in section 5 (4) of the Act and that such decision was final and conclusive. Being dissatisfied with the Minister's decision the appellant now brings its appeal from the assessment to this Court. In its Notice of Dissatisfaction the complaint is made that the Board made its finding on the basis of capital employed and did not make any finding under section 5 (3), and it is contended that it should have given relief under section 5 (3) (*b*). The

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real substance of the appellant's grievance is contained in the last two paragraphs of the Notice of Dissatisfaction as follows:

> 11. In order to give the Company a chance to recover and continue operating in the future the Standard of Profits should be fixed at least at $45,000 per year as requested and determined by the taxpayer.
>
> 12. Standard Profits of $21,434.42 determined by the Board, it is submitted, is too low under the circumstances and if allowed to stand will in the years 1940-1943 impose a taxation burden which may be disastrous to the appellant.

On the argument before me counsel for the appellant made two arguments. His main one may be summarized as follows. He contended that the Board of Referees was appointed by the Minister to advise and aid him in exercising the powers conferred upon him under the Act, that until a standard profit had been determined in accordance with the Act there was no right to levy any tax under it, that section 5 gave the taxpayer a right to have his standard profits determined in accordance with its provisions if he came within them, and that the determination of whether he was entitled to the remedy provided by the section was the act of the Minister on the advice of the Board. In his view, it was not the Board but the Minister on the advice of the Board that determined the taxpayer's standard profit. The submission was that since the Board was an advisory body it was only its advice that was final and conclusive; but that it was the Minister's approval that established the standard profit, that the appellant's application for relief was to the Minister and that it was his duty to see that all the requirements of the Act were complied with. Counsel conceded that the decision of the Board, if within the Act, was final and conclusive and that there was no appeal from it, but contended that it did not become effective until the Minister had acted as the Act provided, and that there was nothing in the Act making the Minister's approval final and conclusive. Counsel agreed that the Act did not contemplate a review by the Minister of the representations made to the Board, but contended that he had referred this case to the Board to be determined under section 5 (3), that it was his duty to see that they had done so and that the Board's decision showed on the face of it that they had dealt with the case entirely under section 5 (1). It was argued that

before the Board could determine the case under section 5 (1) they must first advise the Minister that the taxpayer had not brought himself within section 5 (3), that before the Minister approved their decision he should have demanded advice whether the case came under section 5 (3), that there was nothing in the Board's decision to show whether they had considered the case under that section, that the Minister in approving the Board's decision had acted without the advice which the Act required him to have and that, under the circumstances, his approval could not be regarded as final and conclusive. Counsel urged that since the application had been made under section 5 (3) the appellant had a right to have it dealt with and disposed of under that section before any order could be made under section 5 (1), that until this was done the Board's decision under section 5 (1), although approved by the Minister, was not final and conclusive and that the Court should refer the assessment back to the Minister so that he might obtain the advice of the Board as to whether a departure from the basis of capital employed as provided by section 5 (1) was justified or not. This was the main argument on behalf of the appellant.

Acceptance of this argument would benefit the appellant only if the Board had not already considered its case under section 5 (3) and if on the matter being referred to them they should advise that a departure from the capital employed standard was justified. But if, on the other hand, they had in fact already considered the matter under section 5 (3) and had concluded that a departure from the capital standard was not justified then the appellant's major complaint that the Board had not advised the Minister in the matter and that he had not obtained their advice thereon would be met by specific advice to the Minister and the appellant would find itself in exactly the same position as its present one. Counsel realized that the acceptance of his major contention might thus well be a hollow victory and put forward a second argument. He contended, as a matter of law, that the case came within section 5 (3) and that the appellant was entitled to have its standard profits determined under it. It was urged that even if it were assumed that the Board had considered the case under section 5 (3) it had improperly interpreted it

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or improperly applied the facts and thus deprived the appellant of a right to which it was entitled, that the evidence showed that there had been an abnormal impairment of capital, that no reasonable body of men sitting in a judicial capacity could fail to find such abnormal impairment, that if the Board had realized the facts they would have determined the appellant's standard profits under section 5 (3), that the Court could find that the case came within the section and that the appellant was entitled to relief under it and that the Court should refer the assessment back to the Minister with instructions to refer the appellant's application to the Board for determination of its standard profits under section 5 (3).

