BETWEEN:

HUNTTING MERRITT SHINGLE CO. LTD. ..... } APPELLANT;

AND

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

1951
Apr. 9
May 14

Revenue—Excess Profits Tax Act 1940, 4 Geo. VI, c. 32, s. 6(1) (b), and 6(3)—Reserve—Depreciation—Minister's decision is based on facts as at time decision rendered—Appeal allowed.

Appellant had been made an allowance before 1947 for expected depreciation in its inventory or stock, pursuant to s. 6(1) (*b*) of the Excess Profits Tax Act. In 1947 it claimed a large allowance for reserve to meet expected depreciation on stock during 1948 calculated on the same basis as that approved for the earlier period. In 1949 the respondent disallowed the claim and taxed the whole of the profits received in 1947 together with the amount which had been allowed earlier. On January 2, 1948 the company sold all its assets at a profit and in June 1948 went into liquidation. An appeal was taken from this decision.

Held: That the Minister was justified in refusing to allow any deduction for depreciation suffered in 1948 as at the time of his ruling in 1949 it had become apparent that there would be no depreciation and the fact that he could not have foreseen this at an earlier date and might have ruled differently is irrelevant; his ruling must be judged at the time it was made and it was then right.

2. That since the amount allowed as depreciation before 1947 had not been taken from the reserve and used during 1947 or left in the reserve after the end of 1948 it was not taxable and in this respect the appeal must be allowed and it is irrelevant that there actually was no depreciation in 1947.

APPEAL under the provision of the Excess Profits Tax Act.

The appeal was heard before the Honourable Mr. Justice Sidney Smith, Deputy Judge of the Court, at Vancouver.

J. L. Lawrence and *B. W. F. McLoughlin* for appellant.
Dougald Donaghy, K.C. and *F. J. Cross* for respondent.

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

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SIDNEY SMITH D.J. now (May 14, 1951) delivered the following judgment:

This case turns on the question whether the appellant company's profits for 1947 subject to Excess Profits Tax were or should have been reduced by an amount which it claimed should be allowed to meet future depreciation in its "inventory," under Sec. 6 (1) (*b*) of the Excess Profits Tax Act. This section gives a right to set aside a reserve for the purpose, if the Minister "allows" it, and the amount so set aside is deductible from the profits taxable in that year.

The material facts are as follows: The appellant had been made an allowance of $17,228.38 before 1947 for expected depreciation in its "inventory" or stock. In 1947 in its return of profits it claimed a large allowance for "reserve" to meet expected depreciation on stock during 1948. This claim is said, without dispute, to have been calculated on the same basis as that approved for the earlier period. The Minister, however, by no act either allowed or disallowed the claim until 1949 when he disallowed it *in toto* and taxed the whole of the profits earned in 1947. He also taxed with these the $17,228.38 referred to.

Amendments to the Excess Profits Tax Act passed in 1947 announced that the tax would not be in force after that year. Transition provisions were included for dealing with depreciation reserve that still existed. Before 1947 the Act had provided that any reduction made in the reserve would be taxable in the year of reduction. The changes passed in 1947 that are relevant to the appellant company (whose fiscal year was the calendar year) provided that any reductions in reserve made in 1948 should be treated as 1948 profits and not subject to Excess Profits Tax. See Sec. 6(3).

On 2 January 1948 the company sold all its assets at a profit and in June 1948 went into liquidation, its funds being apparently all distributed in 1948.

The company claims that the allowance which it claimed in 1947 for reserve must be treated as having been "allowed" and having gone into the reserve so as to reduce the 1947 taxes *pro tanto*. The argument is that the Minister was

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bound to allow this setting aside, and the situation must be treated as though he had done his duty. Then it is said that the distribution of assets by the liquidator in 1948 reduced the reserve to nil, so that by Sec. 6 (3) this was not taxable. The 1947 profits would be reduced by the amount allowable for reserve and taxes lessened proportionately.

All this is based on the premise that the depreciation claimed was "allowed" or should have been allowed. The Crown denies both alternatives.

This denial is put on several grounds. I understood the Crown to go so far as to claim that the allowance lay entirely in the discretion of the Minister; he never allowed any, and that is said to be the end of the matter. I cannot accept this view. The decision in *Pioneer Laundry & Dry Cleaners Ltd.* v. *Minister of National Revenue* (1), makes it clear that the Minister's discretion is quasi-judicial and not arbitrary but subject to review.

Next the Crown said that even so, the sale of the company's assets at a profit disproved any depreciation, so that the Minister was right in making no allowance. I cannot agree that this was proof. It may have been due to depreciation that the profit on sale was not twice as large as it was. This argument fails to take account of the market factor. The sale price itself is no test.

However, the Crown's next argument seems to have much more substance, viz. the argument that the Minister was right in making no allowance because by the time the matter came before him the company had sold all its assets on 2 Jan. 1948, and in June 1948 had gone into liquidation, these events making it clear that in 1948 the company had no stock to suffer depreciation.

On consideration, I find that contention unanswerable. There is ample legal authority to show that when a Court or other tribunal has to make computations that *prima facie* require it to forecast the future, it must do what it can with the available materials, and must often work with conventional rules and assumptions; but still if by the time of the computation the event, which ordinarily the tribunal would have to anticipate, has actually taken place,

(1) (1940) A.C. 127.

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the tribunal must proceed on the actual facts, and can no longer act on artificial rules for measuring the future probabilities as its guide. It is no longer concerned with the future.

This is illustrated by the case of *Williamson* v. *Thorneycroft* (1). There a widow whose husband had been killed sued for compensation which would be measured by her expectancy of life. Before the case came to trial she died and her executors continued it. In assessing her loss the trial Judge awarded damages based on her expectancy of life as it appeared when the cause of action arose, based largely on her age. The Court of Appeal held this was wrong, and that the Judge should have had regard to the fact that the widow's life had proved to be short, so that her loss was extremely small.

