BETWEEN:

ANJULIN FARMS LIMITED .....APPELLANT;

AND

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

1960
Sept. 23
1961
June 2

Revenue—Income tax—Income Tax Act, S. of C. 1952, c. 148, ss. 46(2)(4) and 57(1)—Nil assessment—A notice of assessment must be treated as an assessment even though no tax levied—Appeal allowed.

Appellant on April 29, 1955, filed its income tax return for 1954. On June 7, 1955, the Minister forwarded to appellant a Notice of Assessment showing the tax levied for 1954 as "nil". On July 16, 1959, the Minister forwarded to appellant a Notice of Re-Assessment by which a tax and interest were levied. The appellant appealed to this Court.

Held: That the "nil" assessment made in 1955 must be treated as an assessment made at that time and a re-assessment in July, 1959, is invalid as being out of time. *Vide* s. 46(4) of the *Income Tax Act* as it was in 1959.

2. That in construing s. 46(4) of the Act as it was in 1959, the word "assessment" therein includes an assessment of "nil" dollars and therefore the original assessment herein was that of June 7, 1955, and the assessment dated July 16, 1959, stated to be a "re-assessment" and being more than four years after the original assessment, was invalid and of no effect.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Cameron at Calgary.

Edward E. McNally for appellant.

C. E. Smith, Q.C. and *G. W. Ainslie* for respondent.

1961

ANJULIN FARMS LTD. v. MINISTER OF NATIONAL REVENUE

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

CAMERON J. now (June 2, 1961) delivered the following judgment:

This is an appeal in respect of the appellant's taxation year ending October 31, 1954. In its return dated April 29, 1955, it showed a profit for the year of $8,386.40, but after deducting certain amounts for depletion on royalties as well as for losses incurred in previous years, showed no taxable income. That return was apparently accepted as correct and on June 7, 1955, a "Notice of Assessment" (Exhibit 4) was forwarded to the appellant showing the tax levied as "nil". More than four years later and on July 16, 1959, the Minister forwarded to the appellant a "Notice of Re-assessment" (Exhibit 7) by which a tax of $1,755.31 and interest thereon was levied. Attached thereto and forming part of Exhibit 7 was the form T7W-C, showing the adjustments to the declared income and indicating a revised taxable income of $8,776.56. Then followed a Notice of Objection by the appellant dated August 31, 1959. Up to the date of the trial, no action was taken by the Minister following the receipt of the Notice of Objection under the provisions of s. 58(3), but at the trial on motion of his counsel and counsel for the appellant consenting, the time for filing his reply was extended to that date. In the meantime, after more than six months had elapsed from the date of serving the Notice of Objection, the appellant, under s. 60(2), served a Notice of Appeal to this Court on March 7, 1960, to which the Minister replied on July 21, 1960.

The onus is on the taxpayer-appellant and he must establish the existence of facts or law showing an error in relation to the taxation imposed upon him (*Johnston v. M.N.R.*[1]).

The first point raised by the appellant is a legal one, namely, that the purported "re-assessment" of July 16, 1959, is invalid as being out of time. Certain objections on the facts are also raised in the alternative, but if the legal objection now raised is correct, the others need not be considered.

[1] [1948] S.C.R. 486.

It is submitted that the appellant was first assessed on June 7, 1955 (the date of the Notice of Assessment Exhibit 4) and that that was therefore the original assessment; that as the "Notice of Re-assessment" (Exhibit 7) is dated July 16, 1959, that "re-assessment" was made on that date and being more than four years from the date of the original assessment, was invalid under the provisions of the then s. 46(4) of the *Income Tax Act*.

Section 46(4) as it was in 1959 reads:

> 46. (4) The Minister may at any time assess tax, interest or penalties and may
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> (*a*) at any time, if the taxpayer or person filing the return has made any misrepresentation or committed any fraud in filing the return or supplying information under this Act, and
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> (*b*) within 4 years from the day of an original assessment in any other case,
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> re-assess or make additional assessments.

The parties are in agreement that no question of fraud or misrepresentation arises in this case.

