Toronto
1966
June 13-15
Ottawa
Sept. 29

BETWEEN:

QUEMONT MINING CORPORATION, LIMITED ..... APPELLANT;

AND

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

AND BETWEEN:

RIO ALGOM MINES LIMITED ..... APPELLANT;

AND

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

AND BETWEEN:

MACLEOD-COCKSHUTT GOLD MINES LIMITED ..... APPELLANT;

AND

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

Income tax—Deductions—Provincial mining taxes—Whether deductible in ascertaining "profits" of business—Computation of deductible amount under Reg. 701(b)—No deduction if no mining income—Income Tax Act, s. 11(1)(p), 12(1)(a)—Income Tax Regulations P.C. 1958-492, secs. 700, 701(b).

***Income tax—Depletion allowances—Provincial (Quebec) mining tax—Not** deductible from mining profits in ascertaining depletion allowance—"Profits", meaning of—Income Tax Regulations P.C. 1958-492, s. 1201(2)(a).*

Under *Income Tax Regulation* 701(*b*) (applicable to the 1958 and subsequent taxation years) the allowable deduction for provincial mining taxes is the proportion of such taxes which the taxpayer's income from mining operations in the Province *calculated under the Income Tax Act* is of his income on which such taxes were paid *calculated under the applicable provincial statute.*

No deduction is allowable under *Income Tax Regulation* 700 (applicable to the 1957 and previous taxation years) in respect of provincial mining taxes paid in a taxation year in which the taxpayer had no income from mining. *M.N.R. v. Spruce Falls Power & Paper Co.* [1953] 2 S.C.R. 407, referred to.

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The duties imposed under the Quebec *Mining Act* being taxes on annual profits are not laid out for the purpose of producing such profits and hence are not deductible in computing such profits under the *Income Tax Act*. *Nickel Rim Mines Ltd. v. Att'y-Gen. Ont.* [1966] 1 O R 345, applied; *Harrods (Buenos Aires) Ltd. v. Taylor-Gooby*, 41 T C. 450, distinguished; *Roemsch v M.N.R.* [1931] Ex. C.R. 1, *I.R.C. v. Dowdall, O'Mahoney & Co.* [1952] A.C. 401, applied; *Premium Iron Ores Ltd. v. M.N.R.*, 66 D.T C. 5280, distinguished.

In computing mining profits for purposes of the percentage depletion allowance under *Income Tax Regulation* 1201 duties paid under the Quebec *Mining Act* are not to be deducted since these are not expenses incurred for the purpose of producing such profits. There is no reason for construing the word "profits" as used in *Income Tax Regulation* 1201(2)(*a*) in a sense different from that attributed to it in the *Income Tax Act*. *Bishop v. Smyrna and Cassaba Rly. Co.* [1895] 2 Ch. 265, *Spanish Prospecting Co.* [1911] 1 Ch. 92, distinguished; *M.N.R. v. Anaconda American Brass Ltd.* [1956] A.C 85, *M.N.R. v. Irwin* [1964] S C R. 662, *M.N.R. v. Imperial Oil Ltd.* [1960] S.C.R. 753, applied; *Naval Colliery Co. v. C.I.R.* (1928) 12 T.C. 1017, referred to.

APPEALS by Quemont Mining Corp and MacLeod-Cockshutt Gold Mines Ltd. from Tax Appeal Board and by Rio Algom Mines Ltd. from income tax assessment.

Allan Findlay, Q.C. and *H. F. Teney* for appellant Quemont Mining Corporation, Ltd. *W. B. Williston, Q.C.* and *A. D. Calvin* for appellants Rio Algom Mines Ltd. and MacLeod-Cockshutt Gold Mines Ltd.

J. D. Arnup, Q.C. and *D. G. H. Bowman* for respondent.

CATTANACH J.:—These are appeals by the three taxpayers named in the above styles of cause and which, for the purposes of convenience, will hereinafter be referred to as Quemont, Rio Algom and MacLeod-Cockshutt.

The appeals of Quemont and MacLeod-Cockshutt are from decisions of the Tax Appeal Board dated May 5, 1964[1] and May 6, 1964[2] respectively, whereby the Board dismissed appeals from assessments to income tax by the Minister in the case of Quemont for its taxation years 1958, 1959 and 1960 and in the case of MacLeod-Cockshutt for its taxation years 1960 and 1961. The appeal of Rio Algom is from an assessment by the Minister to income tax for its 1960 taxation year.

A common issue in the appeals of all three taxpayers arises from a disagreement between them and the Minister as to the proper method of calculating the deductions to

[1] (1964) 35 Tax A.B.C. 265. [2] (1964) 35 Tax A.B.C. 269

which the taxpayers are entitled under Regulation 701 made pursuant to section 11(1)(*p*) of the *Income Tax Act* that is in arriving at the appropriate proportion of provincial mining tax paid by them in each of the taxation years under review which is to be deductible in computing their taxable income under the *Income Tax Act*. Other issues raised in the pleadings were settled by agreement among counsel. There was no dispute among the parties as to the figures employed but the difference of opinion is only in the process of calculation, except that, in the case of Quemont, there is an additional issue involving the allowance to be permitted under section 11(1)(*b*) of the *Income Tax Act*.

By agreement among counsel the appeals of the three taxpayers on the issue common to each were tried together. At the conclusion of the hearing of the common issue the remaining issue in which only Quemont was involved was heard.

Section 11(1)(*p*) of the *Income Tax Act*, during the relevant taxation years, read as follows:

11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:

...

(*p*) such amount as may be allowed by regulation in respect of taxes on income for the year from mining or logging operations;
(This section was amended in 1962 Chapter 8, Section 2(2) by deleting a reference to logging operations applicable to the 1961 and subsequent taxation years).

The amount which is deductible under paragraph (*p*) is governed by *Income Tax Regulation 701*, which reads as follows:

701. (1) In computing his income for a taxation year, a taxpayer may deduct, under paragraph (*p*) of subsection (1) of section 11 of the Act, an amount equal to the lesser of

(*a*) the aggregate of the taxes paid, in respect of his income derived from mining operations in the province for the year,
(i) to the province, and
(ii) to a municipality in the province in lieu of taxes on property or any interest in property (other than his residential property or any interest therein), or

(*b*) that proportion of such taxes that his income derived from mining operations in the province for the year is of his income in respect of which the taxes were so paid.

(2) In this section,

(*a*) "income derived from mining operations" in a province for a taxation year by a taxpayer means,

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(i) if the taxpayer has no source of income other than mining operations, the amount that would otherwise be his income for the year if no amount had been deducted in computing his income under paragraph (*b*) or (*p*) of subsection (1) of section 11 of the Act, section 83A of the Act, subsection (3) of section 85I of the Act, or paragraph (*g*) of subsection (1) of section 1100 of these Regulations, or

(ii) in any other case, the amount that would otherwise be his income for the year if no amount had been deducted in computing his income under paragraph (*b*) or (*p*) of subsection (1) of section 11 of the Act, section 83A of the Act, subsection (3) of section 85I of the Act, or paragraph (*g*) of subsection (1) of section 1100 of these Regulations, minus the aggregate of

(A) his income for the year from all sources other than mining, processing and sale of mineral ores, minerals and products produced therefrom, and

(B) an amount equal to 8% of the original cost to him of properties described in Schedule B to these Regulations used by him in the year in the processing of mineral ores, minerals or products derived therefrom, or, if the amount so determined is greater than 65% of the income remaining after deducting the amount determined under clause (A), 65% of the income so remaining, or, if the amount so determined is less than 15% of the income so remaining, 15% of the income so remaining;

(*b*) "mine" includes any work or undertaking in which mineral ore is extracted or produced, including a quarry;

(c) "minerals" include every naturally occurring inorganic or fossilized organic substance which is mined, quarried or otherwise obtained from the earth at or below its surface but does not include petroleum or natural gas;

(*d*) "mineral ore" includes all unprocessed minerals or mineral bearing substances;

(*e*) "mining operations" means the extraction or production of mineral ore from or in any mine or its transportation to, or over any part of the distance to, the point of egress from the mine, including processing thereof prior to or in the course of such transportation but not including any processing thereof after removal from the mine; and

(*f*) "processing" as applied to mineral ores includes all forms of beneficiation, smelting and refining, and also transportation and distributing but does not include any of these operations that are performed with respect to mineral ore before it is removed from the mine.

(Regulation 701 was enacted by P.C. 1958-498 dated April 9, 1958 and made applicable to the 1957 and subsequent taxation years. In 1962 Regulation 701(2)(*a*) was amended to add references to sections 11(1)(*p*) and 83A of the *Income Tax Act* which was also made applicable to the 1957 and subsequent taxation years).

The formula prescribed by Regulation 701(1)(*b*) for the determination of the amount of provincial mining tax paid which is deductible is described therein as

> that proportion of such taxes that his income derived from mining operations for the year is of his income in respect of which the taxes were so paid.

