BETWEEN:

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

1958
Oct. 8

1959
Aug. 13

AND

NORMAN LE FEVRE GRIEVE AND TORONTO GENERAL TRUSTS CORPORATION ..... RESPONDENTS.

Revenue—Income—Income tax—Chief source of income—Combination of farming and other source of income—Determination by Minister—When functus officio—Income Tax Act, R.S.C. 1952, c. 148, ss. 13, 42 and 46.

Section 13 of the Income Tax Act, R.S.C. 1952, c. 148 is as follows:

"13. (1) Where a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income, his income for the year shall be deemed to be not less than his income from all sources other than farming minus the lesser of

(*a*) one-half his farming loss for the year, or

(*b*) $5,000.

(2) For the purpose of this section, the Minister may determine that a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income."

In computing his income tax returns for the years 1953, 1954, a taxpayer whose sole occupation was farming, deducted his farming losses from his other income, the bulk of which he received as life beneficiary of an estate. For 1953 he claimed to elect to average his income in accordance with the provisions of s. 42 of the *Income Tax Act*. The Minister assessed the taxes payable by the taxpayer accordingly but later determined pursuant to s. 13(2) that the taxpayer's chief source of income for 1953 and 1954 was neither farming nor a combination of farming and some other source of income and he thereupon re-assessed for those years and in so doing allowed as a deduction from other income only one-half of the farm losses claimed. The election to average income for 1953 was also rejected because the chief source of income during the averaging period did not appear to have been derived from farming as required by s. 42(1).

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The taxpayer's appeal to the Income Tax Appeal Board having been allowed, the Minister appealed from that decision to the Exchequer Court and, the taxpayer having died in the interval, the executors of his will were made parties respondent. On the appeal to this Court it was contended for the respondent that the determinations made by the Minister under s. 13(2) were subject to review by this Court and that the chief source of income for 1953, 1954 was a combination of farming and some other source of income, and alternatively that, in view of the original assessments, the Minister was *functus officio* and had no power thereafter to make the determination under s. 13(2) upon which the re-assessments were based.

Held: That it does not follow from the mere fact of an assessment having been made that the Minister necessarily has made a determination under s. 13(2) and become *functus officio,* for until the applicability of s. 13(1) was questioned by some one, there would have been no issue to be determined.

2. That the original assessments being in conformity with the taxpayer's computations, there was no issue for determination by the Minister under s. 13(2) until such issue was opened in the subsequent correspondence. In this situation there was no foundation for an inference that the Minister had made determinations or had exhausted his power prior to or when making the first assessments and he therefore was not *functus officio* when making the determinations admitted in the taxpayer's reply.

3. That as it was conceded that the taxpayer's chief source of income for 1953 and 1954 was not farming, and as there was no evidence that his chief source of income was farming in any of the years 1949 to 1953, s. 42(1) was inapplicable and the claim to average properly rejected.

4. That the determination by the Minister under s. 13(1) is reviewable on appeal to this Court, but only within the limits indicated in *Minister of National Revenue v. Wright's Canadian Ropes Ltd.* [1947] A.C. 109 at 122.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Thurlow at Vancouver.

F. J. Cross for appellant.

L. A. King for respondent.

THURLOW J. now (August 13, 1959) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a judgment of the Income Tax Appeal Board dated November 22, 1957,[1] allowing an appeal by William Robert

[1] 18 Tax A.B.C. 208; 57 D.T.C. 574.

Grieve against income tax reassessments for the years 1953 and 1954. Mr. Grieve died on August 8, 1958, and at the opening of the trial by consent Norman LeFevre Grieve and the Toronto General Trusts Corporation, the executors named in his will, were made parties respondent, and the proceedings were continued against them. The matter in issue is whether Mr. Grieve was entitled, in computing his income for income tax purposes for the years in question, to deduct the whole of his farming losses for those years or was limited to a deduction of half of them by s. 13 of the *Income Tax Act*. For 1953 there is a further issue of whether or not he was entitled to average his income pursuant to s. 42 of the Act.

