BETWEEN:

FALCONBRIDGE NICKEL MINES LIMITED ..... APPELLANT;

AND

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

1963
Nov. 25-28
1965
Feb. 18

Revenue—Income—Income tax—Expenses incurred for prospecting, exploration and development in searching for minerals—Deductibility of exploration expenses incurred by corporation whose chief business is that of mining or exploring for minerals—Deductibility of expenses incurred for exploration on property not owned by taxpayer—Deductibility of exploration expenses where taxpayer has benefitted from such expenditures—Deductibility of exploration expenses incurred by taxpayer as principal and as agent—"Shares of capital stock" and "right to purchase shares of capital stock"—Meaning of "undertake"—Income Tax Act, R.S.C. 1952, c. 148, s. 58(3) and s. 83A(7) as enacted by S. of C. 1955, c. 54, s. 22(1); S. of C. 1949 (2nd Session) c. 25, s. 53(4); S. of C. 1952, c. 29, s. 34.

This is an appeal from the assessments of the appellant under the *Income Tax Act* for its 1950, 1951 and 1952 taxation years. The appellant is a corporation incorporated pursuant to the laws of the Province of Ontario and during the taxation years in question its chief business was that of mining or exploring for minerals, and it was actively engaged in prospecting and exploring for minerals by means of qualified persons and incurred expenses for such purposes.

In assessing the appellant's income for the taxation years in question, the respondent disallowed the deduction of twelve amounts totalling $413,641 11 expended by the appellant on prospecting, exploration and development in searching for minerals pursuant to seven agreements entered into with different companies and individuals with respect to land owned by those companies and individuals.

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Held: That where a statutory provision speaks of an agreement under which a corporation "undertook" to incur expenses, there is no doubt that the statute is speaking of a legally enforceable agreement to incur those expenses.

2. That the expenses referred to in s. 53(4) of c. 25, S. of C. 1949 (2nd Session) are what might be referred to as "pre-production" expenses and are therefore expenses of a capital nature which would not ordinarily be deductible in the computation of income.

3 That there is no requirement that the expenses referred to in s. 53(4) of c. 25, S. of C. 1949 (2nd Session) must have been incurred by the taxpayer for exploration on his own property.

4 That there is no requirement that the taxpayer claiming deduction of expenses under s 53(4) shall not have benefitted directly or indirectly from incurring the expenses. They are deductible if expended on the taxpayer's own property, even if his property appreciates in value as a result, and they are likewise deductible if expended on another's property under an agreement whereby the taxpayer is to have certain rights in the future in respect of the property, should the results of such expenditures be beneficial.

5 That s. 53(4) requires that the expenditures be incurred by the taxpayer on his own account—that is, as a principal and not merely as an agent or contractor for somebody else.

6 That an exploration company cannot be said to be carrying on an exploration programme on its own behalf when it is carrying it on under a contract under which it is to be reimbursed for the total expenses of the programme as such or under which it carries on the programme as a means of obtaining a credit for the amount of the expenses against an amount which it would otherwise have to pay in cash.

7. That an obligation in an agreement is not any the less a legal obligation because, by virtue of a provision in the agreement, the obligations of one of the parties thereto may be terminated by giving thirty days' notice.

8. That a comparison of the words in paras. (*a*) and (*c*) of s. 83A(7) of the *Income Tax Act* shows that the statute makes a contrast between (*a*) a corporation that owned or controlled the mineral rights, and (*b*) a corporation that was to be formed for the purpose of acquiring or controlling the mineral rights, and between (*c*) the shares of capital stock of a corporation and (*d*) a right to purchase shares of the capital stock of a corporation.

9. That the appeals are allowed in part.

APPEALS under the *Income Tax Act*.

The appeals were heard by the Honourable Mr. Justice Cattanach at Toronto.

Allan Findlay and *A. S. Kingsmill* for appellant.

G. W. Ainslie and *T. Z. Boles* for respondent.

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

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CATTANACH J. now (February 18, 1965) delivered the following judgment:

These are appeals from the assessments of the appellant under the *Income Tax Act* for its 1950, 1951 and 1952 taxation years.

At the outset of the hearing of these appeals, counsel for the respondent requested that paragraph 8 of the respondent's reply to the Notice of Appeal respecting the assessment for the appellant's 1950 taxation year be deleted since he did not propose to argue or rely on the defence raised thereby. Accordingly I ordered that the said paragraph 8 be stricken from the reply.

By agreement between the parties the appellant withdrew its claim for depletion allowances in respect of a mine under s. 11(1)(*b*) of the *Income Tax Act*, and s. 1202 of the Regulations thereunder, for its 1951 and 1952 taxation years. The appellant's Notices of Appeal for the 1951 and 1952 taxation years and the respondent's Replies thereto were amended accordingly.