This formula can be expressed in the following form:

$$\frac{\text{A. The taxpayer's income derived from mining operations in the province}}{\text{B. The taxpayer's income in respect of which the taxes were so paid}} \times \text{C} = \text{D}$$

C: Taxes paid in respect of the taxpayer's income derived from mining operations to the province in question

D: The deductible portion of the provincial taxes paid

(For the purposes of convenience I shall refer to A as the numerator, B as the denominator and C as the multiplicand.)

All parties agreed that the foregoing formula is the correct one. It is common ground also, although this was not specifically referred to in the course of argument, that taxes paid under the Quebec *Mining Act* constitute the taxes referred to in the multiplicand C although they are imposed in respect of a larger amount than the taxpayer's "income derived from mining operations in the provinces for the year" as that phrase is defined by Regulation 701, and that taxes paid under *The Mining Tax Act* of Ontario similarly constitute taxes referred to in the multiplicand C although they are imposed in respect of an amount that not only includes income from mining operations computed on a higher basis than under the Federal Act but also includes income from processing which is not included in the Regulation 701 concept of "mining operations". (This common ground must have been reached on the assumption that the definition in paragraph 2(*a*) of Regulation 701 does not apply to the words, "his income derived from mining operations in the province for the year" in paragraph 1(*a*) of the Regulation although, in terms, it does so apply.) Each party, however, took a different view as to the composition of the fraction, A/B. Separate and distinct positions were taken on behalf of each of the parties.

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The Minister's formula for computing the deductible proportion of the provincial taxes paid can be put in the following form:

$$\frac{\text{A. Income derived from mining operations in the province computed under the Income Tax Act.}}{\text{B. Taxpayer's income in respect of which taxes were so paid computed under the Provincial Mining Act.}} \times \text{C. Taxes paid to the Province} = \text{D. Deductible portion.}$$

(i.e the fraction A/B should be $\frac{\text{Federally computed income}}{\text{Provincially computed profits}}$).

Counsel for Quemont submitted that the Minister's formula was erroneous and submitted that the right formula is,

$$\frac{\text{A. Income computed under the Quebec Mining Act, less the greater of, (a) 8\% of appellant's milling assets (8\% of \$5,478,479 20) or, (b) 15\% income from mining operations (15\% of \$3,046,495-23)}}{\text{B. Income computed under the Provincial Mining Act}} \times \text{C Tax paid to Province} = \text{D. Deductible Portion}$$

(i.e. the fraction A/B should be $\frac{\text{Income computed Provincially}}{\text{Profits computed Provincially}}$).

Counsel for Rio Algom and MacLeod-Cockshutt, while agreeing that the Minister's formula was wrong, submitted that the right formula is:

$$\frac{\text{A. Income derived from mining operations in the Province as computed under the Income Tax Act}}{\text{B Income derived from mining operations in the Province as computed under the Income Tax Act plus any other income in respect of which tax may have been imposed by the province.}} \times \text{C Tax paid to the Province} = \text{D. Deductible Portion}$$

(i e. that the fraction A/B should be $\frac{\text{Income computed Federally}}{\text{Profits computed Federally}}$).

While counsel for Quemont and counsel for Rio Algom and MacLeod-Cockshutt agree that the Minister's fraction is not the right one, nevertheless, counsel for Quemont in his principal submission is in agreement with the Minister's selection of the denominator B. His disagreement with the Minister is in the selection of the numerator A., which he contends should be income computed on the Provincial basis rather than on the Federal basis.

On the other hand counsel for Rio Algom and MacLeod-Cockshutt is in agreement with the Minister's selection of the numerator A. as being the income of the taxpayer from mining operations in the Province computed on the Federal basis but he is in disagreement with the Minister's selection of the denominator B. as being the taxpayer's income in respect of which taxes were paid computed on the Provincial basis. His contention is that the denominator B. should be the mining income in respect of which the tax was imposed by the Province, also computed on a Federal basis, plus any amount on which the Province has imposed the tax in respect of non-mining operations.

As I have already indicated, it was assumed by all parties that C, the multiplicand, refers to certain taxes that were in fact paid to the particular Province. Counsel for Rio Algom and MacLeod-Cockshutt in passing mentioned that to carry logic to its extreme limits it might be argued that the definition of the words, "income derived from mining operations" in Regulation 701(2)(*a*) should be applied to the multiplicand C as well. Obviously it would not be in his interest to press such an argument and counsel for the Crown did not adopt it.

As an alternative to his principal contention counsel for Quemont adopted the principal contention of counsel for Rio Algom and MacLeod-Cockshutt. Conversely, counsel for Rio Algom and MacLeod-Cockshutt adopted as an alternative to his principal contention the principal contention of counsel for Quemont.

In the Quemont appeal counsel for both parties agreed to proceed with the appeal from the assessment for the 1960 taxation year and that the evidence so adduced and the argument made therein should be applicable to the appeals from the assessments for the 1958 and 1959 taxation years.

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The parties hereto, by their respective counsel, hereby admit the following facts and documents, provided that such admission is made for the purpose of this action only and may not be used against either party on any other occasion or by any other person.

1. The Appellant, Quemont Mining Corporation Limited, is a company incorporated under the laws of Canada. In the taxation year 1960, the Appellant carried on the business of mining in the Province of Quebec.

2. The Appellant paid $152,854.67 to the Province of Quebec under the Quebec Mining Act for the taxation year 1960.

3. The Appellant's income for the 1960 taxation year, as computed under the Quebec Mining Act, was $3,046,495.23.

4. The amount that would otherwise be the Appellant's income, computed under the Income Tax Act, R.S.C. 1952, c. 148, if no amount had been deducted in computing its income under paragraph (*b*) or (*p*) of subsection (1) of section 11 of the Income Tax Act, section 83A of the Income Tax Act, or paragraph (*g*) of subsection (1) of section 1100 of the Regulations, was $2,880,958.32, and the original cost to the Appellant of the properties described in Schedule B to the Regulations used by it in the year in the processing of mineral ores, minerals or products derived therefrom, (hereinafter called "milling assets") was $5,478,497.30.

5. In computing the deduction of $129,926.00 claimed by it for the 1960 taxation year under section 11(1)(*p*) of the Income Tax Act and section 701 of the Regulations, the Appellant used the following formula:

The lesser of:

A. The amount paid to Quebec under the Quebec Mining Act ($152,-854.67)

OR:

B.

$$\text{Amount paid to Quebec under Quebec Mining Act} \times \frac{\text{income computed under the Quebec Mining Act, less the greater of (a) 8\% of the Appellant's milling assets (i.e. 8\% of \$5,478,497.30) or (b) 15\% of \$3,046,495 23}}{\text{income computed under the Quebec Mining Act}}$$

i.e.

$$\$152,854.67 \times \frac{\text{\$3,046,495.23 less the greater of (a) \$438,279.78 or (b) \$456,974 28}}{\$3,046,495\ 23}$$

i.e.

$$\$152,854.67 \times \frac{\$3,046,495\ 23 = \$456,974\ 28}{\$3,046,495.23}$$

$$\$152,854\ 67 \times \frac{\$2,589,520\ 95 = \$129,926.00}{\$3,046,495\ 23}$$

As a result, the Appellant deducted $129,926.47 under Section 11(1)(*p*) and Regulation 701 in computing its income for 1960.

6. In assessing and in computing the amount of $122,558.81 which the Respondent allowed as a deduction under section 11(1)(*p*) and Regulation 701 for the Appellant's 1960 taxation year the Respondent used the following formula:

The lesser of:

A. The amount paid to Quebec under the Quebec Mining Act ($152,854.67)

OR:

B. the amount that would otherwise be the Appellant's income, computed under the Income Tax Act, if no amount had been deducted in computing his income under the provisions of the Income Tax Act referred to in paragraph 4 hereof ($2,880,958 32) less the greater of

(a) 8% of the original cost of the Appellant's milling assets (i.e. 8% of $5,478,497.30) or

(b) 15% of $2,880,958 32

$$\frac{\text{Amount paid to Quebec under Quebec Mining Act}}{\text{income computed under the Quebec Mining Act}} \times$$

i.e. $2,880,958.32 less the greater of (a) $438,279.78 or (b) $432,143 73

$$\frac{\$152,854\ 67}{\$3,046,495.23} \times$$

i.e. $152,854.67 × $2,880,958.32=$438,279.78 / $3,046,495.23

i.e. $152,854.67 × $2,442,678 54=$122,558 81 / $3,046,495.23

7. Either party may adduce further evidence relevant to the issues in this appeal and not inconsistent with this agreement.

In the appeal of Rio Algom counsel also agreed upon a statement of facts which is reproduced hereunder:

The parties hereto, by their respective counsel, hereby admit the following facts and documents, provided that such admission is made for the purpose of this action only and may not be used against either party on any other occasion or by any other person.

1. Paragraph 1 of the Amended Notice of Appeal is admitted.

2. The fiscal period of Pronto Uranium Mines Limited ("Pronto") ended, in 1956, 1957, 1958 and 1959 on December 31 and in 1960 on June 30.