I agree with counsel for the respondent that counsel for the appellant in his main argument attacked the assessment under appeal along the only avenue that could lead to a reconsideration of the appellant's application. If the Board of Referees did not give any answer to the Minister's request for advice as to whether or not a departure from the capital standard was justified then it would follow that the appellant's application for the determination of its standard profits under section 5 (3) (*b*) has not yet been disposed of in accordance with the requirements of the section but is still pending before the Minister, that the Board's decision under section 5 (1), notwithstanding its approval by the Minister, was premature and inoperative, and that the assessment based on it was invalid and should be set aside. Before there could then be a valid assessment the Minister would have to request the advice of the Board as to whether a departure from the capital standard was justified or not and the Board would have to answer it. If the Board should give its advice in the affirmative and the Minister was satisfied, he would have to direct that the standard profits be ascertained by the Board under section 5 (3). But, if on the other hand, the Board should answer the request for advice in the negative the Minister could properly request them to ascertain the standard profits under section 5 (1). The essence of the argument is that the Board gave no advice at all to the Minister under section 5 (3) and that until they did so, the Minister could not validly approve a decision under section 5 (1). The complaint on this head is not against the Board for not

giving any advice but rather against the Minister for failing to obtain it. The appellant's alleged grievance is that it had a statutory right to have the Board of Referees consider and advise the Minister whether its standard profits should be determined by reference to some standard other than that of capital employed or not, and that this right has not been accorded to it. This branch of the appeal is thus reduced to very narrow limits.

The onus of showing that the Board did not answer the Minister's request for advice under section 5 (3) is, of course, on the appellant. The disposition of this part of the appeal depends upon what inference ought to be drawn from the decision of the Board when read in the light of the reference by the Minister. The Reference to the Board was

> For advice as to whether or not departure from capital standard is justified and if such departure is justified for determination of Standard Profits under Section 5 (3). If not, the Board is requested to ascertain Standard Profits under Section 5 (1).

While the decision made no express reference to whether departure from capital standard was justified or not, counsel for the respondent urged that it must be read as the Board's reply to the Minister's request for advice; that the Board had given their answer to the Minister's request for advice in the manner indicated by the reference, and that the proper inference to be drawn from their decision to ascertain the standard profits under section 5 (1) was that they had thus advised the Minister that in their opinion departure from the capital standard was not justified. At the hearing of the appeal I was impressed with the argument of counsel for the appellant and inclined to give effect to it, but I have come to the conclusion that the inference that ought to be drawn from the Board's decision is the one urged by counsel for the respondent. The reference requesting advice as to whether or not departure from the capital standard was justified indicated that the answer might be given in a specified manner. If the Board considered that a departure was justified, they were to determine the standard profits under section 5 (3). Such action by the Board would clearly be an affirmative answer to the request for advice. Similarly, if the Board thought that a departure was not justified they were to

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ascertain the standard profits under section 5 (1) and their decision thereunder would be an answer in the negative. In either case, the request for advice could be answered by a prescribed course of action with its necessary implication just as fully as by express words. The contrary inference suggested by counsel for the appellant was that the Board had given no answer at all to the request for advice contained in the reference. I am unable to agree. The very wording of the reference shows that it was a reference for advice and action under section 5 (3), if the Board considered that a departure from the capital standard was justified, and action under section 5 (1), if they did not. To draw the inference suggested by counsel for the appellant would be tantamount to saying that the Board disregarded the terms of reference, closed their eyes to that part of it which requested them to consider whether the case was one which fell under section 5 (3) and saw only that part which requested them to proceed under section 5 (1). In my opinion, an inference based on such an assumption would be an unreasonable one and I reject it. The result is that this part of the appellant's case falls to the ground.

