

1955
May 30
Oct. 31

BETWEEN:

NORTH BAY MICA COMPANY }
LIMITED

APPELLANT;

AND

THE MINISTER OF NATIONAL }
REVENUE

RESPONDENT.

Revenue—Income —Income tax—Mining company—Income derived from mines—Exemption from income tax—The Income Tax Act, S. of C. 1948, c. 52, ss. 74(1)(b) and (2), 128(1)—References to the Income War Tax Act, R.S.C. 1927, c. 97—Definition of “mine”—Meaning of “new or old” mine in s. 4(x) of the Income War Tax Act—Meaning of “came into production” in s. 74(1)(b) of the Income Tax Act—Operation of a mine as distinct from the mine coming into production —Appeal from Minister’s assessment dismissed.

Section 74 of the Income Tax Act, S. of C. 1948, c. 52, as amended, reads in part as follows:

- 74. (1) Where a corporation establishes that a mine was (b) an industrial mine certified by the Minister of Mines and Technical Surveys to have been operating on mineral deposits (other than bedded deposits such as building stone), that came into production of ore during the calendar years 1946 to 1954, inclusive, income derived from the operation of the mine during the period of thirty-six months commencing with the day on which the mine came into production (other than any operation thereof in the year 1946) shall, subject to prescribed conditions, not be included in computing the income of the corporation.
- (2) In this section “production” means production in reasonable commercial quantities.

From October, 1942 to April, 1945 large commercial quantities of raw mica were mined by Purdy Mica Mines Ltd. on a property in Ontario. The operations were discontinued because the chief productivity dikes—the most important one being No. 3 dike—had been bottomed and were nearing exhaustion. Early in 1950 appellant company acquired the mine and a new dike, named No. 3 dike extension, was opened up for the purpose of mining a new concentration of mica discovered some months before and located a few feet from the old No. 3 dike, the latter being used as a base for operations in the new dike. Production of mica in commercial quantities from No. 3 dike extension by appellant company commenced on March 1, 1950, continued during the remaining months of 1950 and ran into 1951. In its income tax return for its 1951 taxation year appellant company claimed an exemption under s. 74 of the Income Tax Act but this was disallowed by the Minister on the ground that the company did not qualify for the exemption. An appeal from the assessment was taken to this Court which

Held: That the question to be determined here is when the “mine” came into production. The words “came into production” in s. 74 of the Act refer to the mine or mineral deposits coming into production,

not to the "operation" as distinct from the mine coming into production. When appellant company acquired the mine in 1950 it proceeded to explore and develop it from the point at which the Purdy company had ceased operations. The exploration, development and geological work were different but the mine is the same mine which previously had been operated and from which mica had been produced by the Purdy company during the years 1942-1945.

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2. That the words "new or old" in s. 4(x) of the Income War Tax Act, R.S.C. 1927, c. 97, as amended, are not mere surplusage. The omission of these words in the Income Tax Act has significance. Under section 4(x) of the Income War Tax Act the question of whether a mine, old or new, came into production so as to qualify for tax exemption was a matter for the Minister, in his discretion, to determine. Under section 74 of the Income Tax Act no ministerial discretion is provided for. The question of whether a "mine" came into production on a date that entitles income derived by a company from such production to tax exemption must depend on the facts of the particular case and the application of section 74 to those facts. Wording contained in section 4(x) or in any other section of the Income War Tax Act has no bearing on the interpretation of section 74, other than to the extent required by section 128(1) of the Income Tax Act in respect to a reference to a transaction, matter or thing in a year to which the Income War Tax Act was applicable.
3. That the omission from section 74 of the Income Tax Act of the descriptive words "new or old" restricts the application of the section to a period of 36 months commencing with the day on which a mine, regardless of whether it is new or old, first came into production.
4. That the reference to "the day on which the mine came into production" as contained in section 74 relates to the day on which the mine first came into production and that the mica mine operated by the appellant company in 1950 first came into production of ore in reasonable commercial quantities in the year 1942, shortly after its discovery by one Purdy.

APPEAL from an assessment under the Income Tax Act, S. of C. 1948, c. 52, as amended.