3. Pronto's income derived from the operation of the Pronto Uranium Mine was exempt income under section 83(5) of the Income Tax Act during the 36 month period commencing on May 1, 1956 and ending on April 30, 1959 (hereinafter sometimes referred to as the exempt period).

4. For its 1956 taxation year Pronto paid to the Province of Ontario under The Mining Tax Act, R.S.O. 1950, c. 237, tax in the amount of $64,552.31.

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5. In computing its income or loss for the 4 month period ended April 30, 1956, Pronto allocated $21,517.44, or 4/12 of the said sum of $64,552.31 to the 4 month period ended April 30, 1956 and sought to deduct that amount in computing its income under section 11(1)(*p*) of the Income Tax Act.

6. During the 4 month period ended April 30, 1956, Pronto suffered a loss on its mining operations in Ontario.

7. For its 1959 taxation year Pronto paid taxes in the amount of $358,290.85 to the Province of Ontario under The Mining Tax Act, R.S.O. 1950, c. 237. In computing its income or loss for the 4 month period ended April 30, 1959, Pronto allocated in its (Federal) Income Tax Return $127,091.87 (Department's figure $125,373.30) of the aforesaid $358,290.85 to that four month period. In computing its income or loss for the 8 month period following April 30, 1959, Pronto allocated in its (Federal) Income Tax Return $231,198.98 (Department's figure $232,917.55) of the aforesaid $358,290.85 to that eight month period. For the purposes of this appeal, the parties agree to accept the Department's figures in this paragraph as being correct.

Rio Algom is the continuing corporation resulting from the amalgamation under section 96 of the Ontario *Corporations Act, 1953* by Letters Patent dated June 30, 1960 of Algom Uranium Mines Limited, Milliken Lake Uranium Mines Limited, Northspan Uranium Mines Limited and Pronto Uranium Mines Limited.

In the appeal of MacLeod-Cockshutt, there was no agreed statement of facts but the relevant facts are set out in paragraphs A. 1 to 7 of the appellant's Notice of Appeal for the 1960 taxation year. The Minister, in his reply, admitted those paragraphs excepting paragraph 6 with respect to which he says that the Notice of Assessment speaks for itself. Accordingly I reproduce the aforesaid paragraphs of the appellant's Notice of Appeal:

A. *STATEMENT OF FACTS*

1. The taxpayer is a company incorporated under the laws of the Province of Ontario and carries on the business of mining in that Province and pays mining tax levied under The Mining Tax Act (Ontario).

2. The amount of "mining tax" paid by the taxpayer under the said Mining Tax Act in respect of its 1960 taxation year was $16,197.60.

3. Section 11(1)(*p*) of the Income Tax Act (Act) provides inter alia that a taxpayer may deduct in computing his income for the year, such amount as may be allowed by regulation in respect of taxes on income for the year from mining operations. Section 701(1) of the Income Tax Regulations (Regulations) provides as follows:

"701(1) In computing his income for a taxation year, a taxpayer may deduct, under paragraph (*p*) of subsection (1) of section 11 of the Act, an amount equal to the lesser of

(*a*) the aggregate of the taxes paid, in respect of his income derived from mining operations in a province for the year,

(i) to the province, and

(ii) to a municipality in the province in lieu of taxes on property or any interest in property (other than his residential property or any interest therein), or

(*b*) that proportion of such taxes that his income derived from mining operations in the province for the year is of his income in respect of which the taxes were so paid."

4. In the return of income filed by the taxpayer in respect of its 1960 taxation year, the amount claimed by the taxpayer as a deduction in computing income under the above-mentioned provisions in respect of the "mining tax" so paid was $17,560.00.

5. In the assessment for the taxpayer's 1960 taxation year the Minister disallowed the aforesaid amount of $17,560 00 claimed by the taxpayer as a deduction in computing income, and allowed the amount of $8,770 00 as a deduction in lieu thereof.

6. In determining the amount of the deduction allowable to the taxpayer on account of provincial tax (which determination was made under paragraph (*b*) of Section 701(1) of the Regulations), the Minister construed the phrase "income in respect of which the taxes were so paid", as used in said paragraph (*b*) and as he considered it applicable to the taxpayer, to mean the amount of profits, ascertained and fixed under The Mining Tax Act (Ontario), on the basis of which the mining tax exigible was computed. The Minister's computation of the amount prescribed in the said paragraph (*b*) was, as shown in a schedule attached to the notice of assessment, as follows:

$$\text{Income derived from mining operations (Reg 701(2))} \times \frac{\text{Ontario Mining Tax}}{\text{Profit as assessed by Ontario Mines Department}} \text{ or } \frac{\$151,573}{\$279,960} \times \$16,197.60 \text{ equals } \$8,770\ 00$$

7. The amount of $8,770.00 computed in the above-mentioned manner, being less than the amount of mining tax actually paid by the taxpayer to the Province of Ontario in respect of its 1960 taxation year, is the amount which the Minister allowed as a deduction under the provisions of Section 701 of the Regulations.

Section 11(1)(*p*) permits as a deduction in computing a taxpayer's income under the *Income Tax Act* such amount as may be allowed by regulation in respect of taxes on income from mining operations.

In section 2(*e*) of Regulation 701, mining operations are defined as meaning "the extraction or production of mineral ore from or in any mine or its transportation to, or over any part of the distance to, the point of egress from the mine, including processing thereof prior to or in the course of such transportation but not including any processing thereof after removal from the mine;".

It is apparent from the foregoing definition that "mining operations" are to be strictly limited to the operations of removing mineral ore from the earth and this has been

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referred to as being the movement of the ore to the "pit's mouth". Any transportation or other treatment beyond that point is not a mining operation within this concept but is rather "processing" as defined in section 2(*f*) of Regulation 701.

In the present appeals Quemont carries on its operations in the Province of Quebec and Rio Algom and Mac-Leod-Cockshutt carry on their respective operations in the Province of Ontario.

Under the Quebec *Mining Act,* chapter 196 Statutes of Quebec, 1941, to which Quemont is subject, a tax is imposed on the annual profit, which is computed by taking the gross value of the year's output, sold, utilized or shipped during the year and deducting therefrom certain costs of operations and expenses which have been incurred during the year and which are set out in the Statute. The word "output" as defined in the Quebec *Mining Act* includes the mineral bearing substances coming from the mine, which are sold, removed or placed upon the market, including those treated or partially treated at any smelter or mill forming part of the works. In the Quebec *Mining Act* the words, "gross value of the year's output" means the real value of the ore and minerals at the ruling market prices at the time of their sale or use.

From the foregoing it is clear that under the Quebec *Mining Act* the tax is imposed upon an annual profit and in determining such annual profit the starting point for the value of the mineral ore is at the point of shipment or use. It follows that the value of the mineral ore is not taken at the pit's mouth but at some subsequent point or points. Therefore, under the Quebec *Mining Act* there is included in the tax imposed thereby some portion thereof which is imposed as a tax on income from "processing" as defined in Regulation 701(2)(*f*) and is not deductible as a tax on income derived from "mining operations" as those words are defined in Regulation 701(2)(*e*) (being the operation of bringing the mineral ore to the surface or to the pit's mouth).

Regulation 701(2)(*a*) defines income derived from mining operations:

> Subsection (i) thereof covers the case where there is no income from a source other than mining operations.

Under subsection (ii) where there is income other than from mining operations there are two divisions, A & B.

A provides for the deductions of income from sources other than mining, processing and sale of mineral ores.

B is apparently designed to exclude processing income and is designed to estimate, as for example, when a tax is imposed as under the Quebec *Mining Act* on both income from mining operations and milling operations, how much that tax should be attributed to processing income.

The device that has been apparently adopted to fix an arbitrary amount to represent processing income is to accept (1) 8% of the milling assets or (2) 15% of the total profits, whichever is the greater, as being attributable to processing income.

It follows that the maximum amount of the tax imposed under the Quebec *Mining Act* which could be deductible in computing income under the *Income Tax Act* would be 85% of the tax so imposed.

Under the Ontario Statute, the *Mining Tax Act,* chapter 242, R.S.O. 1960 to which Rio Algom and MacLeod-Cockshutt are subject, the profit for a taxation year is the difference between the amount of the gross receipts from the output of the mine, or if the ore is not sold the amount of the actual market value of the output at the pit's mouth, less certain expenses, payments, allowances or deductions which are then set out. From the foregoing it is clear that the Ontario *Mining Tax Act* imposes the Ontario tax only on income derived from the Regulation 701 concept "mining operations" since the value of the ore at the pit's mouth is taken as the base.

Accordingly the maximum amount of the tax imposed under the Ontario Statute which could be deductible in computing a taxpayer's income under the *Income Tax Act* could be 100% of the tax so imposed.