The Minister conceded at the hearing that he had been in error in deducting certain amounts of interest paid on borrowed capital for the purpose of computing profit as a base for determining depletion allowance and consented to judgment that the appeal from the assessment of the respondent for its 1952 taxation year be allowed and that the matter be referred back to the Minister in order that the profit be re-calcaulated and the amount of the depletion allowance to which the appellant is entitled be redetermined.

The remaining issues in the three appeals are of the same general character, although the amounts differ and there are differences in circumstances. Each issue involves a consideration of s-s. (4) of s. 53 of c. 25 of the Statutes of 1949 (Second Session), which reads as follows:

(4) A corporation whose chief business is that of mining or exploring for minerals may deduct, in computing its income for the purpose of the said Act for the year of expenditure, an amount equal to all prospecting, exploration and development expenses incurred by it, directly or indirectly, in searching for minerals during the calendar years 1950 to 1952 inclusive, if the corporation files certified statement of such expenditures and satisfies the Minister that it has been actively engaged in prospecting and exploring for minerals by means of qualified persons and has incurred the expenditure for such purposes.

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(This subsection was replaced for 1952 by a new subsection, which is not materially different for present purposes and need not be reproduced at this point. See s. 34 of c. 29 of 1952).

The remaining issues also involve consideration of s-s.(7) of s. 83A of the *Income Tax Act* as enacted by s. 22(1) of c. 54, Statutes of Canada 1955, reading as follows:

> 83A. (7) For the purposes of this section and section 53 of chapter 25 of the statutes of 1949 (Second Session), it is hereby declared that expenses incurred by a corporation, association, partnership or syndicate on or in respect of exploring or drilling for petroleum or natural gas in Canada or in searching for minerals in Canada do not and never did include expenses so incurred by that corporation, association, partnership or syndicate pursuant to an agreement under which it undertook to incur those expenses in consideration for
>
> (*a*) shares of the capital stock of a corporation that owned or controlled the mineral rights,
>
> (*b*) an option to purchase shares of the capital stock of a corporation that owned or controlled the mineral rights,
>
> (*c*) a right to purchase shares of the capital stock of a corporation that was to be formed for the purpose of acquiring or controlling the mineral rights.

The appellant is a corporation incorporated pursuant to the laws of the Province of Ontario with its head office in the City of Toronto in that province and during the taxation years in question the chief business of the appellant was that of mining or exploring for minerals. During those years, it was actively engaged in prospecting and exploring for minerals by means of qualified persons and incurred expenses for such purposes.

With reference to only two of the amounts in dispute, of which there are twelve, did the respondent argue that the expenditures did not satisfy all the requirements contained in s-s. (4) of s. 53. The two items in respect of which the respondent contends that the requirements of s-s. (4) of s. 53, read by itself, have not been satisfied, are the items covering expenses amounting to $247,243.88 in 1951 and to $56,047.26 in 1952. The respondent's submission in this connection is based upon a plea that the expenses were incurred by the appellant "for and on behalf of Gullbridge Mines Limited and not on its own behalf and that the appellant was reimbursed therefor." Reliance was placed on the decision of Cameron J. in *Okalta Oils Limited v. Minister of National Revenue*[1].

[1] [1959] Ex. C.R. 66.

Before considering the first of these twelve amounts, it should be noted that s-s. (7) of s. 83A declares, in effect, *inter alia,* that expenses of the kind described in s-s. (4) of s. 53 that have been incurred by a corporation "do not and never did" fall within the beneficial provisions of s-s (4) of s. 53 if they are expenses incurred by the corporation pursuant to an agreement

(a) under which the corporation "undertook to incur those expenses", and

(b) under which the consideration for such undertaking belongs to one of the classes of things described in paragraphs (a), (b) and (c) of s-s. (7) of s. 83A.

It follows that the respondent could only have validly disallowed an expense which otherwise was entitled to the beneficial provisions of s-s. (4) of s. 53

(a) if that expense was incurred by the corporation pursuant to an undertaking in an agreement, and

(b) if the consideration for the undertaking fell within one of the classes described in s-s. (7) of s. 83A.

If it appears, in connection with any one of the amounts in issue, that one of these two requirements is not met, the respondent erred in ruling that the amount did not fall within the provisions of s-s. (4) of s. 53 by virtue of s-s. (7) of s. 83A.