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

H. Maxwell Bruce, Q.C. and *S. D. Thom* for appellant.

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

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

RITCHIE J. now (October 31, 1955) delivered the following judgment:

This is an appeal from a reassessment of income tax, under date of September 21, 1951, made by the Minister of National Revenue in respect to the 1951 taxation year of the appellant, which ended on February 28, 1951.

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The relevant part of section 74, of the Income Tax Act, S. of C. 1948, c. 52, as applicable to the 1951 taxation year of the appellant, reads as follows:

74. (1) Where a corporation establishes that a mine was
 (b) an industrial mine certified by the Minister of Mines and Technical Surveys to have been operating on mineral deposits (other than bedded deposits such as building stone), that came into production of ore during the calendar years 1946 to 1954, inclusive, income derived from the operation of the mine during the period of thirty-six months commencing with the day on which the mine came into production (other than any operation thereof in the year 1946) shall, subject to prescribed conditions, not be included in computing the income of the corporation.

(2) In this section, "production" means production in reasonable commercial quantities.

The reassessment made by the Minister disallowed the claim for exemption made by the appellant under section 74.

The appellant objected to the reassessment, but it was confirmed by the Minister as having been made in accordance with the provisions of the Act and in particular on the ground that the taxpayer did not qualify for the exemption.

It is common ground that the mine with which we are concerned was an industrial mineral mine and that it was certified by the Minister of Mines and Technical Surveys as required by clause (b) of section 74(1). Unfortunately, the actual certification had been mislaid and was not available at the hearing of the appeal.

The mine is situate in the township of Mattawan in the Province of Ontario and is generally referred to as the "Purdy mine", by reason of the mica deposits on the property having been discovered in the winter of 1941-42 by a young prospector named Justin Purdy.

Following his 1941-42 discovery, Purdy with two partners proceeded to take mica from surface outcrops and sold to dealers in Ottawa and Hull the initial production which appears to have been in commercial quantities.

In October, 1942 the Purdy claims were acquired by Inspiration Mining and Development Company Limited, which incorporated a subsidiary company, Purdy Mica Mines, Limited, for the purpose of developing the property. For convenience, this company will be referred to as "the Purdy company".

Production by the Purdy company, which soon attained important volume, continued until April, 1945, when mining was discontinued because consulting geologists advised

against expending further moneys in a search for commercial quantities of raw mica on the property and the Purdy company was convinced its chief productivity dikes had been bottomed and were nearing exhaustion. After April, 1945 the only interest of the Purdy company in the property was from the standpoint of salvage.

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In 1949 James J. Kenmey, a geologist, learned of the Purdy property from Paul McDermott, a prospector who had worked on the property from 1942 until the discontinuance of mining operations in 1945. Following procurement of an article (Exhibit A) describing the mica deposits on the Purdy property and written for the American Institute of Mining and Metallurgical Engineers by Hugh S. Spence, Kenmey visited the property in company with McDermott and found the old pits filled with water, all machinery removed, no structures of any value standing and the road grown over. The property had not been worked since April, 1945. No commercial mica was in sight.

McDermott, at the request of Kenmey, secured from the Purdy company, under date of June 14, 1949 a letter lease (Exhibit 7), covering mining claims numbered S-36095, S-36137 and S-37975 for a term of three years from the date of the letter and stipulating royalty payments based on the value of production. The letter lease also gave McDermott an option to purchase the mining claims for the sum of \$10,000 in cash plus a ten per cent interest in a new company which McDermott would cause to be incorporated to own and operate the claims. The royalty payments were to apply on the purchase price.

Kenmey and McDermott made four or five visits to the Purdy property during the summer of 1949, going over it in the light of the Spence article, and systematically inspecting each of the old pit workings. Mr. Kenmey's objective was to correlate the Spence description of the mica showings with other geological reports written by a Dr. Harding (Exhibit B) and a Dr. Lang.

The lease so obtained by McDermott was assigned to Kenmey, who formed a partnership consisting of three other parties and himself. From June, 1949, until about February, 1950, the partnership conducted exploration work by means of trenching and obtained some production but in less than commercial quantities.

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The appellant company was incorporated early in 1950 and subsequently acquired ownership of the mine. Kenmey became the president of the appellant company. Following incorporation of the appellant company development and exploration work on the property was pressed more vigorously.