At this stage, it should be mentioned that the provincial method of arriving at the profit on which mining tax may be charged is, in certain circumstances, less favourable to the taxpayer than is the method of computing income under the *Income Tax Act.* Deductions which are permitted under the *Income Tax Act* are, in such circumstances, larger

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than those permitted under the provincial statutes here under consideration, which results in the provinces obtaining an appreciably larger tax than would be the case if the provincial method of computing profit coincided with the computation of income under the *Income Tax Act*.

Counsel for Quemont and counsel for Rio Algom and MacLeod-Cockshutt contend that the legislative intent as derived from section 11(1)(*p*) of the *Income Tax Act*, and Regulation 701 passed pursuant to the authority contained in that provision, is that all provincial taxes on income from mining operations as those words are defined by the Regulation should be deductible, that is, in the Province of Quebec, 85% for the reasons outlined above, and, in the Province of Ontario, 100%. It was counsel's contention that either formula advanced by them would accomplish that result, whereas the formula adopted by the Minister would not do so.

Only one witness was called, whose evidence, by agreement, was applicable to all three cases. This witness, by a series of mathematical computations which were filed in evidence as exhibits, showed that in applying the formula adopted by the Minister by reason of the different methods of computing income under the *Income Tax Act* and the respective provincial statutes would result, in some years, in a deductible portion of the provincial tax paid being in excess of 100% in the case of Ontario and 85% in the case of Quebec, which because of Regulation 701(1)(*a*), must be reduced to 100% and 85%, and in other years a deductible portion of less than 100% and 85%. It was also demonstrated that, because of the limitation to the aggregate of the provincial taxes paid in accordance with Regulation 701(1)(*a*), the average percentage over a period of years must always be less than 85% and 100%.

A submission was made that I should consider the tax sharing agreements between the Government of Canada and the Governments of certain of the provinces as an aid in construing Regulation 701. I doubt that I should do so; but, in any event as it appears to me, any assistance that I would get from such a consideration would merely support the conclusion that I have reached unaided thereby. It is, therefore, unnecessary to reach any concluded opinion as to whether such agreements are a proper aid to the construction of Regulation 701.

The deduction allowable under Regulation 701 is an amount which is the lesser of two alternatives. It seems logical to infer therefrom that it was contemplated by the Governor-in-Council, by whom the Regulation was made, that, in some instances, the amount that would result from an application of the formula outlined in Regulation 701(1)(*b*) would be a figure larger than the aggregate of the taxes paid to the Province as outlined in Regulation 701(1)(*a*). This could happen when in the fraction A/B the numerator A is larger than the denominator B. This might occur under the formula adopted by the Minister, i.e. where the numerator A is the income derived from mining operations in the Province computed under the *Income Tax Act* over the denominator B, which is the taxpayer's income in respect of which taxes were paid to the Province as computed under the Provincial Statute. Such result could not occur under the formula suggested by counsel for either of the appellants.

Regulation 701(1)(*b*), which gives rise to the fraction under consideration, reads as follows:

> that proportion of such taxes that his income derived from mining operations in the province for the year is of his income in respect of which the taxes were so paid.

The words, "such taxes" must mean the taxes which were paid to the Province which constitutes the multiplicand, C, in the formula which I reproduced in graphic form at the outset. That being so, the concluding words of the section "his income in respect of which taxes were so paid", must mean the taxpayer's income calculated in accordance with the Provincial Statute. The taxes that are paid to a province are not paid on income calculated under the Federal *Income Tax Act* but are paid on income calculated under the applicable Provincial Statute. I, therefore, conclude that the denominator B of the fraction A/B is a figure determined not by the Minister or by any court but under the Provincial Statute.

The numerator, A of the fraction A/B is in the words of Regulation 701(1)(*b*) "his income derived from mining operations in the Province for the year". The question immediately arising is whether the "income derived from mining operations" is to be income calculated in accordance with the *Income Tax Act* or income calculated in accordance with the applicable Provincial Statute.

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Regulation 701(2)(*a*) defines the words "income derived from mining operations" and for the purposes of convenience I reproduce that definition at this point:

> 701.(2) In this section,
>
> (*a*) "income derived from mining operations" in a province for a taxation year by a taxpayer means,
>
> (i) if the taxpayer has no source of income other than mining operations, the amount that would otherwise be his income for the year if no amount had been deducted in computing his income under paragraph (*b*) or (*p*) of subsection (1) of section 11 of the Act, section 83A of the Act, subsection (3) of section 85I of the Act, or paragraph (*g*) of subsection (1) of section 1100 of these Regulations, or
>
> (ii) in any other case, the amount that would otherwise be his income for the year if no amount had been deducted in computing his income under paragraph (*b*) or (*p*) of subsection (1) of section 11 of the Act, section 83A of the Act, subsection (3) of section 85I of the Act, or paragraph (*g*) of subsection (1) of section 1100 of these Regulations, minus the aggregate of
>
> (A) his income for the year from all sources other than mining, processing and sale of mineral ores, minerals and products produced therefrom, and
>
> (B) an amount equal to 8% of the original cost to him of properties described in Schedule B to these Regulations used by him in the year in the processing of mineral ores, minerals or products derived therefrom, or if the amount so determined is greater than 65% of the income remaining after deducting the amount determined under clause (A), 65% of the income so remaining, or, if the amount so determined is less than 15% of the income so remaining, 15% of the income so remaining;

As previously pointed out, the definition is divided into separate definitions for two different cases: (i) where the taxpayer has no income other than from mining operations and (ii) where there is income from sources other than mining operations. The word "income" must have the same meaning in both parts.

On referring to paragraphs (i) and (ii) of the definition above reproduced income means what would otherwise be the taxpayer's income if no amounts were deducted under specified provisions of the *Income Tax Act* and the Regulations under the *Income Tax Act*. All such deductions are deductions under the Federal *Income Tax Act* and Regulations thereunder. Therefore, it seems to follow that the words "the amount that would otherwise be his income", from which no such deductions have been made, must be income calculated in accordance with the same *Income Tax Act*.

Assuming I am correct in my conclusion that the definition of "income derived from mining operations" in Regulation 701(2)(*a*) means income calculated under the *Income Tax Act* it is submitted by counsel for the taxpayers that the definition should be applied to those words where they appear in both paragraphs (*a*) and (*b*) of Regulation 701(1).

Section 34 of the *Interpretation Act*, chapter 158, R.S.C. 1952 reads as follows:

> 34. Definitions or rules of interpretation contained in any Act, unless the contrary intention appears, apply to the construction of the sections of the Act that contain those definitions or rules of interpretation, as well as to the other provisions of the Act.

By virtue of section 2(1)(*b*) of the *Interpretation Act* the provisions of the Act are made applicable to regulations.

In considering the words, "income from mining operations" in the context in which they appear in Regulation 701(1)(*a*), it seems to me that the clear and unequivocal meaning of those words, considering only that paragraph, is the income in respect of which taxes were paid to the Province, which of necessity must be mining income calculated as required by the Provincial Statute. It follows, therefore, that there is a contrary intention as contemplated in section 34 of the *Interpretation Act* and accordingly the definition of the words in Regulation 701(2)(*a*) is not applicable to them as used in Regulation 701(1)(*a*).

Counsel for Rio Algom and MacLeod-Cockshutt submitted that that definition must be applied to the words, "in respect of his income derived from mining operations" where they appear in Regulation 701(1)(*a*) and that they must mean, in that provision, income in the Federal sense, although the taxes that, as all parties agree, are contemplated by that provision were, in fact, determined by reference to income computed on a Provincial basis. I cannot accept such conclusion since it is common ground that the taxes are those paid to the Province and are those that have been calculated on income determined by a method laid down by the Province without any reference whatsoever to the *Income Tax Act*.

The second of the alternative figures is that which results from the fraction in the formula outlined in Regulation 701(1)(*b*), the numerator of which I have concluded is "his

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income derived from mining operations" which by applying the definition of those words as set out in Regulation 701(2)(*a*) must mean income calculated on a Federal basis. With this conclusion counsel for the Minister and counsel for Rio Algom and MacLeod-Cockshutt in his principal argument, are in agreement, but counsel for Quemont is not. The denominator of the fraction comprised in the words, "his income in respect of which taxes were so paid" refers to "his income derived from mining operations in the Province" as contained in Regulation 701(1)(*a*) which I have concluded means the income calculated under the Provincial Statute. With this conclusion counsel for the Crown and counsel for Quemont, in his principal argument, agree but counsel for Rio Algom and MacLeod-Cockshutt does not. In his submission the denominator is Federally calculated income plus additional taxes which were paid to the Province on non-mining income. In my view the words of subsection (*b*) must mean the income with respect to which taxes were paid to the Province, that is, Provincially calculated income.