The first amount in issue is an amount of $10,512.05 that was expended by the appellant in respect of properties which are the subject matter of an agreement entered into by the appellant with Newfoundland Gull Lake Mines Limited on August 17, 1950. (That company is hereinafter referred to as "Gull Lake" and that agreement is hereinafter referred to as the "Gull Lake agreement".) The principal features of that agreement are as follows:

(a) the appellant agreed to pay to Gull Lake $2,500 in consideration for which Gull Lake granted to the appellant an exclusive right or option to purchase certain mining claims;

(b) the parties agreed that the appellant should have a right for a period of sixty days to make an examination of such mining claims;

(c) it was agreed that as long as the option granted to the appellant remained in force the appellant would be entitled to exclusive possession of the mining claim;

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(d) it was agreed that, "if on or before the sixty day period", the appellant should notify Gull Lake that it wished to proceed with the agreement, the appellant would cause a new company to be incorporated;

(e) it was agreed that, upon the incorporation of the new company, Gull Lake and the appellant would transfer the mining claims to the new company and, as consideration for the transfer, the new company would allot to Gull Lake 500,000 of its Class "A" shares and would allot to the appellant such number of its Class "B" shares as could be purchased, at five cents per share, by a payment equal to $2,500 plus the amount that the appellant had expended in connection with the examination of the mining claims; and

(f) it was agreed that, forthwith after the incorporation of the new company, the parties would cause the new company to enter into an agreement with the appellant under which the appellant would subscribe for shares in the new company on a specified basis and the new company would grant to the appellant an exclusive right or option to purchase a specified number of its Class "B" shares.

The sum of $10,512.05, being the first of the amounts in issue, is the amount of expenses incurred by the appellant in exploration work on the claims which are the subject matter of the Gull Lake agreement after the agreement came into force and before the incorporation of the new company contemplated by the agreement.

The first question is whether these expenses in the amount of $10,512.05 were incurred by the appellant "pursuant to an agreement under which it undertook to incur those expenses" within the meaning of those words in s-s. (7) of s. 83A.

The only agreement which was in force at the time the expenditures in question were made and which has any relevance to the expenditures is the Gull Lake agreement of August 17, 1950 and the only provisions in that agreement relating to the expenditures are paragraphs 2, 3 and 5 thereof, which read as follows:

2. Forthwith upon this agreement being approved by the shareholders of Gull Lake as hereinafter provided, Falconbridge shall have the right for a period of sixty (60) days thereafter to make an examination of the said mining claims by its engineers in the usual manner in which mining

properties are examined, with the right to take and remove such quantities of ore as may be required for assay and sampling purposes.

3. It is understood and agreed that this is an option only and nothing herein contained shall be deemed to obligate or bind Falconbridge to cause such examination to be made, to expend any moneys or to perform any other act other than the payment of any moneys required to be paid by Falconbridge under the provisions of Clause 1 hereof.

5 Gull Lake covenants and agrees that so long as the option hereby granted remains in force Falconbridge shall be entitled to exclusive possession of the said mining claims as and from the date of the approval of this agreement by the shareholders of Gull Lake as hereinafter provided.

In my view, this was not an agreement by which the appellant "undertook" to incur the expenses in question if the word "undertook", as used in s-s. (7) of s. 83A, implies, as I think it does, a legal liability enforceable by legal action. The word "undertook" or "undertake" has various senses depending upon the context in which it is used. If it be said that a businessman "undertook" a particular business operation, the word "undertook" indicates only that he embarked upon that operation. If it be said that a solicitor gave an "undertaking" to another solicitor, one does not think primarily in terms of an obligation enforceable by action in the Court. Where, however, a statutory provision speaks, as s-s. (7) of s. 83A does, of an agreement under which a corporation "undertook" to incur expenses, there is no doubt in my mind that the statute is speaking of a legally enforceable agreement to incur those expenses. Such conclusion is reinforced by the presence of the words "in consideration for..." It seems clear to me that the respondent's argument is in effect that the Court should read the words "pursuant to an agreement under which it undertook to incur those expenses", where those words appear in s-s. (7), as though they read "as authorized by an agreement under which it was authorized to incur those expenses" or "as contemplated by an agreement which contemplated that it would incur those expenses".

For the above reasons, I am of the view that s-s. (7) of s. 83A does not apply to the amount of $10,512.05, which is the first of the twelve amounts in dispute. It is unnecessary, therefore, to deal with the appellant's further argument that, in any event, the expenditures were not incurred in consideration of one of the classes of matters described in paras. (*a*), (*b*) and (*c*) of s-s. (7) of s. 83A.