The Purdy company had obtained its most important production from a vein of mica about ten feet in width and about four hundred feet in length which had been worked to a depth of around sixty feet from a dike or pit designated as No. 3 dike. Examination of No. 3 dike by Kenmey and his associates had not disclosed suitable mica in sufficient quantities to constitute an economic operation but had revealed stringers of the same pegmatite bearing mica that the Purdy company had mined.

The pegmatite stringers leading off in the wall rock of No. 3 dike suggested to Mr. Kenmey that another lens or concentration of mica might be located to replace the lens which had been mined out by the Purdy company. Under Kenmey's direction waste rock was removed to a width of from three to five feet west of the old No. 3 dike and such removal led to the discovery of a new lens or concentration of mica having a width of about eight feet and a length of about seventy-five feet.

A new dike, named No. 3 dike extension, was opened up by the appellant company for the purpose of mining the new discovery. The pit in No. 3 dike which had been opened up by the Purdy company was used by the appellant company as a base for operations in No. 3 dike extension which was mined to a depth of about one hundred and seventy feet, a level lower than the No. 3 dike Purdy company workings had been carried to.

Production of mica in commercial quantities from No. 3 dike extension by the appellant company commenced on March 1, 1950, continued during the remaining months of 1950 and ran into 1951.

Mr. Kenmey testified that the new find was a different deposit of mica than that worked by the Purdy company and said the designation "No. 3 dike extension" was used merely as a matter of convenience.

Substantially all the commercial mica mined by both the Purdy company and the appellant company came from a zone of mica-bearing pegmatite about 1,600 feet in length and 400 feet in width. From 90 to 95 per cent, or almost all of the mica production by the Purdy company came from No. 3 dike. A like percentage of the appellant company production came from No. 3 dike extension.

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Professor George B. Langford, the head of the Department of Geological Sciences and professor of mining geology at the University of Toronto, who was called as an expert witness by the respondent, said that, in his opinion, the mica lens in No. 3 dike mined by the Purdy company and the mica lens in No. 3 dike extension discovered and mined by the appellant company were mineralogically and geologically the same and formed part of the same mica deposit.

In support of its appeal, the appellant company advanced the following seven grounds:

1. That section 74(1)(b) of the Income Tax Act applies to the operation rather than the existence of a mine;
2. That the word "mine", as used in the context of section 74, means "the excavation from which minerals are extracted" and does not mean "veins" or "deposits" of minerals in the earth;
3. That the mining operations conducted by the Purdy company during the years 1942 to 1945 ended in 1945 and at no time have been renewed;
4. That the mine was not in production or in operation from April, 1945 until the mining claims were acquired by Kenmey and his associates and operated on a commercial basis in 1950;
5. That mining operations by the appellant, as contemplated by section 74, brought the mine into production in 1950 so that the requirement of the statute is satisfied;
6. That for the purpose of this appeal no prior mining operation on the property has any significance or relevance in the interpretation or application of section 74;
7. That section 74 does not state mining operations qualifying for the exemption conferred by it must be

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a continuation of an old operation or must be a new operation. The only requirement is that there be a mine coming into production.

In respect to the first and second grounds above referred to it was contended that the word "mine", as used in the context of section 74, refers to a place—an excavation—from which minerals can be extracted and that the only concern of the section is with the operation of that place or operation. In other words, it is the activity constituting the operation of the mine, not the mine itself, that yields the income and it is with such activity that section 74 is concerned. From that basis, it was argued the words "came into production" refer to the activities carried on in a mine leading to the production of minerals, so that the question at issue in this appeal really is whether the activities having to do with operation of the mine by the appellant company resulted in mineral production in commercial quantities commencing on March 1, 1950. I am not prepared to accede to that submission. The question to be determined is when the "mine" came into production.

The Shorter Oxford English Dictionary describes "mine" as meaning "an excavation made in the earth for the purpose of digging out metallic ores or coal, salt, precious stones, etc. Also a place yielding these."

Murray's Dictionary describes "mine" as "an excavation made in the earth for the purpose of digging out metals or metallic ores or certain other minerals, as coal, salt, precious stones. Also the place from which such minerals may be obtained by excavation."

Halsbury (Hailsham Edition), Volume 22, at page 526 states the word "mine" may sometimes include not only mineral deposits but also so much of the adjoining strata, whether superjacent or subjacent, as may be necessary to remove for the purpose of working the mineral.