If I were to accept the submission of either counsel for Quemont or Rio Algom and MacLeod-Cockshutt that the fraction contemplated in Regulation 701(1)(*b*) is either Provincially calculated income over Provincially calculated income, or Federally calculated income over Federally calculated income, in a case where the taxpayer had no source of income other than from mining operations this would result in the entire amount of the taxes paid to the Province being deductible. This counsel submits is the intention of the legislature gleaned from the Provincial Federal agreements and both formulae advocated by them has the additional advantage of overcoming the anomalies outlined in the examples thereof which were put in evidence. However, it would appear to me that the Regulation does not contemplate such a result and if such had been the intention it would have been a simple matter so to state. It does not seem possible to me that it was intended by the Regulation to allow deductions on the basis of a larger income than that produced by the application of its own method of calculating income. The anomalies demonstrated by the examples given in evidence result from the differences in practice as to deductions allowed in computing

income between the Federal and Provincial taxing authorities and to differences between the various Provincial taxing authorities.

I, therefore, conclude that the formula adopted by the Minister in computing the deduction under section 11(1)(*p*) of the *Income Tax Act* was the correct one.

In the appeal of Rio Algom a further issue arises.

From January 1, 1956 to April 30, 1956 the mine, though producing ore, did not do so in commercial quantities. However, Rio Algom paid to the Province of Ontario a tax in the amount of $64,552.31 under the Ontario *Mining Tax Act* for the calendar year 1956. In computing its loss under the *Income Tax Act* for the four month period ending April 30, 1956[1] Rio Algom allocated $21,517.44 or four twelfths of the amount of $64,552.31 to that period and sought to deduct that amount in computing its income under section 11(1)(*p*) of the *Income Tax Act* as a loss in its 1960 taxation year by reason of the provisions of section 27(1)(*e*) of the *Income Tax Act,* that is as a business loss sustained in the five taxation years immediately preceding its 1960 taxation year.

The Minister disallowed the amount of $21,517.44 as not properly deductible pursuant to section 11(1)(*p*) because he alleges (1) that no profits were earned by Rio Algom from its mining operations during the four month period ending on April 30, 1956 and accordingly (2) Rio Algom has no "income derived from mining operations" as that phrase is defined in the Regulation then applicable being 700. The relevant parts of Regulation 700 read as follows:

> 700.(1) The amount that a taxpayer may deduct from income under paragraph (*p*) of subsection (1) of section 11 of the Act shall be that proportion of the total taxes on income paid by him to a province, or to a Canadian municipality in lieu of taxes on property or any interest in property (other than his residential property or any interest therein), that
>
> (*a*) his income derived from mining operations...is of the total income in respect of which the taxes were so paid.
>
> (2) In this section,
>
> . . .
>
> (*b*) "income derived from mining operations" means the net profit or gain derived or deemed to have been derived from mining operations by a person engaged therein with or without an allowance in respect of depletion and if such a person receives net profit or

[1] No question was raised as to the deductibility of a loss for this four month period in a subsequent year and I express no opinion on that question.

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gain from sources other than mining operations either by reason of the carrying on by him of the processing of mineral ore extracted by him or otherwise, the net profit or gain to be deemed to have been derived by him from mining operations shall not exceed that portion of the total net profit or gain received by him from all sources, determined by deducting from the said total

(i) the returns received by him by way of dividends, interest or other like payments from stock, shares, bonds debentures, loans or other like investments;

(ii) the net profit or gain, if any, derived by him from, and attributable in accordance with sound accounting principles to, the carrying on of any business, or derived from and so attributable to any source, other than mining operations and the processing and sale of mineral ores or products produced therefrom, and other than as a return on investments mentioned in subparagraph (i); and

(iii) an amount by way of return on capital employed by him in processing mineral ores or products derived therefrom, equal to 8% of the original cost to him of the depreciable assets including machinery, equipment, plant, buildings, works and improvements, used by him in the processing of mineral ore or products derived therefrom but not in excess of 65% of that portion of the said total net profit or gain remaining after deducting therefrom the amounts specified in subparagraphs (i) and (ii); provided that, in the case of a person who mines and smelts mineral ores from which metals other than gold, silver or platinum are recovered in amounts exceeding in value 5% of the total value of the metals recovered, the amount to be deducted under this subparagraph shall not in any case be a smaller amount than the following proportion of the total net profit or gain remaining after deducting therefrom the amounts specified in subparagraphs (i) and (ii):

(A) where both copper and nickel are recovered, each in amounts which exceed in value 5% of the total value of the metals recovered 40%

(B) where both lead and zinc are recovered, each in amounts which exceed in value 5% of the total value of metals recovered 30%

(C) where both copper and zinc are recovered, each in amounts which exceed in value 5% of the total value of metals recovered 20%

(D) in other cases 15%

(*c*) "mine" includes any work or undertaking in which mineral ore is extracted or produced, including a quarry;

(*d*) "minerals" includes gold, silver, rare and precious metals or stones, copper, iron, tin, lead, zinc, nickel, salt, saline deposits, alkali, coal, limestone, granite, slate, marble or other quarriable stone, gypsum, clay, marl, gravel, sand and volcanic ash but does not include petroleum or natural gas;

(*e*) "mineral ore" includes all unprocessed minerals or mineral bearing substances;

(*f*) "mining operations" means the extraction or production of mineral ore from or in any mine or its transportation to, or any part of the distance to the point of egress from the mine including any

processing thereof prior to or in the course of such transportation but not including any processing thereof after removal from the mine; and

(*g*) "processing" includes milling, concentrating, smelting, refining, fabricating, transporting or distributing.

(3) Nothing contained herein shall be construed as allowing a taxpayer to deduct an amount in respect of taxes imposed under a statute or by-law which is not restricted to the taxation of persons engaged in mining . . .operations.

(This regulation was by P.C. 1958-498 dated April 9, 1958 which was applicable to the 1957 and subsequent taxation years.)

The Minister's disallowance of part of the Ontario mining tax paid by Rio Algom in its 1956 taxation year is predicated upon the interpretation of the words "the total income in respect of which the taxes were so paid" as they appear at the end of Regulation 700(1)(*a*) as meaning the profits as determined under the Ontario *Mining Act*.

Regulation 700(3) limits the deduction to cases where a tax is imposed only on persons engaged in mining operations which would include a person engaged in mining and other things.

The tax with respect to which a deduction is allowed is a tax "on income paid by him to a province . . .in lieu of taxes on property or any interest in property".

The amount of the deduction is defined as that proportion of such taxes that "his income from mining operations as defined herein" is of "the total income in respect of which taxes were so paid". The formula for determining the proportion of the amount of the allowable deduction is therefore:

$$\frac{\text{A. The taxpayer's income from mining operations as defined herein}}{\text{B. The total income in respect of which taxes were so paid}} \times \text{C. Tax on income paid by taxpayer to a province in lieu of tax on property} = \text{D. Deductible portion}$$

It is clear that the denominator B, being the "income in respect of which taxes were so paid" is the income as assessed under the provincial taxing statute.

This conclusion is confirmed by *M.N.R. v. Spruce Falls Power & Paper Company Limited*[1] where the Supreme

[1] [1953] 2 S.C.R. 407.

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Court considered an allowance claimed respecting logging operations by virtue of section 5(1)(*w*) of the *Income War Tax Act*, which is the predecessor of section 11(1)(*p*) of the *Income Tax Act*, under a regulation reproduced at page 417, which very closely parallels Regulation 700.

Kellock J. said at page 417:

> . . . the deduction authorized was the fraction of the provincial or municipal tax represented by the taxpayer's income from logging operations as defined by the regulations, divided by the taxpayer's total income in respect of which the taxes mentioned in s. 5(1)(*w*) were paid, i.e. the total income from logging as defined by the provincial legislation.

The numerator A of the fraction is "the taxpayers' income from mining operations as defined herein" i.e. as defined in Regulation 700(2)(*b*). This definition is designed to arrive at a figure and is couched in terms of basic concepts, i.e. "net profit or gain" and does not require a reference back to Part I of the *Income Tax Act*. It is apparent from the Agreed Statement of Facts that the "net profit or gain" derived by Rio Algom from its mining operations for the period January 1, 1956 to April 30, 1956 was nil.

Therefore, the numerator A in the formula expressed immediately above is zero. It follows therefrom that the Minister was right in disallowing the amount of $21,517.54 claimed as a deduction by the appellant.

The necessity of considering the part of Regulation 700 dealing with provincial tax on mining operations, affords an opportunity to compare that Regulation with Regulation 701, which replaced it. Such a comparison supports the conclusions that I have reached above as to what constitutes the proper interpretation of Regulation 701.

The deduction is limited by Regulation 701(3) as it was by Regulation 700(3) to cases where a tax is imposed only on a person engaged in mining operations.

However, the tax in respect of which a deduction is allowed is no longer a tax on income in lieu of taxes on property as it was under Regulation 700, but is a tax paid in respect of "income derived from mining operations" which words are defined by Regulation 701(2) in terms of a mathematical formula so that, *prima facie*, they mean, for a particular person for a particular year, a particular dollar amount.

The amount of the deduction permitted is defined as a formula, almost exactly the same as in Regulation 700, being that proportion of such taxes that "his income derived from mining operations in the province for the year" is of "his income in respect of which the taxes were so paid".

