BETWEEN:

HOLLINGER NORTH SHORE EXPLORATION CO. LTD., ... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ... RESPONDENT.

1959
Oct. 29, 30, 31
1960
Apr. 22

Revenue—Income tax—Whether payment of royalty to lessee by sublessee on ore shipped from leased mine "income derived from the operation of a mine" within the meaning of the Income Tax Act R.S.C. 1952, c. 148, s. 83(5) as enacted by S. of C. 1955, c. 54, s. 21(1).

Section 83(5) of the *Income Tax Act* provides:

"Subject to prescribed conditions, there shall not be included in computing the income of a corporation income derived from the operation of a mine during the 36 months commencing with the day the mine came into production."

The appellant corporation in 1953 secured an operating license in the form of a lease to mine iron ore from land in northern Quebec and thereafter subleased such right to another company. The consideration therefor included, *inter alia*, payment of an overriding royalty on all iron ore and specialties shipped by the sublessee from any mines on the leased land. Payment to the appellant under the agreement totalled $3,182,936, for the year 1956, the whole of which year was within the period of 36 months commencing with the day on which the mine operated on the property by the sublessee came into production. The Minister ruled that this sum was not income derived from the operation of a mine and thus exempted by section 83(5) and assessed the appellant accordingly. On an appeal from the assessment

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Held: That the sum in question was not "received" from the operation of the mine but "arose and accrued" by reason of the operation and was thus "derived" therefrom. It was therefore "income derived from the operation of a mine" within the meaning of section 83(5) of the Act and was exempted by that provision.

APPEAL under the *Income Tax Act*.

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

H. H. Stikeman, Q.C., H. F. White, Q.C. and *Jean Monet* for appellant.

P. M. Ollivier and *D. Andison* for respondent.

THURLOW J. now (April 22, 1960) delivered the following judgment:

This is an appeal from an assessment of income tax in respect of the appellant's income for 1956. In making the assessment, the Minister included in the computation of income an amount of $3,182,936.93 which the appellant received in the year from Iron Ore Company of Canada and the issue to be determined is whether or not he was right in so doing. The appellant's case is that this sum was "*income derived from the operation of a mine,*" etc., within the meaning of s. 83(5) of the *Income Tax Act*, R.S.C. 1952, c. 148, as enacted by S. of C. 1955, c. 54, s. 21(1), by which it was provided that

> Subject to prescribed conditions, there shall not be included in computing the income of a corporation *income derived from the operation of a mine* during the period of 36 months commencing with the day on which the mine came into production.

The material facts are not in dispute. In February, 1953, the appellant, a corporation organized under the law of the Province of Quebec, was granted by the Crown pursuant to a statute of that province an "operating licence in the form of a lease" by which it obtained, *inter alia*, the right to mine and take iron ore from a tract of land in the northern part of the province. For the purpose of exploiting the rights so obtained, and pursuant to an elaborate arrangement made some years earlier between the appellant and a number of other companies for the exploration and development of the iron ore known to be located on the tract of land, the appellant shortly after obtaining the licence, by what is referred

to as a sublease, granted to Iron Ore Company of Canada certain proportions of the iron ore located on the tract of land with the right to mine and carry away the ore so granted. The consideration to be paid for this grant, as set out in the sublease, consisted of (*a*) a payment of $100,000 per year, (*b*) the sublessee's share of the duties payable under the *Quebec Mining Act*, and

(*c*) An overriding royalty on all iron ore and specialties shipped by the Sublessee under this Sublease from any mines upon the described lands (except iron ore and specialties shipped for the acount of the Sublessor) and sold and delivered each year by the Sublessee, of seven per cent of the then competitive market price f.o.b. vessels at Seven Islands, Quebec (determined as provided in Section 2 of the *Mutual Covenants* of this Sublease) for each grade and kind of such iron ore and specialties, which the Sublessee binds itself to pay to the Sublessor during the term hereof; provided however, that, in the event seven per cent of such competitive market price for any grade or kind of such iron ore or specialties shall be less than twenty-five cents a ton, then the overriding royalty on such iron ore and specialties shall be twenty-five cents a ton.