The second of the amounts in dispute is an amount of $4,953.73 being the amount of expenditures incurred by the

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appellant in the 1950 taxation year after the incorporation of the new company contemplated by the Gull Lake agreement of August 17, 1950. This new company was incorporated with the name of Gullbridge Mines Limited on November 14, 1960 and the expenditures in question were incurred between that date and the end of that year. It would appear that these expenditures were not made pursuant to, or contemplated by, any agreement. What I have said with reference to the first item therefore applies with even greater force to the second item[1].

The third amount in dispute is an amount of $247,243.88 which is an amount of expenditures incurred by the appellant in respect of the properties which were the subject matter of the Gull Lake agreement of August 17, 1950 after those properties had been transferred to Gullbridge Mines Limited, the new company contemplated by the August 17, 1950 agreement, and after the appellant had entered into an agreement with that new company as contemplated by the original agreement. The appellant entered into the agreement with the new company on December 27, 1950. (That agreement is hereinafter referred to as the "Gullbridge agreement" and the new company is hereinafter referred to as "Gullbridge".)

The principal features of the Gullbridge agreement are as follows:

(a) the appellant subscribed for shares in the new company in the total amount of $15,000.05;

(b) Gullbridge granted to the appellant an option to purchase all or any part of 2,059,638 of its Class "B" shares in accordance with a schedule under which a specified number of shares could be purchased at a specified price on or before a specified date and, if that option were exercised, a further number of shares could be purchased before a specified date at a specified price and, if that option were exercised,

[1] The evidence is that the appellant was permitted to apply this expenditure in the sum of $4,953 73 against the purchase price of shares of Gullbridge purchased under the agreement which it made with that company after these expenditures were incurred. However, not only did the respondent not argue that the expenditures in question were not made by the appellant on its own behalf but it is probable that they were so made although Gullbridge did, for some unexplained reason, give the appellant credit for this amount as though the expenditures had been made on behalf of Gullbridge. This is not an amount, such as are the ninth and tenth amounts where, in my view, the facts established to bring the amounts under s-s. (7) of s. 83A operate to take them out from under s-s. (4) of s. 53.

a further number of shares could be purchased before a specified date at a specified price, and so on. There were, in effect, seven separate options totalling 2,059,638 shares, each option being conditional upon the appellant having exercised all previous options.

Against the background of this scheme of options, is to be read para. 4 of the Gullbridge agreement, the paragraph of that agreement under which the appellant incurred these expenses in the amount of $247,243.88. Para. 4 reads as follows:

> 4. The parties hereto agree that instead of the Optionee taking up and paying for shares the Optionee may expend the moneys required to keep this option in force on diamond drilling and on other exploration, development and mining work on the said mining claims and the Optionor hereby grants to the Optionee the exclusive right to take immediate possession of the said mining claims and as long as this agreement remains in force, the exclusive right by its servants, agents and workmen to carry on thereon and thereunder such exploration, development and mining work as the Optionee shall think fit and to take and remove therefrom such quantity of ore and minerals as it may deem necessary or advisable for assay and test purposes and the Optionee shall be reimbursed for all expenditures made by it on behalf of the Optionor, such reimbursement being in the form of shares of the Optionor issued in accordance with the terms of this agreement.

This item of $247,243.88 represents expenditures that the respondent contends were not incurred by the appellant on its own behalf. The respondent contends therefore that this amount does not qualify under s-s. (4) of s. 53.

In considering whether or not s-s. (4) of s. 53 has application to expenditures of the kind that are represented by this third item in the sum of $247,243.88, it is important to consider the ambit of s-s. (4) of s. 53. In the first place, it is to be noted that the expenses referred to in s-s. (4) are what might be referred to as "pre-production" expenses and are therefore expenses of a capital nature which would not ordinarily be deductible in the computation of income. In the second place, it is to be noted that there is no requirement in s-s. (4) that the taxpayer by whom the expenses are incurred shall have incurred them for exploration on his own property. Having regard to the obvious objective of the legislation to induce companies to extend their exploration programmes, there would appear to be no reason for imposing such a limitation. In the third place, it is to be noted that there is no requirement that the taxpayer claiming the deduction shall not have benefitted directly or indirectly

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from incurring the expenses. Presumably, if the exploration expenses were incurred in relation to the taxpayer's own property, and if the results have been fruitful, the capital value of his property will have gone up substantially as a result of the expenditures, but, nevertheless, s-s. (4) appears to authorize their deduction. By the same token, if an exploration company carries on (*in*) an exploration programme on property belonging to somebody else under an agreement whereby, in the event of the programme having proved to be fruitful, the exploration company is to have certain rights in the future in respect of the property—e.g., the right to be a partner in the operation of the property or the right to purchase the property on specified terms —he would nevertheless appear to be entitled to make the deductions contemplated by s-s. (4). That this is the effect of s-s. (4), when read by itself, appears to be confirmed by the declaratory provision contained in s-s. (7) of s. 83A which expressly removes from the operation of s-s. (4) of s. 53 expenses incurred under an agreement pursuant to an undertaking in consideration for certain types of rights specified therein.