Du Parcq L.J. said in this case (p. 660):

> In one sense it is true to say that the moment at which damages are to be fixed in a case under Lord Campbell's Act is at the moment of the death. That does not mean that one should shut one's eyes to everything which has happened subsequently . . . In assessing damages one is in a happier position if one can find that certain events have happened than if one has to speculate about events which are likely to happen . . . It seems inconceivable that it should be suggested that the Court must say "I cannot hear evidence to hear that the woman was dead" or rather "Although she is dead I must shut my eyes to that fact. I must assume that she is alive and speculate in that region of phantasy as to her prospect of continuing to live."

The British Columbia Court of Appeal reasoned in the same way in *Mah Ming Ju* v. *Terminal Cartage Ltd.* (2), where after the plaintiff had obtained a judgment for damages to be assessed, the quantum depending largely on his expectancy of life, he died from extrinsic causes before the damages were assessed. On their assessment the Court held that regard must be had to his actual life span and not to the probabilities as they originally appeared. The same ruling was made in *Ponyicki* v. *Sawajima* (3).

The same principle was followed by the House of Lords in *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Company* (4). There the appellants, owners of coal seams near the respondents' waterworks, gave statutory notice that they intended to work the coal. The respondent gave counter-notice to leave a certain seam

(1) (1940) 2 K.B. 658
(2) (1942) 58 B.C.R. 470.
(3) (1943) S.C.R. 197 at 201.
(4) (1903) A.C. 426.

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unworked, this giving the appellants a right to compensation. Arbitration on the amount was delayed two years, and in the meantime the price of coal unexpectedly rose. The arbitrator fixed two amounts for submission on stated case, one based on the price at the date of the notice, the other based on the price at the date of arbitration. A divisional Court held the larger sum recoverable: the Court of Appeal reversed them. The House of Lords restored the first decision.

Lord Halsbury L.C. said at pp. 428, 429:

> If it were a purchase . . . the person who had to make the calculation of what was the compensation ought to have arrived at the sum which experience has now shown to be the correct amount.
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> It is true he probably would not have been able to arrive at that sum accurately, but he ought to have contemplated upon such material as he had what would be the true sum. He ought to have considered the possible rise or fall of prices. We now know what would have been the true sum, and the proposition baldy stated seems to be that, because you could not arrive at the true sum when the notice was given, you should shut your eyes to the true sum now you do know it, because you could not have guessed it then.
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> It is of course only an accident that the true sum can now be ascertained with precision. But what does that matter?

Lord Macnaghten added (p. 431):

> . . . the arbitrator's duty is to determine the amount of compensation payable. In order to enable him to come to a just and true conclusion it is his duty, I think, to avail himself of all information at hand at the time of making his award which may be laid before him. Why should he have to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him why should he shut his eyes and grope in the dark?

Applying this reasoning to the present case, I think that when the matter came before the Minister, and it was then quite clear that the company would have no stock to depreciate in 1948, it was not his duty to ignore this, and speculate how the probabilities of depreciation would have appeared to him if he had considered the matter earlier. His knowledge at the time of adjudication made it quite proper for him to disallow all depreciation.

The company tried to meet the above principle by arguing that his adjudication was in effect automatic, and virtually that there was no need for him to adjudicate at all. It was argued that all he had to do was to fix the *principle* of computing depreciation, as he had done in an earlier year, and he was then "functus". Also that once

the principle was fixed in 1946, it could not be changed. With deference, I cannot accept this view. No quasi-judicial decision can be automatic. The Act requires the Minister to "allow" a deduction for depreciation before it can be made, and this requires some official act on his part. Though it is probable that the principle of computation in one year should apply to another, that is only so, *other things being equal.* Here other things were not equal; for by the time that the Minister ruled on the depreciation to be suffered in 1948, it had become apparent that there would be none.

That justified him in refusing to allow any deduction, and the fact that he could not have foreseen this at an earlier date, and might have ruled differently then, is legally irrelevant. His ruling, for the reasons stated, must be judged at the time when it was made, and it was then right.

So much for the appellant's main claim to be allowed for depreciation to take place in 1948.

However, different considerations apply to the $17,228.38 reserve allowed and set up before 1947. The Minister has not only disallowed the deduction of the larger sum but has added in and taxed this $17,228.38 as part of the appellant's profits for 1947. This course would be justified if it could be shown

(*a*) that this sum was taken from the reserve and used during 1947, or

(*b*) that this sum was left in the reserve after the end of 1948. (S. 6(3)).

There is no suggestion that this was used in 1947 or that anything was left after 1948. The Crown's written argument attempts to justify the taxation of this allowance with 1947 profits under Section 6(1), saying that this section—

> . . . requires that the sum of $17,228.38 which was part of the 1946 profits and which had been transferred to a suspense account and not taxed shall be brought back into the taxable profits and taxed along with the profits of the year 1947, because there had been no depreciation in inventory values, but on the contrary there had been an appreciation according to the price obtained on the sale of the total inventory for 1948.

I cannot see, with respect, that Section 6 requires anything of the sort; this sum, unlike the larger allowance

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claimed, had been "allowed" by the Minister, and that being so it could only become taxable on one of the bases I have specified. The fact that there actually was no depreciation in 1947 as expected (if that were proved, which I think it was not) would be legally irrelevant.

The appeal should therefore be allowed in part, and the 1947 tax reduced by 15 per cent of $17,228.38. In the circumstances I think the appellant, though only partially successful, should have its costs, except so far as they may have been increased by the inclusion of the larger claim.

Judgment accordingly.