Section 13 of the *Income Tax Act*, R.S.C. 1952, c. 148, as applicable to the years 1953 and 1954, was as follows:

13. (1) Where a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income, his income for the year shall be deemed to be not less than his income from all sources other than farming minus the lesser of

(*a*) one-half his farming loss for the year, or

(*b*) $5,000.

(2) For the purpose of this section, the Minister may determine that a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income.

(3) For the purpose of this section, a "farming loss" is a loss from farming computed by applying the provisions of this Act respecting computation of income from a business *mutatis mutandis* except that no deduction may be made under paragraph (*a*) of subsection (1) of section 11.

Section 42 provided a right for a taxpayer to elect to average his income "where a taxpayer's chief source of income has been farming or fishing during a taxation year (in this section referred to as the 'year of averaging') and the four immediately preceding years (in this section referred to as the 'preceding years')."

William Robert Grieve was a farmer who had carried on farming operations for many years prior to 1953 and 1954. Farming was his sole occupation. In some years these

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operations had yielded a profit. In others, notably in 1953 and 1954, they resulted in a loss. The following figures relating to his income were put in evidence:

Year	Investment Income	Farming Profit	Farming Loss
1942	$15,706.00	$ 565.67	
1943	15,030.24		$ 528.98
1944	15,187.38	1,570.08	
1945	14,784.56	2,616.61	
1946	15,264.97	170.29	
1947	16,726.04		314.72
1948	17,278.57	238.04	
1949	16,541.47		1,386.19
1950	15,800.71	260.60	
1951	14,878.89		3,674.32
1952	14,238.12		4,898.80
1953	9,297.23		6,539.19
1954	11,062.64		4,851.77

In computing his income for 1953 and 1954 for the purposes of the *Income Tax Act*, Mr. Grieve deducted his farming losses for these years from his other income, the bulk of which was income which he received as life beneficiary of an estate. For 1953 he also claimed, pursuant to s. 42, to elect to average his income in accordance with the provisions of that section. His returns for the years 1953 and 1954 were dated April 8, 1954 and April 12, 1955, respectively. In the return for 1953, gross farming revenue was reported at $2,255.93 and farming expenses at $8,795.12, including $424.19 for capital cost allowances, and a tax refund of $509.23 was claimed as a result of the averaging under s. 42. In the return for 1954, the farming revenue was reported at $2,542.42, the expenses claimed amounted to $7,394.19, including $411.69 for capital cost allowances, and tax was computed at $487.50. By notices of assessment dated May 31, 1954 and May 18, 1955 respectively, the Minister advised Mr. Grieve that tax levied for 1953 resulted in a credit of $509.23 and that the tax levied for 1954 was $487.50, these amounts being exactly as computed in Mr. Grieve's returns.

On or about January 7, 1955, by a letter directed on behalf of the Chief Assessor for the Vancouver Taxation District to a firm of chartered accountants who acted for Mr. Grieve, the latter was informed that his income tax returns for 1953

and earlier years were under review and information was requested on a number of details pertaining to his farming operations. He was also informed that, as the farming losses incurred in the averaging period amounted to $16,074.31 and were offset only by the 1950 profit of $260.60, while during the same period investment and other income totalled $17,851.42 (*sic*), his chief source of income did not appear to be from farming and therefore the averaging "privilege" could not be "extended" to him. The accountants answered the questions and on March 8, 1955 a further letter was addressed on behalf of the Chief Assessor to Mr. Grieve. In this letter he was again informed that his returns for 1952 and 1953 were under review and, after setting out s. 13 verbatim, the letter went on to state that it was proposed to recommend to the Deputy Minister that he make a determination under s. 13(2) that Mr. Grieve's chief source of income for 1952 and 1953 was neither farming nor a combination of farming and some other source of income. In the final paragraph, Mr. Grieve was informed that any representations he might wish to make should be made, preferably in writing, within two weeks, after which time the matter would be referred to head office. Some further correspondence, in which the accountants offered representations on his behalf, followed, and later, on December 16, 1955, a notice of reassessment was sent to him in which his tax for the year was computed at $835.74. Some two months later, a letter was sent to him referring to the letter of March 8, 1955, and stating that the Deputy Minister had determined that Mr. Grieve's chief source of income for 1953 was neither farming nor a combination of farming and some other source of income. The reassessment had been made on that basis, and in it one-half only of the farm loss for the year (after deducting therefrom the capital cost allowances claimed) was allowed as a deduction. The election to average income pursuant to s. 42 was also rejected, because "the chief source of income during the averaging period does not appear to have been derived from 'farming' as required by s. 42(1) of the *Income Tax Act*." A notice of objection was given by Mr. Grieve, and subsequently, on July 26, 1956, the Minister, per the Deputy Minister (as