While the words of Regulation 701(1)(*b*) describing the numerator in such fraction do not specifically contain a cross-reference to the definition in Regulation 701(2)(*a*) similar to the cross-reference in Regulation 700(1)(*a*), the words describing the numerator are the same words as those that are defined by Regulation 701(2)(*a*) and, in the absence of any indication in the context to the contrary, this amount, i.e. the numerator, must be computed in accordance with the definition in Regulation 701(2)(*a*) which, unlike the definition in Regulation 700(2)(*b*), is in terms of the concepts in Part I of the *Income Tax Act*.

The subject matter of the tax is, by virtue of Regulation 701(1)(*a*), a tax paid "in respect of his income derived from mining operations in the province for the year". Consequently it would seem that the "income in respect of which the taxes were so paid" i.e. the denominator, as described by Regulation 701(1)(*b*) must be his "income derived from mining operations in the province for the year" which are the very words used to describe the numerator and which are defined by Regulation 701(2)(*a*).

The result is that, if the words of Regulation 701 are read literally, a deduction is only permitted in the very improbable case when a provincial statute is found levying a tax in respect of "income derived from mining operations in the province for the year" as computed in accordance with Regulation 701(2)(*a*) of these Federal regulations, and then the amount deductible is to be computed in accordance with a formula where the numerator and the denominator are the same. In other words, the net result is that, if such a tax is found, the amount deductible is the amount of the tax. It seems most unlikely that the Governor-in-Council resorted to such complex language as it used in Regulation 701 if that was what was intended. It could have been simply so stated.

All counsel argued the case on the basis that Regulation 701, when it used the words "income derived from mining

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operations in a province for the year" in Regulation 701(1)(*a*), did not mean the amount computed under Regulation 701(2)(*a*) but rather meant income in a generic sense from such mining operations and that Regulation 701 when it spoke about "taxes paid in respect" of such income included taxes paid in respect of such income and any other income. This seems to me to have been the correct approach even though it means saying that the definition in Regulation 701(2)(*a*) is excluded by the context insofar as the ascertainment of the Provincial tax or the denominator is involved.

Once it is accepted that the definition in Regulation 701(2)(*a*) is excluded from application to Regulation (701)(1)(*a*) it follows that the reference in that part of Regulation 701(1)(*b*) that defines the denominator becomes a reference to the income in respect of which the Provincial taxes were actually paid and not to the amount calculated under Regulation 701(2)(*a*). In short the denominator is income computed under the Provincial Statute as I have already concluded and the numerator being described as "income derived from mining operations", which are the words defined by the definition, must be computed in accordance with it.

In the result the appeals of Rio Algom and MacLeod-Cockshutt are dismissed with costs and the appeal of Quemont on the issue common to those of Rio Algom and MacLeod-Cockshutt does not succeed.

The issues peculiar to the Quemont appeal are set out in paragraphs 9 and 10 of the Quemont's Notice of Appeal.

> 9. The duties paid by the Appellant under the Quebec Mining Act were an outlay or expense incurred by the Appellant for the purpose of gaining or producing income from the property or business of the Appellant. As such, they were wholly deductible by the Appellant in computing its income for the taxation year 1960 and their deduction was not prohibited by section 12(1)(*a*) of the Act.

Section 12(1)(*a*) of the *Income Tax Act* reads as follows:

> 12.(1) In computing income, no deduction shall be made in respect of
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer.
> ...

Paragraph 10 of the Notice of Appeal is as follows:

> 10. In the alternative, if the duties paid by the Appellant under the Quebec Mining Act were not an outlay or expense incurred by the

Appellant for the purpose of gaining or producing income from the property or business of the Appellant and are taxes on income from mining operations within the meaning of section 11(1)(*p*) of the Act, then the portion of such duties that the Respondent allowed as a deduction in computing the income of the Appellant under section 11(1)(*p*) of the Act should not have been deducted by the Respondent in his computation of the "profits" of the Appellant to which the allowance provided for by section 11(1)(*b*) of the Act and section 1201 of the Regulations is applicable.

Section 11(1)(*b*) of the *Income Tax Act* reads as follows:

11.(1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:

...

(*b*) such amount as an allowance in respect of an oil or gas well, mine or timber limit, if any, as is allowed to the taxpayer by regulation;

The pertinent regulations are 1200 and 1201 which read in part as follows:

1200. For the purpose of paragraph (*b*) of subsection (1) of section 11 of the Act there may be deducted in computing the income of a taxpayer for a taxation year amounts determined as hereinafter set forth in this Part.

1201(1) For the purpose of this Part,

(*a*) "resource" means

...

(iii) a base or precious metal mine,

...

(2) Where a taxpayer operates one or more resources, the deduction allowed is 33⅓% of

(*a*) the aggregate of his profits for the taxation year reasonably attributable to the production of oil, gas, prime metal or industrial minerals from all the resources operated by him,

minus

(*b*) the aggregate amount of the deduction provided by subsection (4).

Subsection 4 of Regulation 1201 lists the items that may be deducted from the aggregate of the profits of a taxpayer attributable to the production of minerals as being (*a*) losses, (*b*) exploration expenses, (*c*) capital cost allowance, (*d*) capital interest and (*e*) exempt income.

The scheme of Regulation 1201 is that in order to determine the amount which may be deducted thereunder, the first step is to determine the taxpayer's profits reasonably attributable to the production of prime metal from which profits are then deducted the items listed in subsection 4, which do not include the amount of taxes paid to the Province of Quebec under the Quebec *Mining Act*.

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It is obviously to the taxpayer's advantage to keep the amount of his profits as high as possible for that is the amount by reference to which the deduction of 33⅓% is computed. The greater the amount of the profit, the greater is the deduction permitted. The appellant, therefore, contends that the amount paid to the Province of Quebec should not be deducted in determining its profits, whereas the Minister contends that it should be so deducted to arrive at the amount by reference to which the 33⅓% deduction is computed.

The submissions of counsel for Quemont, as I understood them, may be summarized in the following manner.

With respect to the issue raised in paragraph 10 of the Notice of Appeal, which outlines his principal argument on this issue, he contends (1) that the word "profits" as used in Regulation 1201(2)(*a*) must mean the difference between the receipts from the taxpayer's business for the taxation year and the expenditures which were laid out for the purpose of earning those receipts, (2) that the amount of the taxes paid by Quemont to the Province of Quebec under the Quebec *Mining Act* was not an expenditure laid out by it to earn its mining receipts but was a special tax on income and (3) the taxes so paid to the Province of Quebec are not deductible in determining Quemont's income under the *Income Tax Act*. Assuming the correctness of the foregoing contentions, he then points out that an expenditure of this kind is not included in subsection 4 of Regulation 1201 which governs what must be deducted from the profits.

Counsel for Quemont put forward an alternative contention, which is outlined in paragraph 9 of the Notice of Appeal and which is, in effect, that in the event that I should conclude that the taxes paid to the Province of Quebec under the Quebec *Mining Act* was an expenditure for the purpose of earning profit for the purpose of the depletion allowance, then the amount so paid to the Province of Quebec must also be deductible by virtue of the provisions of section 12(1)(*a*) of the *Income Tax Act* for the purpose of determining income in respect of which income tax is to be paid.

During the course of the argument, I intimated to counsel that my view then was that the expenditure in

question was not one laid out for the purpose of earning income. Upon more considered reflection, I still adhere to that view.

It is clear from section 13 of the Quebec *Mining Act* that every mine in the Province of Quebec is liable for duties upon a graduated scale dependent upon the amount of the annual profits.

Section 14 of that Act sets out a statutory formula for ascertaining the annual profits. From the gross value of the year's output sold, utilized or shipped during the year there is to be deducted the costs of operation and expenses incurred during the year which are then enumerated under eight headings.

It will be observed that the word used in section 13 is "duties" but considering the nature of those duties and having regard to the situation revealed by this legislation, there is no doubt that these duties are, in effect, provincial taxes on annual mining profits and neither can there be any doubt, in my opinion, that the type of taxation to which section 11(1)(*p*) of the *Income Tax Act* is directed is provincial taxation specifically imposed on income from mining operations which I conceive the Quebec duties to be.

Under section 14 the gross value of the year's output includes ore which has been utilized or shipped during the year and which may not have been sold, so that part of the profit may not have been realized profits.

In *Nickel Rim Mines Ltd. v. Attorney-General for Ontario*[1] the Ontario Court of Appeal considered whether the tax imposed by section 4 of the *Mining Tax Act*, R.S.O. 1950, chapter 237 was *ultra vires* the Province as not being "direct" as it must be to fall within the taxing authority conferred on the Province by section 92 of the *British North America Act*. The section of the Ontario *Mining Tax Act* there under review, to all intents and purposes and subject to those variations which have already been mentioned, closely parallels sections 13 and 14 of the Quebec *Mining Act*. Wells J. who heard the action in the first instance came to the conclusion that the tax on the profits from the ore which was sold was a direct tax, but that the tax on the profits from the ore which was not sold was an indirect tax.