On the other hand, s-s. (4) of s. 53 does require that the expenditures must have been "incurred" by the taxpayer before the taxpayer can deduct them under that subsection. I think it must follow from this that the expenditures must have been incurred by the taxpayer on its own account—that is, as a principal and not merely as an agent or a contractor for somebody else. Compare *Okalta Oils Limited v. Minister of National Revenue, supra.*

Superficially, it might seem that there is little, if any, difference between

(a) an arrangement under which an exploration company agrees to carry on an exploration programme on property belonging to somebody else as agent or contractor on behalf of the owner, and

(b) an arrangement under which an exploration company agrees with the owner of property, for a consideration, to carry on an exploration programme on its own behalf on property belonging to somebody else.

Practically, there might, depending on the terms of the agreements, be little or no difference. Legally, however, there are

two quite different arrangements. In the first, the exploration company does what it does as agent of the owner of the property. Compare *Montreal v. Montreal Locomotive Works*,[1] per Lord Wright at pp. 162-3 and pages 167-8. In the second, the exploration programme is its own, and, in relation to third parties, it alone is responsible. Expenses incurred in carrying out the programme under the first kind of arrangement would be incurred by the owner of the property for the purposes of s-s. (4) of s. 53 while expenses incurred in carrying out the programme under the second kind of arrangement would be incurred by the exploration company for the purposes of that subsection.

Without reviewing the various tests as to when a programme is being carried on as a contractor on behalf of a principal and when it is being carried on as a principal on his own behalf—compare *Montreal v. Montreal Locomotive, supra,* at p. 169—for the purposes of this case, it is sufficient to say that in my view an exploration company cannot be said to be carrying on such a programme on its own behalf when it is carrying it on under a contract under which it is to be reimbursed for the total expenses of the programme as such or under which it carries on the programme as a means of obtaining a credit for the amount of the expenses against an amount which it would otherwise have to pay in cash.

One view of paragraph 4 of the Gullbridge agreement might be that the appellant had, as an alternative to exercising its option to take up shares in Gullbridge at any of the various stages of the option schedule, the right, on its own behalf, to carry on diamond drilling and other operations on the Gullbridge property, and that, to the extent that it so expended money, it would not have to take up shares in order to keep the balance of the option schedule in force. On this view of the matter, para. 4 of the Gullbridge agreement would appear to contemplate the possibility that the appellant would prefer to carry on the exploration on its own behalf and at its own expense rather than subscribe to Gullbridge's capital so that the exploration could be carried on on behalf of Gullbridge and at Gullbridge's expense. On this view of the matter, also, the concluding words of para. 4, of the Gullbridge agreement whereby it was provided that

[1] [1947] 1 D.L.R. 161.

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the appellant should be reimbursed "for all expenditures made by it on behalf of the optionor", could not conceivably have any application to amounts that would be expended by the appellant on its own behalf.

As I understood the appellant's argument, however, the appellant took the position that the concluding words of para. 4 of the Gullbridge agreement, did not apply in respect of the exploration work carried on by the appellant under the first part of that paragraph but that the expenses so incurred were nevertheless to be credited against the purchase price of shares that the appellant was to receive under para. 2 of the Gullbridge agreement as though it had exercised the option in the ordinary way. I further understood that the appellant did receive shares in respect of all the work carried on by the appellant under para. 4 of the Gullbridge Agreement[1]. That being so, the appellant appears to have taken the position, at the time that it took the shares and during the course of the argument of this appeal, that the work done by it under para. 4 was done as a mode of paying for shares that it was acquiring from Gullbridge. If the work was done by the appellant for Gullbridge in lieu of making a cash payment to Gullbridge, I am of the opinion that the expenses of doing the work cannot be regarded as having been "incurred" by the appellant so as to come within the words "incurred by it" in s-s (4) of s. 53. For this reason, I am of the opinion that this third item of $247,243.88 was properly disallowed by the Minister as not falling within s-s (4) of s. 53.

The fourth item in dispute is the sum of $56,047.26 incurred in the 1952 taxation year in respect of the properties that had been transferred to Gullbridge. What has been said with reference to the third item of $247,243.88 applies equally with respect to this item of $56,047.26.