The Halsbury conception of a "mine" appears to best describe the area covered by the three mining claims acquired by the appellant company.

In *Spencer v. Scurr* (1) Lord Romley, Master of the Rolls, held that a seam of coal discovered to be lying at a depth of 118 fathoms below two known seams of coal, and

(1) (1862) 31 Bevan's 334.

which could only be worked by means of a new shaft made specially for the purpose and at very great expense, was part of the original mine.

In *Elias v. Snowdon* (1) Lord Selborne said at page 466:

I do not consider that the sinking a new pit on the same vein, or breaking ground in a new place on the same rock, is necessarily the opening of a new mine or a new quarry.

The wording of section 74(1)(b) is clear. Its application is solely to an industrial mine which a corporation has established to be an industrial mineral mine certified to have been operating on mineral deposits and which came into production of ore during the calendar years 1946 to 1954 inclusive.

The words "came into production" refer to the mine or mineral deposits coming into production, not to the "operation" as distinct from the mine coming into production.

When Kenney and his associates took over the Purdy property in 1949 and the appellant company acquired it in 1950 they proceeded to explore and develop it from the point at which the Purdy company had ceased operations. Exploration and development procedure and geological thinking were different but I must find that the mine operated by the appellant is the same mine which previously had been operated and from which mica had been produced by the Purdy company during the years 1942-1945.

The appellant, however, contends that any prior operation of the mine by the Purdy company or by Justin Purdy has no bearing on its claim for exemption and that section 74 grants exemption notwithstanding the production obtained by the prior operators. In support of that contention stress was laid on the wordings of similar exemptions granted to mining companies under the Income War Tax Act and to section 128(1), one of the transitional sections, of the Income Tax Act.

An exemption from tax, such as conferred by section 74, first was conferred by a 1936 amendment to the Income War Tax Act. By the addition of section 89 to the Income War Tax Act, the 1936 amendment exempted from tax, for its first three fiscal periods, the income of a company derived from the operation of a metalliferous mine that came into production after the 1st day of May, 1936 and prior to the

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(1) (1879) 4 A.C. 454.

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1st day of January, 1940. The element of "ministerial discretion" was embodied in the legislation by authorizing the Minister to "determine which mines whether new or old" qualified for the exemption. Under the 1936 legislation, subject to the Minister so determining, it would seem the revival of production in an old mine could qualify for the exemption.

In 1939 section 89 of the Income War Tax Act was amended by substituting "1943" for "1940" so as to extend the exemption to mines which came into production after the 1st day of May, 1936 and prior to the 1st day of January, 1943. The "new or old" wording and the requirement of determination by the Minister remained.

In 1942 the exemption provision in respect to mines coming into production after the 1st day of January, 1943 was transferred to the Excess Profits Tax Act. Paragraph (*g*) was added to section 7 of the Excess Profits Tax Act so as to exempt from taxation under that Act the profits of a company derived from the operation of any base metal or strategic mineral mine which came into production in the three calendar years commencing the 1st day of January, 1943. Again the Minister was authorized to "determine which mines whether new or old" qualified for the exemption.

In 1945, the exemption under the Excess Profits Tax Act was continued by adding paragraph (*h*), section 7(*h*) so as to extend the exemption to profits of a company derived from the operation of any metalliferous or industrial mineral mine coming into production on or after January 1, 1946. No end date was set for the commencement of production but the Minister again was authorized to determine which mines, whether new or old, qualified for the exemption.

In 1946 section 3(8) of chapter 55 of the statutes of that year added paragraph (*x*) to section 4 of the Income War Tax Act and so revived the policy, under that Act, of granting to mining companies exemption from taxation of income derived during the first three years of production from a mine, whether new or old. The exemption was subject to regulations and to determination by the Minister. The commencement of production period covered by this amendment was from January 1, 1944 to December 31, 1949 but

in the case of a base metal or strategic mineral mine was subject to determination by the Minister that it came into production before January 1, 1946 and in the case of a metalliferous or industrial mineral mine was subject to a ministerial determination that it came into production on or after January 1, 1946.

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When the Income Tax Act first was enacted, in 1948, it included section 74 in substantially the same language as that with which we now have to deal and, notwithstanding that the statute applies only to 1949 and subsequent taxation years, dealt with commencement of production periods during the calendar years 1946 to 1949 inclusive.