[1] [1966] 1 O.R. 345.

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On appeal Porter C.J.O. who delivered the judgment of the Court of Appeal, agreed with Wells J. that the tax, in so far as it applies to realized profits, is a direct tax. However, as to the tax on ore not sold, he took the view that it was also a direct tax. At page 363 he said:

> In the case at bar, we are considering a profit tax, to be assessed at the end of each year. Although the tax in part may be upon profits estimated before actual sale, I do not think that the nature of the tax is thereby affected....

It is clear from the above quoted language that the Court of Appeal recognized that the tax imposed under the Ontario *Mining Tax Act* on realized and estimated profits was a tax on income.

I, therefore, conclude that the duties imposed under the Quebec *Mining Act,* are taxes imposed upon annual profits, both realized and estimated, and are not an expense incurred by Quemont for the purpose of producing income from its property or business.

Neither do I think that a Provincial tax on profits is an expense of earning receipts so as to be deductible in determining profits under the *Income Tax Act.*

There are types of taxes which if paid are deductible as having been incurred in the course of the income earning process. Such taxes are expenditures made for the purpose of earning or producing income from a property or a business such as the tax under consideration in *Harrods (Buenos Aires) Ltd. v. Taylor-Gooby (H.M. Inspector of Taxes)*[1]. In that case the appellant company, which was incorporated and resident in the United Kingdom carried on the business of a departmental store in Buenos Aires. In consequence the company was liable in Argentina to a tax known as the substitute tax, which was levied on joint stock companies incorporated in Argentina, and on companies incorporated outside Argentina which carried on business there, as did the appellant company through an "*Empresa estable*". The tax was charged annually at the rate of one percent on the Company's capital and was payable whether or not there were profits liable to Argentina income tax. Under Argentina law there were sanctions available to remedy non-payment of the tax.

[1] 41 T.C. 450.

For the Crown it was contended (*inter alia*) that the company paid the tax in the capacity of taxpayer rather than trader. On behalf of the Company it was contended that it paid the substitute tax solely for the purpose of enabling it to carry on its business in Argentina and if it had not paid the tax it would have been unable to carry on its business there.

The Court of Appeal accepted the contention of the appellant company and held the tax so paid to be properly deductible as it was "money wholly and exclusively laid out or expended for the purpose of (its) trade" within the meaning of section 137(*a*) of the United Kingdom *Income Tax Act*.

Diplock L.J. pointed out at page 469 that the liability to the Argentina substitute tax was not dependent upon whether profits were made or not. This is not so in the case of the tax under the Quebec *Mining Act*. The distinction is clearly that the substitute tax was one paid to enable the taxpayer to earn profits whereas the tax imposed under the Quebec *Mining Act* is a tax on profits when earned.

In *Roenisch v. Minister of National Revenue*[1] an appeal was brought from the assessment of the appellant upon the ground of the Minister refusing to allow as a deduction under the *Income War Tax Act*, an amount of income tax paid to the Province of British Columbia. Under the British Columbia *Taxation Act* provision was made for taxing the income of the individual but provision was made therein that, for the purpose of ascertaining such income, a deduction was allowed of all income tax payable to the Crown in the right of the Dominion. There was no corresponding text in the *Income War Tax Act* respecting a deduction of Provincial Income Tax such as 11(1)(*p*) of the present *Income Tax Act*, and accordingly the appellant sought relief or remedy under section 6(1)(*a*) of that Act from which section present section 12(1)(*a*) is derived.

Audette J. held that "it is self evident that the amount of the income tax paid to the Province is not an expense for the purpose of earning income". He pointed out at page 6 that "The position is indeed quite different under the federal and provincial tax Acts, because there is a text, a provision, in the provincial statute allowing a deduction of this

[1] [1931] Ex. C.R. 1.

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kind; but there is no similar provision in the federal tax Act. All deductions and exemptions are specifically mentioned in the latter Act and no such deduction or exemption as those claimed in this case are therein mentioned."

He, therefore, concluded "...relying on the authorities above mentioned and upon what I think the proper construction and interpretation of the federal Act, that the amount of provincial income tax is not an expenditure for the purpose of earning the income and should not be deducted in arriving at the amount of the tax payable under the federal Act".

The question of the deductibility of a tax paid on profits to a foreign jurisdiction was considered in *I.R.C. v. Dowdall, O'Mahoney & Co. Ltd.*[1] where a company resident in Eire carried on business at two branches in England. The whole of its profits, including those which arose from its businesses in England, were subject to income tax in Eire and its profits from the businesses in England were subject to United Kingdom excess profits tax. The company sought to deduct a proportion of the Eire taxes in computing the profits of the businesses in England for assessment to excess profits tax in the United Kingdom. It was held by the House of Lords that the Irish taxes were not paid for the purpose of earning profits but were an application of profit when made.

Lord Oaksey said at page 409:

> ...I am of opinion that taxes such as those now in question, namely, income tax, corporation profits tax and excess profits tax, are not according to the authorities wholly and exclusively laid out for the purposes of the company's trade in the United Kingdom. Taxes such as these are not paid for the purpose of earning the profits of the trade: they are the application of those profits when made and not the less so that they are exacted by a dominion or foreign government. No clear distinction in point of principle was suggested to your Lordships between such taxes imposed by the United Kingdom government and those imposed by dominion or foreign governments.

Lord Radcliffe said at page 423:

> ...the question before us relates to a deduction of income and profit taxes paid in another country. But, once it is accepted that the criterion is the purpose for which the expenditure is made in relation to the trade of which the profits are being computed, I have been unable to find any material distinction between a payment made to meet such taxes abroad and a payment made to meet a similar tax at home.

[1] [1952] A C. 401.

Upon the authority of the *Roenisch* case *(supra)* and the *Dowdall, O'Mahoney* case *(supra)* it is clear that a tax on profits imposed by a different or foreign jurisdiction is not an expenditure laid out to earn profit and is accordingly not deductible in determining taxable income. I do not think that the authority of the two foregoing cases is in any way impugned by the recent decision of the Supreme Court in *Premium Iron Ores Ltd. v. M.N.R.*[1] reversing a decision of this Court and which was delivered subsequent to the argument in the present appeals so that it was not available to counsel. One issue there involved was the deductibility of legal expenses incurred in disputing a claim for income taxes by a foreign jurisdiction. The majority of the Supreme Court held that the legal expenses so incurred were deductible since they were expended for the purpose of retaining or protecting revenue. In the *Premium Iron Ores* case *(supra)* the issue concerned the deductibility of legal expenses in disputing the imposition of income tax by a foreign jurisdiction, whereas in the *Roenisch* case (*supra*) and the *Dowdall, O'Mahoney* case (*supra*) the issues concerned the deductibility of a tax on income validly imposed by other jurisdictions.

Accordingly, I do not accept the point taken in paragraph 9 of the Quemont's Notice of Appeal that the duties paid by Quemont under the Quebec *Mining Act* were an outlay or expense incurred by it for the purpose of gaining or producing income from its business. It follows that the amount so paid is not deductible as being an exception to the prohibition in section 12(1)(*a*) of the *Income Tax Act*.

Having so concluded I now turn to the issue raised in paragraph 10 of Quemont's Notice of Appeal which is, as outlined above, (1) that the word "profits" as used in Regulation 1201 must mean the difference between receipts from the taxpayer's business and the expenditures laid out to earn those receipts and (2) that the taxes paid to the Province of Quebec was not an expenditure laid out to earn those receipts and therefore should not be deducted to determine Quemont's income under the *Income Tax Act* and if such is the case then the only way by which the amount paid for taxes to Quebec could be properly deducted would be by the inclusion of such item in the deduc-

[1] 66 DTC 5280.

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tions enumerated in subsection 4 of Regulation 1201 in which enumeration the tax allowable under section 11(1)(*p*) of the *Income Tax Act* is not included.

Counsel for the Minister, as I understood his argument, readily concedes that the taxes paid to the Province of Quebec were not laid out for the purpose of gaining the income and accordingly those taxes so paid are not a proper deduction from income under section 12(1)(*a*) of the *Income Tax Act*. However, he does not accept the premise of counsel for Quemont that the word "profits" used in Regulation 1201(2)(*a*) is synonymous with the word "income" or that it means the difference between receipts and expenditures laid out to earn those receipts. On the contrary he contends that the word "profits" is used in Regulation 1201(2)(*a*) in its popular and ordinary commercial sense and means net profits, or receipts which are left to the taxpayer after all accounts are paid.

I attach no particular significance to the circumstances that this is the first time this point has been raised by a taxpayer on an appeal to the courts from an assessment or that Quemont, in preparing its tax returns, deducted the amount which it calculated had been paid to the Province of Quebec as taxes on mining operations to compute the amount it was entitled to deduct under Regulation 1201(2)(*a*). The issue is not whether Quemont prepared its return correctly but rather whether the Minister assessed the taxpayer in accordance with the *Income Tax Act*, and the Regulations thereunder as it is his duty to do.