Once it is found that the Board answered the Minister's request for advice whether a departure from the capital standard was justified or not then that, I think, ends the matter. It was then within the competence of the Board under the terms of the reference to ascertain the appellant's standard profits under section 5 (1) and within that of the Minister to approve the Board's decision. I am quite unable to accept the appellant's second argument that the Court could determine that the case came within section 5 (3) and that it should refer the assessment back to the Minister with instructions to refer the appellant's application to the Board for determination of its standard profits under section 5 (3). There are several reasons for coming to this conclusion.

I think it is plain from a review of the appellant's documentary submissions that a compelling, if not the most important, reason for causing it to switch its original claim to a claim under section 5 (3), after that section was enacted, was that the large item of $182,230.63 of depreciation during the seven years of loss prior to 1936, which the

appellant had included in its first estimate of capital employed, was disallowed. Its disallowance brought the amount of capital employed to a figure below that necessary to support its claim of $45,000, even if the Board were to allow the full limit of 10 per cent permitted by section 5 (1). What the appellant was primarily concerned with was the maintenance of its claim at $45,000 and, since this could not be done under section 5 (1) after the disallowance of the depreciation item because of the limitation of 10 per cent, the claim was switched to one under section 5 (3) in the belief or hope that there would be a better chance of maintaining its claim under that section. The appellant's real complaint is against the amount of the standard profits fixed by the Board rather than the basis upon which it was ascertained. It would not be unfair to conclude from the documents submitted by the appellant that if the item of depreciation had been allowed to be included in the computation of capital employed it would have been quite willing to have its standard profits ascertained on such basis. Moreover, if the Board had allowed a return of 10 per cent instead of 6 per cent on the amount of capital employed as determined by the Board much of the appellant's ground of complaint would have disappeared. To a considerable extent, therefore, if not wholly, the appellant's complaint is against the quantum of standard profits allowed. With that question the Court can have no concern. The quantum of the standard profits of a taxpayer determinable under section 5 of the Act is not a matter for the Court. Parliament has set up special machinery for its determination. If the provisions of the Act have been complied with the ascertainment of the amount of the standard profits, whether under section 5 (1) or under section 5 (3), is, subject to the provisions of the Act, within the sole discretion of the Board of Referees and the Court has no right to interfere with it. Parliament has enacted that the decision of the Board shall not be operative until approved by the Minister but that when it has been so approved the decision shall be final and conclusive: it is also provided that if the decision is not approved by the Minister it shall be submitted to the Treasury Board who shall thereupon determine the standard profits and that its decision shall be final and conclusive. I think it is

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beyond dispute that it was never intended by Parliament that the findings of the Board of Referees made within their sphere of function should be subject to review by the Court. It must be careful to confine itself within its own field of jurisdiction and not to intrude upon a field which Parliament has assigned to another body. It is not for the Court, therefore, to express any opinion whether the quantum of the standard profits allowed to the appellant was adequate or not.

In my view, the scope of the Court's function in the present case is confined to determining whether the requirements of the Act have been complied with. It having been found that the Board of Referees did advise the Minister that departure from the capital standard was not justified the only remaining question is whether there is any merit in the appellant's second argument that the facts are such as to warrant a finding by the Court that the appellant's case falls within section 5 (3) and that its standard profits should be ascertained thereunder.

We have already seen that the ascertainment of standard profits under section 5 (3) must be made by the Board. But before such ascertainment can be made certain statutory conditions must be complied with. In the first place, the taxpayer must apply under the section. Secondly, the Minister must be satisfied either that the business was depressed during the standard period or that it was not in operation prior to January 1, 1938. So far there is no difficulty. But in addition, the Minister must be satisfied either (*a*) that the business is of such a nature that capital is not an important factor in the earning of profits, or (*b*) that the capital has become abnormally impaired or due to other extraordinary circumstances is abnormally low. The appellant contends that it comes under (*b*). But it is not enough that the capital has become abnormally impaired or is abnormally low. It must also be shown that because of either (*a*) or (*b*) the Minister was satisfied that the ascertainment of standard profits by reference to capital employed would have certain consequences, namely, either result in the imposition of excessive taxation amounting to unjustifiable hardship or extreme discrimination, or jeopardize the continuance of the business of the taxpayer. And the third statutory condition is that the Minister must