The fifth item is an amount of $20,435.41 incurred by the appellant in respect of exploration expenses on properties which were the subject matter of an agreement between the appellant and Rambler Mines Limited dated October

[1] To be absolutely accurate, it is to be noted that a small part of the amount of $247,243 88 expended by the appellant was credited against the purchase price of shares that the appellant was bound to purchase under another clause of the Gullbridge agreement. As far as this aspect of the case is concerned, the result is the same and there is no point in complicating these reasons further by dealing specially with such amount.

21, 1950. (That company is hereinafter referred to as "Rambler" and the agreement is hereinafter referred to as the "Rambler agreement".) This agreement is, for all practical purposes, of the same general character as the Gull Lake agreement of August 17, 1950 and no useful purpose would be served by making the same examination of it as has been made of the Gull Lake agreement. Certain special features of the Rambler agreement will be referred to as they become relevant. The amount of $20,435.41 represents exploration expenses incurred in 1950 on mining properties which are the subject matter of the Rambler agreement before a new company contemplated by the Rambler agreement had been incorporated. What I have said with reference to the first item in dispute applies, with necessary changes concerning details, to this fifth item of $20,435.41.

The sixth item is an amount of $15,125.57 being the exploration expenses incurred on the Rambler properties in 1951 before any agreement was made with the new company contemplated by the Rambler agreement. What has been said with reference to the second items in dispute applies equally to this sixth item of $15,125.57.

The seventh item is an amount of $13,765.73 being an amount expended during the year 1951 by the appellant under an agreement entered into on February 16, 1951 between the appellant and Rambridge Mines Limited, the new company contemplated by the Rambler agreement. (The new company is hereinafter referred to as "Rambridge" and the agreement with it is hereinafter referred to as the "Rambridge agreement".) By para. 2 of the Rambridge agreement, the appellant undertook to make expenditures in respect of exploration in certain defined amounts or, alternatively, to advance such amounts to Rambridge for its corporate purposes.

While the appellant could have satisfied this obligation by making advances to Rambridge instead of expending the money on exploration work, nevertheless, I have difficulty escaping the view that these expenditures were made pursuant to an agreement under which the appellant undertook to incur those expenses within the meaning of the corresponding words in s-s. (7) of s. 83A. I doubt that it was any the less an undertaking because the liability could be avoided under the terms of the agreement by

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electing to do something else. Clearly, it is not any the less a legal obligation because, by virtue of a provision in the agreement, the appellant was entitled to bring its obligations to an end by giving thirty days' notice.

I need come to no firm conclusion on the question discussed in the immediately preceding paragraph as I have not been able to satisfy myself that the consideration for such undertaking to incur expenses, if it was an undertaking, was something that falls within one of the classes described in paras. (*a*), (*b*) and (*c*) of s-s. (7). An examination of the Rambridge agreement itself does not disclose that the appellant was to receive any consideration in the form of "shares" or "an option" to purchase shares or "a right" to purchase shares. (Compare the wording of paras. (*a*), (*b*) and (*c*) of s-s. (7) of s. 83A.) However, it must be recognized that the real bargain was made at the time that the Rambler agreement was entered into. It was provided by the Rambler agreement that, if the appellant gave notice of its desire to proceed with that agreement, a new company would be formed which new company would acquire the mining claims that were the subject matter of the Rambler agreement and, in consideration therefor, the new company would issue its shares, 40 percent to Rambler and 60 percent to the appellant. The Rambler agreement provided, however, that such shares would not be available to the appellant unless and until it performed what it was to agree to do by an agreement which it was to enter into with the new company. The net effect was that the appellant would, by such agreement with the new company, agree to carry out the exploration work in question. Undoubtedly, therefore, the real consideration for its agreeing to incur the exploration expenses on the mining claims that were to be placed in the hands of the new company was the agreement that it would receive 60 percent of the shares of the new company. The consideration was therefore "shares of the capital stock of a corporation that was to be formed for the purpose of acquiring or controlling the mineral rights" and was not "a right to purchase" such shares within para. (*c*) of s-s. (7) or "shares of the capital stock of a corporation that owned or controlled the mineral rights" within para. (*a*). A comparison of the words of para. (*a*) and the words of para. (*c*) in s-s. (7) shows, in my view,

that the statute makes a contrast, which cannot be ignored, between

(a) a corporation that owned or controlled the mineral rights, and

(b) a corporation that was to be formed for the purpose of acquiring or controlling the mineral rights, and

between

(c) shares of the capital stock of a corporation, and

(d) a right to purchase shares of the capital stock of a corporation.