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to which see s. 116(1)), confirmed the reassessment as having been made "in accordance with the provisions of the Act and in particular on the ground that under the provision of s-s. (2) of s. 13 of the Act the Minister has determined that the taxpayer's chief source of income is not farming or a combination of farming and some other source of income; that the taxpayer's chief source of income was not farming within s-s. (2) of s. 41 of the Act."

It appears from the notice of objection to the reassessment for 1954 that on January 5, 1956 a letter, setting out s. 13 and "advising of intended reduction of farm loss claimed" was sent by the District Taxation Office to Mr. Grieve in respect of his 1954 income. To this letter Mr. Grieve made no reply "as the same point was being dealt with at that time in respect of a 1953 assessment." This, I assume, refers to a proposed reference to the Deputy Minister to obtain his determination under s. 13(2) with respect to the 1954 taxation year. In any case, on January 26, 1956, notice of reassessment for 1954 was sent to Mr. Grieve, accompanied by a letter stating that the Deputy Minister had determined that Mr. Grieve's chief source of income for 1954 was neither farming nor a combination of farming and some other source of income. By this reassessment, as well, only half of the farm loss claimed (after deducting capital cost allowance) was allowed as a deduction from other income.

Following a notice of objection given by Mr. Grieve, this reassessment was also confirmed by the Minister, per the Deputy Minister, as having been "made in accordance with the provisions of the Act and in particular on the ground that under the provisions of subsection (2) of section 13 of the Act the Minister has determined that the taxpayer's chief source of income is not farming or a combination of farming and some other source of income."

Notice of appeal to the Income Tax Appeal Board from both reassessments was then given, and on the matter coming before the Board the appeal was allowed by a judgment the effect of which was to vacate the reassessments for both years. The Minister thereupon appealed to this Court and, in his notice of appeal, set out as allegations the deduction

by Mr. Grieve of amounts representing farm losses in calculating his income for the 1953 and 1954 taxation years, the original assessments, and the reassessments, and went on to state in paragraph 4 as follows:

> 4. Before the making of the re-assessments referred to in paragraph 3 hereof, determinations were made under subsection (2) of Section 13 of the Income Tax Act, that the Respondent's chief source of income for the 1953 and 1954 taxation years was neither farming nor a combination of farming and some other source of income.

All of these allegations, as well as allegations relating to the notices of objection, confirmation of the reassessments by the Minister, and the appeal to the Income Tax Appeal Board were admitted in the reply filed on behalf of Mr. Grieve. In subsequent paragraphs of the reply, however, reasons (the truth of which on the evidence there is no reason to doubt) were given accounting for the 1953 and 1954 farming losses as being the result of marketing conditions and severe frosts which killed many of the taxpayer's apple trees, and it was objected that the determinations made by the Minister under s. 13(2) were subject to review by this Court, that the taxpayer's chief source of income for 1953 and 1954 was either farming or a combination of farming and some other source of income, and alternatively, that, in view of the original assessments, the Minister was *functus officio* and had no power to make the reassessments.

Under the last-mentioned plea, it was submitted that it must be presumed that the Minister exercised his power to make a determination as provided by s. 13(2) prior to or at the time of the making of the first assessment for each of the years in question and that thereafter he was *functus officio* and without power to make the later determinations which were referred to in the notice of appeal in the paragraph above quoted. If this contention is sound, it goes to the root of both reassessments.