arrive at his satisfaction on the advice of the Board. It would be very difficult even to estimate the scope of section 5 (3). It was not intended as an alternative to section 5 (1) under which the taxpayer could as a matter of choice get better treatment. But while it is not possible to state with precision the kind of cases that might come under section 5 (3), it is clear that, while section 5 generally was of an exceptional nature in that it dealt with taxpayers whose businesses were depressed, section 5 (3) was intended to apply only to extraordinary cases. There was, therefore, very sound reason for entrusting to a special body such as the Board of Referees the advising of action under it. The matters on which the section requires the Minister to be satisfied are all questions of relative weight and of degree which do not readily lend themselves to precise findings of fact but are rather matters of opinion and discretion.

Although the conditions required by section 5 (3) before the Minister must direct the Board to ascertain standard profits under it have not been complied with counsel contended that the Court should find that the case falls within section 5 (3) and should be referred back to the Minister so that he might direct a reference to the Board under it. This assumes that the Court may substitute its findings for the advice of the Board and the satisfaction of the Minister. In my view, even if the Court could make such a finding, there is no justification for doing so. There were no new facts before the Court that were not before the Board. The appellant had every possible opportunity of presenting its case before them. It made its written submissions and appeared at the hearing through its secretary and its chartered accountant. When they were asked to accept the Department's figure of capital employed they did so without making any plea or argument that some basis other than that of capital employed should be used. It is admitted that between the written submissions and the oral hearing all the relevant facts were made known to the Board. Under these circumstances, I am quite unable to find that the Board or the Minister acted on any wrong principle of law or failed in any way to perform the functions assigned to them or that the Board should have advised the Minister that a departure

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from the capital standard was justified or that the Minister should have been satisfied that there should be such a departure.

But there is a more important reason for rejecting the argument. Although section 5 (3) requires that the Minister must be satisfied as to the matters therein specified before he must direct the Board to ascertain standard profits under it and that such satisfaction must be on the advice of the Board, the argument assumes that the Court may make a finding that would take the place of the satisfaction of the Minister on the advice of the Board. The Court is asked to find that a departure from the capital standard was justified, notwithstanding the Board's advice that it was not. There is no authority for any such assumption. If the Board acted within the field of jurisdiction assigned by the Act and dealt with the appellant's application in a judicial manner, as they did, it is not within the jurisdiction of the Court to review their decision and substitute its opinion for the advice which the Act requires the Board to give and the Minister to have. Moreover, the argument makes another unwarranted assumption. Before the Board may ascertain standard profits under section 5 (3) they must be directed to do so by the Minister after he is satisfied that a departure from the capital standard is justified. Yet it is urged that the Court should send the assessment back to him for reference of the application to the Board for determination of standard profits under section 5 (3), whether he is satisfied that such a course should be taken or not. It is not contemplated by the Act that the Court should substitute its opinion for the satisfaction of the Minister. In my view, it is not for the Court to determine whether the facts of the case are such as to warrant the ascertainment of standard profits under section 5 (3), but exclusively for the Minister on the advice of the Board. Under the circumstances, since the appellant's application has been dealt with under the machinery set up by the Act for the purpose and in accordance with the requirements of the law, the Court has no right to interfere. The decision of the Board as to the appellant's standard profits and its approval by the Minister must stand.

It was suggested by counsel on the opening of the hearing that the computation of the capital employed by the appellant as made by the Board was incorrect in that there was no obligation on its part to take any allowance for depreciation during the years of loss even although it was the practice of the department to require taxpayers to take 50 per cent of the normal depreciation in such years. But on the argument this contention was not put forward. There is no foundation for it.

The appellant having failed to show wherein the assessment appealed from is incorrect either in fact or in law its appeal therefrom must be dismissed with costs.

Judgment accordingly.