For the purposes of the Rambler agreement, Rambler was the corporation that owned the mineral rights within para. (a) and the company to be incorporated, which turned out to be Rambridge, was the corporation that was to be formed for the purpose of acquiring the mineral rights. The consideration was "shares" in Rambridge not "shares" in Rambler and not a "right to purchase shares" in Rambridge. Where under an agreement shares are the consideration, the person who makes the expenditure is entitled to the shares by virtue of the agreement. When the consideration, under an agreement, is a "right" to purchase, he acquires the "right" by virtue of the agreement and he must exercise his right to purchase by some form of notice or election and must pay a purchase price. The difference between a "share" and a "right" to purchase a share is fundamental and is one that is made by every person involved in company finance. Here the appellant was entitled to "shares" in Rambridge and that is a consideration that did not fall under para. (*a*) or (*c*) of s-s. (7) of s. 83A.

I therefore conclude that this seventh item of $13,765.73 does not fall within s-s. (7) of s. 83A and that the appellant should have been allowed to deduct it under s-s. (4) of s. 53.

The eighth item in dispute is the sum of $13,677.68 being an amount expended by the appellant in 1952 on the Rambler property. This amount is in exactly the same position as the seventh item and what I have said with reference to the seventh item therefore applies equally to this eighth item.

The ninth item in dispute is an amount of $6,991.89 expended in respect of certain mining properties that were the subject matter of an agreement between the appellant

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and Jawtam Key Gold Zones (Rambler) Limited dated June 16, 1952, which amount is, for practical purposes, in the same position from the point of view of s-s. (7) of s. 83A as the first item in dispute, and the remarks that I have made with reference to the first item may be taken as applicable thereto *mutatis mutandis*.

The tenth item is an amount of $6,221 and is also an amount expended on the properties referred to in the Jawtam agreement. This amount differs only from the ninth amount in that the appellant's "option to purchase" the properties in question was, under the agreement, conditioned upon its making the expenditures in question. The appellant was, however, under no legal obligation to make the expenditures and the remarks that I made with reference to the first item may be taken as applicable also to the tenth item *mutatis mutandis*.

The eleventh item in dispute is an amount of $15,063.77 expended pursuant to an agreement entered into on March 27, 1951 by the appellant with Stanmore Mining and Smelting Limited and a number of other persons each of whom owned mineral claims in the same area. Under this agreement, each of the persons owning mineral claims agreed to transfer those claims to a company to be formed for the specified amounts of shares in that company.

Paragraph 5 of the agreement reads as follows:

> 5. Falconbridge shall be entitled to act as sole managers of the Company's property for a minimum period of three years to decide the policy of exploration and development and be entitled to receive shares for the first Ten Thousand ($10,000 00) Dollars advanced to the new Company at ten (10¢) cents per share and to receive for the next Forty Thousand ($40,000.00) Dollars shares at twenty-five (25¢) cents per share and thereafter to receive for further advances shares at such price or prices as may from time to time be decided by the directors and Falconbridge agrees to expend the aforesaid total of Fifty Thousand ($50,000.00) Dollars for the purposes of the Company and on exploration work to be commenced as soon as weather conditions permit and to continue the same until the whole of the said sum of $50,000 00 is expended, and thereafter to expend such further sums as in its judgment is considered justified. As for such moneys as are expended in addition to the said Fifty Thousand ($50,000.00) Dollars, the same shall be offered pro rata to the shareholders in the proposed company, provided, however, that in the event of any of such shareholders not purchasing and paying for such shares then the same shall be offered to Falconbridge its nominee or nominees, for the same price and on the same terms, prior to seeking sale to any other person or persons, firm or corporation.

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The appellant and the respondent each put its case in respect of this item on the basis that, if it were not for s-s. (7) of s. 83A, amounts expended by the appellant pursuant to para. (5) would have been entitled to the benefit of s-s. (4) of s. 53 as enacted by s. 34 of c. 29 of the Statutes of 1952, which subsection is applicable to the year 1952. That subsection reads as follows:

(4) A corporation whose principal business is mining or exploring for minerals may deduct, in computing its income for the purpose of *The Income Tax Act* for a taxation year, the lesser of

(*a*) the aggregate of the prospecting, exploration and development expenses incurred by it, directly or indirectly, in seaching for minerals in Canada,

(i) during the taxation year, and

(ii) during previous taxation years, to the extent that they were not deductible in computing income for a previous taxation year, or

(*b*) of that aggregate an amount equal to its income for the taxation year

(i) if no deduction were allowed under paragraph (*b*) of subsection (1) of section 11 of the said Act, and

(ii) if no deduction were allowed under this subsection, minus the deduction allowed by section 27 of the said Act,

if the corporation has filed certified statements of such expenditures and has satisfied the Minister that it has been actively engaged in prospecting and exploring for minerals in Canada by means of qualified persons and has incurred the expenditures for such purposes.