As there was no direct or other evidence that the Minister had made a determination for either year under s. 13(2) prior to giving the first notice of assessment for that year, the substantial question raised by the submission is that of what is to be inferred as to the exercise by the Minister of his power from the giving of the first notices of assessment.

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In approaching the problem, it is, I think, important to note that, while both the function of assessing the tax under the authority of s. 46 and that of making a determination under s. 13(2) are by the Act committed to the Minister, they are separate and different functions and their effects are not the same. The first, that of assessing the tax, is strictly an administrative function. It involves simply the application by the Minister of the substantive law to the facts as they appear. Liability for the tax imposed by the statute is not affected by the assessment so made being incorrect or incomplete or by the fact that no assessment has been made, and, within the times limited by s. 46(4), the assessing function may be re-exercised to realize the full amount of the tax imposed by the statute. If there is any dispute between the taxpayer and the Minister, both the facts and the law, as well as the application of the law to the facts, are left to be determined by the Court on an appeal as provided by the statute. The second function, that of making a determination under s. 13(2), is a judicial function. The subsection constitutes the Minister the judge, for the purpose of s. 13, of the material fact on which the application of s. 13(1) depends and, subject to his decision being not contrary to "sound and fundamental principles," empowers him to bind the taxpayer by such determination.

I do not think, however, that it follows that a determination pursuant to s. 13(2) is necessary in every case to which the rule of s. 13(1) may apply. For example, if a taxpayer files a return and, in doing so, correctly computes his income by applying the rule of s. 13(1), I can see no occasion for the Minister to make a determination of the fact under s. 13(2) before making an assessment of tax for, in such a case, there is no issue to be determined. Nor do I think it would follow from the fact of an assessment having been made that the Minister must necessarily have made a determination under s. 13(2) and become *functus officio* and, therefore, powerless to vary the assessment if it subsequently appeared that s. 13(1) was in fact inapplicable and that the computation was thus wrong, for until the matter was raised by someone there would have been no issue to be determined. As I see it, this power is provided for and

is to be exercised by the Minister in situations where an issue, whether raised by the taxpayer or the Minister, exists as to the material fact on which the application of s. 13(1) depends.

The power conferred by s. 13(2) is substantially different from that which the Minister had under s. 13(2) as it was prior to the repeal and substitution of s. 13 by S. of C. 1952, c. 29, s. 4. For a review of the history of this legislation, see *Minister of National Revenue v. Robertson*[1]. Formerly, the power was to determine what the chief source of income was. That power and the rule for computing income contained in s-s. (1), as it then was, applied to the right of taxpayers to deduct losses not related to the taxpayer's chief source of income, while the present section is concerned only with the right to deduct farming losses. The power contained in the applicable s. 13(2) is not a power to determine what the chief source of income was, nor is it a power to determine, in any general sense, what it was not. It is limited to determining that the chief source of income was neither of two things, namely *farming* or a *combination* of farming and some other source of income. The making of such a determination results only in a negative conclusion of fact, and the absence of such a conclusion cannot imply a positive determination that the chief source of income was one thing or another. At most, the absence of such a conclusion can imply only one of two things, either that the Minister has not exercised the power, or that he has considered the matter judicially, pursuant to s. 13(2), and has come to the conclusion that the facts do not warrant such a determination. Only in the latter case could there be any possible application of the principle that, having exercised the power, the Minister had become *functus officio*.

Now it is, I think, also important to observe that, in the present case, the first assessments for 1953 and 1954 were predicated not on the basis of the rule of s. 13(1) being applicable, but on the basis of the rule of s. 13(1) being inapplicable. This suggests that the Minister has not made a determination that the taxpayer's chief source of income was neither farming nor a combination as set out in s. 13(2), for the assessments do not reflect the application

[1] [1954] Ex. C.R. 321 at 328.

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of the rule of s. 13(1). It is, accordingly, consistent with the assessments to infer that the applicability of s. 13(1) was not considered at all—in which case it would, in my opinion, remain the duty of the Minister to consider it and to reassess accordingly, if necessary—or that the Minister, acting through his subordinates engaged in carrying out the administrative duty of assessing, considered the matter but came to the conclusion that the facts did not warrant raising an issue between himself and the taxpayer on the point. In the latter event as well, I think that it would be the duty of the Minister, in view of s. 46(3) and (4), and that it would remain open to him, to review the assessment and, if necessary, raise the issue at a later time within the periods limited by s. 46(4).