There was also a provision that, beginning with the year 1955, Iron Ore Company of Canada should pay royalty based on a certain minimum tonnage of iron ore per year, which minimum was in fact exceeded in the year in question.

In December, 1949, Iron Ore Company of Canada had entered into a contract with Hollinger-Hanna Limited by which the latter for consideration undertook to provide management services and supervision of the operations and properties of Iron Ore Company of Canada and in June, 1954, the appellant made a similar contract with Hollinger-Hanna Limited for the management by it of the appellant's iron ore operations and properties. In March, 1955, the appellant made a further contract with Iron Ore Company of Canada whereby the latter undertook for certain consideration to mine for the appellant iron ore from the appellant's remaining portion or proportion of the iron ore on the tract of land.

What followed was a single operation in the course of which iron ore was extracted by Iron Ore Company of Canada from a single mine on the tract of land, transported to Seven Islands and sold, the selling price being received by Hollinger-Hanna Limited, which after deducting its charges remitted to the appellant the amount representing the proceeds of sale of its share of the ore. This sum was not

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included in computing the appellant's income and no question arises in this appeal as to it. It was admitted in the course of argument that this sum was exempt under s. 83(5).

Hollinger-Hanna Limited also paid to Iron Ore Company of Canada the amount representing the proceeds of sale of its share of the iron ore and from this amount Iron Ore Company of Canada then paid to the appellant the overriding royalty payable under the sublease which in 1956 amounted to $3,182,936.93 and which, as previously mentioned, the Minister included in computing the appellant's income for that year. It is not disputed that the whole of the year 1956 was within the period of 36 months after the mine came into production.

Was this sum then "income derived from the operation of a mine" within the meaning of that expression in s. 83(5)? The contention put forward on behalf of the Minister was that s. 83(5) applies only to income immediately attributable to the operation of a mine by the corporation itself. In support of this construction it was argued that the expression "income derived from the operation of a mine" in s. 83(5) refers to income from a particular source, that in respect of any particular amount of income so far as any given taxpayer is concerned there can be only one source and the taxpayer must have some proprietary interest in it or dominion over it, and that in order to come within s. 83(5) the operation itself must be the source of the income to the particular corporation claiming the exemption. From this position, it was submitted that here the source to the appellant of the income in question was the sublease or the property right for which the royalty was paid, and that in the hands of the appellant the sum in question was not income from the operation of the mine.

I do not agree with this interpretation of s. 83(5). The subject being dealt with by the subsection is income of the corporation, but the exemption provided is given by reference to the derivation of the income rather than by reference to the kind of corporation or the nature of the business or activity, if any, which it carries on. The word "corporation" is not qualified by any adjective such as "operating" or "mining" which might have lent colour to the Minister's suggestion, nor is the word "operation" or

the word "mine" followed by the words "by the corporation" or any wording to the like effect indicating that the benefit of the section is to be limited to cases wherein the corporation taxpayer is the operator or an operator of the mine. The ordinary meaning of the words "income derived from the operation of a mine" is, in my opinion, broader than that contended for and, had Parliament intended that their meaning should be limited in the manner suggested, the appropriate words to so limit it would, I think, have been included in the section. In their absence, I see nothing in the language used or in the subject matter being dealt with to warrant reading the subsection as if such words were present.