In support of his contention that the meaning to be attributed to the word "profits" is that used in common parlance counsel for the Minister referred to two cases which defined the word in contexts removed from income tax matters.

In *Bishop v. Smyrna and Cassaba Railway Co.*[1] Kekewich J. said at page 269:

> The word "profits", like many other words in the English language, and even some of a technical character, is capable of more than one meaning, and it is often, and properly, used in more than one sense; and it seems to me that the two different senses of the word "profits" afford the key to the solution of the difficulty which I have now to deal with. In ordinary parlance, among mercantile men and lawyers, "profits" mean that sum which periodically, at the end of the half-year, or year, or other time

[1] [1895] 2 Ch. 265.

fixed by agreement, is divisible among the partners—a term which, of course, includes members of a company—as income. It is sometimes called "net profits", only to distinguish it from what are called "gross profits". It is the sum which is ascertained by the taking of a proper account of what has been made by trading and is therefore distributable between the parties entitled.

Then in re *The Spanish Prospecting Company, Limited*[1] Fletcher Moulton L.J. said at page 98:

> The word "profits" has in my opinion a well-defined legal meaning, and this meaning coincides with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification. "Profits" implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates.

Section 2 of the *Income Tax Act* imposes a tax on the taxable income of every person resident in Canada. Section 3 provides that such income includes income from a business and by section 4 that income from a business is the profit therefrom for the year.

The basic concept of "profit" for income tax purposes has been well established. A recent statement of that basic concept is that of Viscount Simonds, in *M.N.R. v. Anaconda American Brass Ltd.*[2] in these words:

> ...The income tax law of Canada, as of the United Kingdom, is built upon the foundations described by Lord Clyde in *Whimster & Co. v Inland Revenue Commissioners* ((1925) 12 T.C 813, 823) in a passage cited by the Chief Justice which may be here repeated. "In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business during such year or accounting period and the expenditure laid out to earn those receipts. In the second place, the account of profit and loss to be made up for the purpose of ascertaining that difference must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the Income Tax Act, or of that Act as modified by the provisions and schedules of the Acts regulating Excess Profits Duty, as the case may be. For example, the ordinary principles of commercial accounting require that in the profit and loss account of a merchant's or manufacturer's business the values of the stock-in-trade at the beginning and at the end of the period covered by the account should be entered at cost or market price, whichever is the lower; although there is nothing about this in the taxing statutes."

This statement of the principle was cited with approval by Abbott J. in *M.N.R. v. Irwin*[3].

[1] [1911] 1 Ch. 92. [2] [1956] A.C. 85 at 100.
[3] [1964] S.C.R. 662.

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In *M.N.R. v. Imperial Oil Limited*[1] the Supreme Court considered Regulation 1201 in its earlier form. Judson J. delivered a judgment for three of the four members of the Court which constituted the majority. At pages 744 and 745 he said:

> ...I think that Regulation 1201 now requires the following procedure in determining the base for the allowance to be granted to a taxpayer who operates more than one oil or gas well:
>
> (1) Determine the profits or losses of each producing well in the normal manner by ascertaining the difference between the receipts reasonably attributable to the production of oil or gas from the well and the expenses of earning those receipts.
>
> . . .

It seems to me to be the clear inference from the language quoted above, Judson J. interpreted the word "profits" as it appeared in Regulation 1201 in its prior form as having the same meaning as that attributed to it by the Privy Council in the *Anaconda* case (*supra*) in the *Excess Profits Tax Act* and by the Supreme Court in the *Irwin* case (*supra*) as applied to the *Income Tax Act,* that is to say the difference between the receipts from a business for the year and the expenses laid out to earn those receipts.

The subsequent amendments to Regulation 1201 do not appear to me to affect the meaning attributed to the word "profits" by Judson J. in the *Imperial Oil* case (*supra*).

It is well recognized that Fletcher Moulton, L.J. when considering the meaning of the word "profits" in the *Spanish Prospecting* case (*supra*) was not dealing with that word in an income tax sense.

In *The Naval Colliery Co., Ltd. v. C.I.R.*[2] Lord Buckmaster commented on the *Spanish Prospecting* case at page 1047 as follows:

> . . ., the Appellants say that the proper method of taking accounts for purposes of determining the profit of the trade is to value everything at the beginning and the end of the accounting period and find the difference, and this view they base on Lord Justice Moulton's statement in Re *The Spanish Prospecting Co., Ltd.,* [1911] 1 Ch. 92. It is obvious that such a principle, which may have application in certain cases, cannot be universally applied and, indeed, it is admitted by Counsel that it needs material modification. Lord Moulton himself pointed out at page 101 that the rule ceases to apply where the Crown interferes. Nor can the rules

[1] [1960] S.C.R. 753. [2] [1928] 12 T.C. 1017.

applicable to wise and prudent trading be used in this connection as was pointed out by Lord Cairns in 6 App. Cas., page 324 (*Coltness Iron Company v. Black*, 1 T.C. 287, at p. 312) where he says: "It may be proper for a trader, or for a trading company to perform in his or their books an operation of this kind every year, in order to judge of the sum that can in that year be safely taken out of the trade and spent as trade profits"; but it cannot be done when the question is the amount of profits received.

What these profits are for purposes of the Income Tax Acts was defined by Lord Herschell in *Russell v. Town and County Bank* (2 T.C. 321, at p. 327 13 App. Cas. 418 at page 424), in these words: "The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts", and as Mr. Justice Channell says in *Alianzo Co., Ltd., v. Bell* (5 T C. 60), [1904] 2 K.B. 666, at p. 671: "He pays on what he gets less the current expenses for getting it", to which, of course, must be added the proper statutory allowances.

I can see no justifiable reason for construing the word "profits" as used in the Regulation in any sense different from the meaning attributed by authorities to that same word as used in the *Income Tax Act*.

It follows that, on this particular issue, the appeal of Quemont is allowed and the assessment is referred back to the Minister for reassessment and in order that the portion of the duties paid by Quemont under the Quebec *Mining Act* that the Minister allowed as a deduction in computing the income of Quemont under section 11(1)(*p*) of the *Income Tax Act* should not be deducted by the Minister and the profits of Quemont to which the allowance provided for by section 11(1)(*b*) of the Act and Regulation 1201 is applicable, might be computed accordingly.

With respect to the issue common to Quemont, Rio Algom and MacLeod-Cockshutt, that is to say, the determination of the proper method of calculating the deductions to which the taxpayers are entitled to under section 11(1)(*p*) of the *Income Tax Act* and Regulation 701 thereunder, in arriving at the proportion of provincial mining tax paid by them which is to be deductible, the appeal of Quemont is dismissed.

In paragraph 6A of the Minister's amended Reply to the Notice of Appeal it is pleaded:

6A. In computing the aggregate of the Appellant's profits for the 1960 taxation year reasonably attributable to the production of industrial minerals pursuant to subsection (2) of section 1201 of the Income Tax Regulation, the Respondent deducted only the sum of $122,558.81, being

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the amount properly allowable as a deduction in computing the income of the Appellant under paragraph (*p*) of subsection (1) of section 11 of the Income Tax Act. The Respondent says that in so doing, he deducted an insufficient amount in the computation of the said profits under subsection (2) of section 1201 of the Income Tax Regulations, and that whereas the deduction in computing the Appellant's income for the purposes of Part I of the Income Tax Act, of the taxes paid to the Province of Quebec in respect of the Appellant's income derived from mining operations in that province for the year in their entirety is prohibited by virtue of s. 12(1)(*a*) of the Income Tax Act, (an amount equal to such taxes, or a proportion thereof, being deductible solely by virtue of s. 11(1)(*p*) of the Income Tax Act and Reg. 701 of the Income Tax Regulations), proper commercial and accounting practice requires that there be deducted, in computing the Appellant's profits reasonably attributable to the production of industrial minerals for the purposes of subsection (2) of section 1201 of the Income Tax Regulations, the whole of the said taxes paid to the province, ($152,854.67).

In effect what the Minister is saying in paragraph 6A is that he disputes the deductibility of the sum of $122,558.81 from Quemont's acknowledged receipts in computing the base to which the percentage of 33% in Regulation 1201(2) applies and adds that the Minister erred in not deducting the greater sum of $152,854.67 being the whole of the taxes paid to the province.

This raises the question whether it is open to the Minister, where there is an appeal from an assessment, to ask the Court to increase the amount of the assessment. Because of the conclusion which I have reached it is not necessary for me to consider or decide that question.

In respect of the appeals of Rio Algom and MacLeod-Cockshutt, as indicated above, there will be judgment at this time dismissing the appeals with costs.

In respect of the appeal of Quemont, as success is divided, I propose to allow the parties an opportunity of speaking to the question of costs. For that reason there will be no judgment until such time as one of the parties brings a motion for judgment.