In the 1948 enactment of the Income Tax Act the adjectival "new or old" classification of mine was, for the first time, not included in the wording granting tax exemption to those mines which might qualify for the exemption. No subsequent amendment of the Income Tax Act has restored the "new or old" wording.

It was strongly urged on behalf of the appellant that section 74(1) of the Income Tax Act and section 4(x) of the Income War Tax Act dovetail and that the interpretation of section 74(1) of the one Act must be the same as section 4(x) of the other Act. In other words that when Parliament revised the language granting the exemption it did not intend to alter the substance of the exemption.

Section 74(1) of the Income Tax Act provides tax exemption for income derived from mines that came into production "during the calendar years 1946 to 1954, inclusive" but excludes from the 36 months' production exemption period "any portion thereof in the year 1946."

I cannot accept the submission that the inclusion in section 74(1) of production period commencing in the years 1946-1949 means the Income War Tax Act exemption of either "new or old" mines as contained in the Income War Tax Act is carried forward into section 74(1). The interpretation of section 74(1) must be confined to the interpretation of the actual wording contained therein. The words "new or old" cannot be read in.

Inclusion of the 1946-1949 years in the commencement of production periods permissible under section 74(1) was, as I see it, to permit the continuation of tax exemption granted to metalliferous or industrial mineral mines that

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came into production after January 1, 1946 and prior to January 1, 1949 and which had been granted the ministerial certificates required under section 4(x) of the Income War Tax Act.

Section 128(1) of the Income Tax Act, the transitional section stressed by counsel for the Minister, reads:

128. (1) A reference to this Act or a regulation to this Act or any provision thereof shall be construed, as regards any transaction, matter or thing in a year to which the Income War Tax Act was applicable, to include a reference to the provisions of the Income War Tax Act relating to the same subject matter.

If exemption periods of three years, granted under the Income War Tax Act to mines that commenced production in 1946, 1947 and 1948 ran into 1949 and subsequent taxation years the companies operating such mines had the right to invoke the protection of section 128(1) of the Income Tax Act but that transitional section, in my opinion, has no application to mines qualifying for protection under section 74 of the Income Tax Act.

Inclusion of the 1946-1948, inclusive, period in section 74(1) is nothing more than a provision relating to years in which the Income War Tax Act was applicable and so must be construed as including a reference to section 4(x) of the Income War Tax Act. Section 128(1) does not go further. The section has no application to mines that came into production in 1949 and subsequent taxation years.

I am unable to persuade myself that the words "new and old" as included in the Income War Tax Act are mere surplusage. The omission of the descriptive words in the Income Tax Act, to me, has significance. Under section 4(x) of the Income War Tax Act the question of whether a mine, new or old, came into production so as to qualify for tax exemption was a matter for the Minister, in his discretion, to determine. Under section 74 of the Income Tax Act no ministerial discretion is provided for. The question of whether a "mine" came into production on a date that entitles income derived by a company from such production to tax exemption must depend on the facts of the particular case and the application of section 74 to those facts. Wording contained in section 4(x) or in any other section of the Income War Tax Act has no bearing on the interpretation

of section 74, other than to the extent required by section 128(1) of the Income Tax Act in respect to a reference to a transaction, matter or thing in a year to which the Income War Tax Act was applicable.

A mine can be new or it can be old. A reference to the date, on which a mine, "whether new or old", came into production is wide enough to include the date on which there is a revival of production from an old mine that has been dormant. A reference to the date on which a mine (without the descriptive adjectives "new or old") came into production has, in my opinion, a much narrower application and does not include the date on which there is a revival of production from an old mine that has been dormant.

As I see it the omission from section 74 of the descriptive words "new or old" restricts the application of the section to a period of 36 months commencing with the day on which a mine, regardless of whether it is new or old, first came into production.

While the original purpose of the exemption from income tax granted to mining companies clearly was to encourage mineral production from new mines and the revival of mineral production from old mines, I must, for the reasons stated, hold that the reference to "the day on which the mine came into production" as contained in section 74 relates to the day on which the mine first came into production and that the mica mine operated by the appellant company in 1950 first came into production of ore in reasonable commercial quantities in the year 1942, shortly after its discovery by Justin Purdy.

The appeal, therefore, will be dismissed with costs.

Judgment accordingly.

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