Nor do I think the present problem is to be solved by endeavouring to determine the "source" of the income to the particular taxpayer. The word "source" does not appear in s. 83(5), but even assuming for this purpose that the words "the operation of a mine" refer to such an operation as the "source" of the income in question, nothing in the language used in s. 83(5) appears to me to require that the taxpayer have some proprietary interest in or dominion over the operation of the mine or that the operation and nothing else should be capable of being accurately described as the source of the income to the particular taxpayer, regardless of the context in which the word "source" might be used. "Source" is a term the meaning of which is largely determined by its context, and when it is used in relation to income its meaning may vary as well. There is not necessarily any single thing which in all senses is the source of income or of particular income. Nor is there necessarily a single source to any given taxpayer for particular income or for income of a particular kind. For example, the source of a sum received by a solicitor for preparing a document could in one sense accurately be said to be the client from whom the sum was received, in another sense the source of the same sum could be said to be the effort which the solicitor put forth to prepare the document. In yet another sense, it might be said to be the contract between the solicitor and

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his client. And finally, it might also be said to be the solicitor's practice. Lord Atkin appears to have had much the same thought in mind when he observed in *Liquidator, Rhodesia Metals Ltd. v. Commissioner of Taxes*[1] at p. 789:

> It is desirable also to point out that at any rate for different taxing systems income can quite plainly be derived from more than one source, even where the source is business.

Later in the same judgment, Lord Atkin said, with reference to the meaning of the word "source" in an ordinance imposing taxation in respect of income received or accrued from any "source" within the Territory:

> Their Lordships incline to view quoted with approval from Mr. Ingram's work on South African Income Tax Law by de Villiers J. in his dissenting judgment: "Source means not a legal concept, but something which a practical man would regard as a real source of income"; "the ascertaining of the actual source is a practical hard matter of fact."

In *Hart v. Sangster*[2] Lord Goddard C.J., with whom the other members of the Court of Appeal agreed, in delivering a judgment dealing with the meaning of source in a statute imposing tax in respect of income where the taxpayer had acquired a new source of profits or income or an addition to a source of profits or income, held that the source of interest on a savings account was not the contract between the customer and the bank, nor the deposit of money coupled with the contract, for in his opinion the contract by itself, without a deposit, would yield no income at all, nor would the deposit by itself yield income in the absence of an agreement to pay interest, express or implied. In his opinion, the source of the income was the deposit of money on the terms of the contract. By the same token, it seems to me that the source of the sum in question to the appellant was neither the sublease nor the property rights which the appellant granted to the sublessee by it, for neither by itself would have yielded the income here in question. Nor, for the same reason, was the source the granting of rights to the sublessee upon the terms of the lease, for even that, without the operation of the mine by the sublessee, would not have produced this sum. What appears to me to have been the source of the sum in question to the appellant (or the source in at least one of the senses of that term) was the operation of the mine by the sublessee in circumstances

[1] [1940] A.C. 774.

[2] [1957] 2 All E.R. 208.

which included the existence of the sublessee's covenant to pay royalty in respect of the ore mined. I also think that the operation of the mine in such circumstances is what a practical man would, above all else, regard as the real source of the income in question. But while this view appears to lend support to the conclusion at which I have arrived, I prefer to rest this judgment more on the result of another approach to the question. The material words of the statute are "income derived from the operation of a mine," and it seems to me to be the safer and better course simply to apply to the facts what appears to be the ordinary meaning of these words.

The word "derived" has been considered in a number of cases in this Court, including *Wilson v. Minister of National Revenue*,[1] *Gilhooly v. Minister of National Revenue*,[2] and *Kemp v. Minister of National Revenue*.[3]

In *Gilhooly v. Minister of National Revenue*, Cameron J. held that the expression "income derived from mining," which appeared in s. 5(1)(*a*) of the *Income War Tax Act*, applied to income in the form of dividends received from a mining company and that the recipient of the dividends was, therefore, entitled to the deduction provided for by s. 5(1)(*a*) in respect of depletion of the mines owned by the mining company.

In *Kemp v. Minister of National Revenue*, the President of this Court discussed the meaning of "derived" in s. 4(*j*) of the *Income War Tax Act* as follows at p. 585:

> But even if the income received by the appellant under paragraph 4 of the will were not the same as that received by the Trustees as interest on income tax exempt bonds, it does not follow that it would be subject to income tax, for proper regard must be had to the meaning of the word "derived" in section 4(*j*). Counsel for the appellant contended that it must not be read as meaning "received in the first instance". I agree. In a taxing Act words must, generally speaking, be given their plain and ordinary meaning, and, according to such meaning, the word "derived" covers a wider field than the word "received", and when applied to the word "income" it connotes the source or origin of such income rather than its immediate receipt. In the New English Dictionary, Vol. III, page 230, its meaning is given as "Drawn, obtained, descended, or deduced from a source;" and in Webster's New International Dictionary, Second Edition, "Formed or developed out of something else; derivative; not primary;"

[1] [1938] Ex. C.R. 246. [2] [1945] Ex. C.R. 141.
[3] [1947] Ex. C.R. 578.