The appellant conceded that the first $50,000 expended under para. 5 of the Stanmore agreement fell within the declaratory provision contained in s-s. (7) of s. 83A but contended that the remaining $15,063.77, the eleventh item in dispute, did not fall within the said s-s. (7). The respondent took the position that the $15,063.77 item also fell within the declaratory provision in s-s. (7).

To determine the issue so raised requires a careful consideration of para. 5 of the Stanmore agreement, which paragraph appears to leave some things to the imagination. As a result of the best consideration that I have been able to give to para. 5, I have been constrained to the view that amounts expended by the appellant under that paragraph cannot be regarded as amounts expended by it on its own behalf and cannot, therefore, be regarded as "expenses incurred by it" within s-s. (4) of s. 53. This brings me to the result contended for by the respondent by different reasoning than that upon which the respondent relied.

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The following are the various stages by which I came to the view that I hold as to the effect of para. 5 of the Stanmore agreement:

(1) Paragraph 5 first provides that "Falconbridge shall be entitled to act as sole managers of the Company's property... to decide the policy of exploration and development..." It follows that whatever Falconbridge, i.e., the appellant, did in its role of "managers of the Company's property" it did as agent of the company—i.e., the new company contemplated by the agreement—and not on its own behalf.

(2) The next provision in the agreement is that "Falconbridge shall... be entitled to receive shares for the first Ten Thousand ... Dollars advanced to the new Company at ten... cents per share and to receive for the next Forty Thousand... Dollars shares at twenty-five... cents per share and thereafter to receive for further advances shares at such price or prices as may from time to time be decided..." It is a necessary implication of this part of the paragraph that Falconbridge is to make "advances" to the new company and is entitled to receive shares for those advances. It may be that what was contemplated was "advances" in the ordinary sense of loaning money or it may have been contemplated that the "advances" would be monies expended by the appellant on behalf of the new company. I cannot escape the conclusion, however, that paragraph 5 contemplated the appellant putting up money to be used by the new company and that Falconbridge was to be entitled to receive shares in consideration for such money.

(3) The next relevant part of paragraph 5 reads: "Falconbridge agrees to expend the aforesaid total of Fifty Thousand... Dollars for the purposes of the Company and on exploration work... and thereafter to expend such further sums as in its judgment is considered justified". When the appellant agreed to expend money which it was to put into the company's coffers or at the company's disposal and for which it was to receive shares, and when the appellant had already been authorized to act as "sole managers of the Company's property", to me, the result is inescapable

that the appellant was agreeing to make such expenditures of the company's money in its capacity as manager of the company's property and that any expenditure made pursuant to such agreement was an expenditure of the new company and cannot therefore be regarded as an expenditure incurred by the appellant for the purposes of subsection (4) of section 53.

In the result, therefore, I am of the opinion that the Minister did not err in disallowing the appellant's claim in respect of this eleventh item of $15,063.77.

The twelfth item in dispute is the sum of $3,603.14 being an amount expended on mining claims which are the subject matter of an agreement entered into on July 29, 1952 between the appellant and John Stanley Brodie and Trevor Wyman Page. I see no relevant difference between the factors determining the character of these expenditures for present purposes and those determining the character of the expenditures making up the first item in dispute, and what I have said with reference to the first item may therefore be taken as applying *mutatis mutandis* to the twelfth item.

At the conclusion of the trial I allowed certain amendments to the pleadings, the effect of which was to allow the Minister to contend that the deductibility of three items should be dealt with by the judgment of this Court notwithstanding the fact that the Minister had, by notification under s-s. (3) of s. 58 of the *Income Tax Act*, agreed to allow their deduction. It was understood at the time that I allowed these amendments to the pleadings that the question as to whether the Court has jurisdiction on an appeal by the taxpayer to disallow deductions that the Minister had previously allowed, would have to be determined before the Minister could succeed in respect of these items. As, in the result, I have come to the conclusion that the three items in question are deductible, it is not necessary for me to deal with this question of jurisdiction.

The result is therefore that the appellant succeeds in respect of the first amount in dispute in the sum of $10,512.05; the second amount in dispute in the sum of $4,953.73; the fifth amount in dispute in the sum of $20,435.41; the sixth amount in dispute in the sum of

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$15,125.57; the seventh amount in dispute in the sum of $13,765.73; the eighth amount in dispute in the sum of $13,677.68; the ninth amount in dispute in the sum of $6,991.89; the tenth amount in dispute in the sum of $6,221.00; and the twelfth amount in dispute in the sum of $3,603.14. The appeals will therefore be allowed with costs and the assessments will be referred back to the Minister for an adjustment of the figures in accordance with the conclusions set out in this paragraph and in the fourth paragraph of this judgment.