Since these explanations are not inconsistent with the assessments, it cannot, in my opinion, be said that the raising of an issue and the exercise of the power to determine it under s. 13(2) are necessarily to be inferred where all that has happened is that a taxpayer in his return has proceeded to calculate his income and his tax on the basis of s. 13(1) being inapplicable and an assessment of tax has been made which apparently proceeds on the same basis, and I think this is so even though both the taxpayer's and the Minister's computations may be quite wrong and even though it was the Minister's duty in his administrative capacity before making the assessment to examine the taxpayer's return and to consider and apply all relevant provisions of the statute. I doubt that any inference can ever be drawn from a mere assessment of tax as to the making of a determination pursuant to s. 13(2), but whether it can in some instances or not, unless an issue for determination under that provision has been raised prior to the making of the assessment, I am of the opinion that the mere making of the assessment implies nothing as to whether or not the power to determine such an issue has been exercised.

In *Minister of National Revenue v. Robertson*[1] Potter J., on the evidence before him, drew an inference that the power conferred on the Minister by s. 13 had in fact been exercised. There, however, both the provisions

[1] [1954] Ex. C.R. 321.

of s. 13 and the power of determination given by s-s. (2) were widely different from those applicable to the years 1953 and 1954, the computation on which the assessment in question was based was at variance with the taxpayer's computation, and Potter J. appears to have drawn his conclusion that the determination had been made not merely from the notice of assessment and a letter referring to s-ss. (3) and (4) of s. 13, though not to s-s. (2), which had accompanied the notice of assessment, but as well from the Minister's decision (following the appellant's notice of objection), in which it was stated that the appellant's chief source of income was neither farming nor a combination of farming and some other source of income within the meaning of s-s. (3) of s. 13 of the Act.

In the present case, the original assessments being in conformity with the taxpayer's computations, there was, in my opinion, no issue for determination by the Minister under s. 13(2) until such an issue was opened in the respective letters whereby the taxpayer was informed that it was proposed to refer the matter to the Deputy Minister for his determination, and the taxpayer was invited to submit representations thereon. In this situation, there is, in my opinion, no foundation for an inference that the Minister had made determinations or had exhausted his power prior to or when making the first assessments, and I am therefore of the opinion that the Minister was not *functus officio* at the time of making the determinations which were admitted in the taxpayer's reply.

It was also submitted that the Minister's determinations were open to review on this appeal and that they were not justified by the facts. In my opinion, a determination by the Minister under s. 13(1) is reviewable on appeal to this Court, but only within the limits indicated in the *Minister of National Revenue v. Wright's Canadian Ropes* case.[1] There Lord Green M. R. said at p. 122:

> This right of appeal must, in their lordships' opinion, have been intended by the legislature to be an effective right. This involves the consequence that the Court is entitled to examine the determination of the Minister and is not necessarily to be bound to accept his decision. Nevertheless the limits within which the Court is entitled to interfere are in their lordships' opinion strictly circumscribed. It is for the taxpayer to

[1] [1947] A.C. 109; [1947] C.T.C. 1; [1947] 2 D.T.C. 927.

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show that there is ground for interference and if he fails to do so the decision of the Minister must stand. Moreover, unless it be shown that the Minister has acted in contravention of some principle of law the Court, in their lordships' opinion, cannot interfere: the section makes the Minister the sole judge of the fact of reasonableness or normalcy and the Court is not at liberty to substitute its own opinion for his. But the power given to the Minister is not an arbitrary one to be exercised according to his fancy. To quote the language of Lord Halsbury in *Sharp v. Wakefield* [1891] A.C. 173 at p. 179 he must act "according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular". Again in a case under another provision of this very sec. 6 (s. 6, sub-s. 1) [sec. 5(1)(*a*)—Ed.] where a discretion to fix the amount to be allowed for depreciation is given to the Minister, Lord Thankerton in delivering the judgment of the Board said "The Minister has a duty to fix a reasonable amount in respect of that allowance and, so far from the decision of the Minister being purely administrative and final, a right of appeal is conferred on a dissatisfied taxpayer; but it is equally clear that the Court would not interfere with the decision unless—as Davis, J. states—'it was manifestly against sound and fundamental principles' ". (*Pioneer Laundry and Dry Cleaners Ltd. v. Minister of National Revenue* [1938-39] C.T.C. 411 at pp. 416-417.)