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I can see no distinction for the present purpose between the meaning of the expression "income derived from mining," which was considered in the *Gilhooly* case, and that of "income derived from the operation of a mine." In each case, I think the word "derived" is broader than "received" and is equivalent to "arising or accruing" (*vide Commissioner of Inland Revenue v. Kirk*[1]), but in neither case is the expression limited to income arising or accruing from the operation of a mine by the particular taxpayer.

In the present case, what the appellant stipulated for and was entitled to receive was not a share of the profits of the mining operation nor a portion of the mineral extracted, but simply a sum of money. This sum was to be equal to seven per cent of the competitive market price of iron ore f.o.b. vessels at Seven Islands, Quebec, as defined in the sublease, but it was not necessarily to be paid from the selling price of the ore, nor was it necessarily to be based on the price at which the ore was sold, and it was payable whether Iron Ore Company of Canada realized the sale price of the ore or not. Moreover, the sum in question came to the appellant pursuant to the sublease and was a payment for the rights which the appellant granted to Iron Ore Company of Canada by the sublease. But, while these features of the sum in question or of the obligation which the payment of the sum to the appellant discharged tend to dissociate the sum from the operation of the mine, to my mind they are not conclusive. Of greater importance is the fact that the sum was not a minimum royalty payment payable whether ore was mined or not, but one that had its origin in the operation of the mine. Neither the sublease nor the property right conferred by it brought this sum into existence or by themselves gave the appellant a right to it. The obligation of Iron Ore Company of Canada to pay the sum to the appellant and the right of the appellant to payment of it, in my opinion, came into existence as a result of the mine being so operated. Nor were this obligation and corresponding right merely measured by the operation of the mine. There was no fixed amount payable for each ton of ore nor was there any maximum limit to the amount which might become payable as overriding royalty. Subject only

[1] [1900] A.C. 588.

to the minimum limits, the amount of overriding royalty could vary both with the quantity of ore extracted in the year and with the competitive market price of ore, which itself might vary from time to time in the year. As I see it, the sum in question became payable to the appellant not merely upon so many tons of ore being mined but because so many tons of ore were mined and shipped in a year when the competitive market price was such that the sum in question became payable, pursuant to the terms of the sublease. Apart from the operation of the mine, the sum in question was not payable in the year in question and would not necessarily ever have become payable. It was not "received" from the operation of the mine but, in my opinion, it arose or accrued by reason of the operation and was thus "derived" therefrom. I am, therefore, of the opinion that the sum in question was "income derived from the operation of a mine" within the meaning of s. 83(5) and none the less so because in different senses the sum may also be said to be derived from the sublease or from the property rights which the appellant granted to the sublessee.

In reaching this conclusion, I am not unaware that the reasoning of Latham C.J. in *Federal Commissioner of Taxation v. United Aircraft Corporation*[1] apears to point to the opposite result, but in that case the problem was one of the location of the source of the income and was so different from that in the present case as to offer little basis for comparison. In this situation, an observation of Lord Atkin in *Liquidator, Rhodesia Metals Ltd. v. Commissioner of Taxes* (*supra*) seems to me to apply. He said at p. 788:

> Their Lordships have no criticisms to make of any of those decisions, but they desire to point out that decisions on the words of one statute are seldom of value in deciding on different words in another statute and that different business operations may give rise to different taxing results.

The appeal will be allowed with costs and the assessment vacated.

Judgment accordingly.

[1] (1943) 68 C.L.R. 525.