In the present case, there was no agreement between the parties nor was there any oral evidence as to what was in fact before the Minister or his Deputy when the two determinations were made, though a number of documents were offered on behalf of the Minister and admitted in evidence by consent. These included copies of the taxpayer's returns for the years in question, the notices of the reassessments and accompanying documents, the taxpayer's notices of objection, which included copies of the correspondence and representations made on the taxpayer's behalf, and a statement showing the taxpayer's investment income and farm profits and losses as previously set out for the years 1942 to 1954 inclusive.

I think it may fairly be assumed that the taxpayer's income tax returns for the years in question and copies of the notices of reassessment and accompanying documents, as well as the taxpayer's notices of objection with accompanying documents, were before the Deputy Minister when he decided to confirm the reassessments. Indeed, it is stated in the decisions that he has reconsidered the reassessments and considered the facts and reasons set forth in the notices of objection. But whether or not the figures relating to the taxpayer's investment income and his farming profits and losses for earlier years were before the Deputy Minister

was not established. Nor was any evidence offered as to what was before him when the determinations, as admitted, were made. In this situation, since "it is for the taxpayer to show that there is ground for interference and if he fails to do so the decision of the Minister must stand," no ground has been shown for interfering with the Minister's determinations. But even assuming that the Deputy Minister had before him the material set out in the taxpayer's returns and the correspondence which preceded the reassessments and reviewing the matter on the basis of that having been the material which was before the Deputy Minister, I am of the opinion that there was in it ample material to support the determinations and that no good ground has been shown for disturbing either of them. I am also of the opinion that, if the figures for earlier years were before him, the determinations are equally unassailable, for if the figures have any effect, it is simply to confirm the determinations. Nor was anything further shown in the notices of objection which would, in my opinion, afford ground for disturbing the determinations. It was conceded in the course of argument, and I think quite properly so, that the taxpayer's chief source of income was not farming, and the case was thus narrowed down to a submission that the taxpayer's chief source of income was in fact a combination of farming and investments. However, on the whole of the material, including that put forward on behalf of Mr. Grieve, there does not appear to have been any connection or relation whatever between his farming as a source of income in any year and the estate or investments from which the bulk of his income was derived upon which one could say that his chief source of income was a combination of the two, beyond the mere fact that he was the recipient or owner of the estate or investment income and was also the recipient or owner of the farming profits or the sufferer of the farming losses. That fact alone does not, in my opinion, inevitably lead to the conclusion that Mr. Grieve's chief source of income was a *combination* of such sources of income within the meaning of s. 13(1), and I can, therefore, see no reason for disagreeing with the Deputy Minister's

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determinations for either 1953 or 1954 that Mr. Grieve's chief source of income was neither farming nor a combination of farming and some other source of income.

There remains the issue under s. 42(1); a matter which is not affected by the Minister's determination under s. 13(2) since that determination is merely for the purpose of s. 13. On this issue, it was accordingly open to the respondents on the trial of this appeal to prove, if they could, that Mr. Grieve's chief source of income for the five averaging years was farming, and it was incumbent on them to prove this if the issue under s. 42(1) was to be resolved in their favour. However, as previously mentioned, it was conceded that Mr. Grieve's chief source of income for 1953 and 1954 was not farming, and on the evidence and particularly the figures already referred to, I am unable to find that his chief source of income was farming in any of the years 1949 to 1953 inclusive. Section 42(1) was therefore inapplicable, and Mr. Grieve's claim to average was properly rejected.

The appeal will, accordingly, be allowed with costs and the reassessments restored.

Judgment accordingly.