For the sake of brevity and to avoid confusion between the words "assessment" and "original assessment" and "re-assessment", I shall hereinafter refer at times to the assessment of which notice was sent to the appellant on June 7, 1955, as "assessment X" and that of which notice was sent on July 16, 1959, as "assessment Y", without attaching any significance to the word "assessment" therein, but merely for purposes of identification.

Counsel for the Minister submits that as no tax was levied or claimed by "assessment X", it was not an assessment and that therefore the original assessment was "assessment Y". He relies on *Okalta Oils Ltd. v. M. N. R.*[1], in which the unanimous judgment of the Supreme Court of Canada was delivered by Fauteux J.

It becomes necessary to examine that decision carefully. In that case, the appellant-taxpayer was originally assessed for $1,000 in respect of the taxation year ending December 31, 1946. Pursuant to s. 69A of the *Income War Tax Act*, it served a Notice of Objection on the Minister who, upon re-consideration, re-assessed the company at "nil" dollars. An appeal purporting to be taken under s. 69B(1) to the Income Tax Appeal Board was dismissed and that

[1] [1955] S.C.R. 824.

1961

ANJULIN FARMS LTD. v. MINISTER OF NATIONAL REVENUE

Cameron J.

decision was affirmed by the judgment of this Court[1]. The taxpayer then appealed to the Supreme Court of Canada and it was held that in the circumstances there was no right of appeal from the decision of the Minister to the Board, nor therefrom to the Exchequer Court.

In that case, Fauteux J. said at p. 825:

> A right of appeal is a right of exception which exists only when given by statute. Under section 69c(1) of the *Income War Tax Act*, a right of appeal to the Exchequer Court is given from the decision of the Income Tax Appeal Board; and under section 69b(1), a taxpayer who has served a notice of objection to an assessment under s. 69a may, after "the Minister has confirmed the assessment or re-assessed", appeal to the Income Tax Appeal Board "to have such assessment vacated or varied."
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> It is the contention of the respondent that, construed as it should be, the word "assessment", in sections 69a and 69b, means the actual amount of tax which the taxpayer is called upon to pay by the decision of the Minister, and not the method by which the assessed tax is arrived at; with the result that if no amount of tax is claimed, there being no assessment within the meaning of the sections, there is therefore no right of appeal from the decision of the Minister to the Income Tax Appeal Board.
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> In *Commissioners for General Purposes of Income Tax for City of London and Gibbs and Others*, [1942] A.C. 402, Viscount Simon L.C., in reference to the word "assessment" said, at page 406:—
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> > The word "assessment" is used in our income tax code in more than one sense. Sometimes, by "assessment" is meant the fixing of the sum taken to represent the actual profit for the purpose of charging tax on it, but in another context the "assessment" may mean the actual sum in tax which the taxpayer is liable to pay on his profits.
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> That the latter meaning attached to the word "assessment", under the Act as it stood before the establishment of the Income Tax Appeal Board and the enactment of Part VIIIA—wherein the above sections are to be found—in substitution to Part VIII, is made clear by the wording of section 58(1) of the latter Part, reading:—
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> > 58(1). Any person who objects to the *amount* at which he is assessed . . .
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> Under these provisions, there was no assessment if there was no tax claimed. Any other objection but one ultimately related to an amount claimed was lacking the object giving rise to the right of appeal from the decision of the Minister to the Board. Under section 69a(1), there is a difference in the wording, as it was in prior section 58(1), but not one indicative of a change of view as to the substance in the matter. In Part VII, which deals with "assessment", a similar meaning is implied in section 54(1) providing that "the Minister shall send a notice of assessment to the taxpayer verifying or altering the amount of the tax. . . ." and in section 55, providing that notwithstanding any "prior assessment, or if no assessment has been made, the taxpayer shall continue to be liable for any tax and to be assessed therefore, and the

[1] [1955] Ex. C.R. 66.

Minister may, at any time, assess any person for tax, interest and penalties. . . ." In *Case No. 111 and Minister of National Revenue*, 8 C.T.A.B.C. 440, a similar objection was made and maintained. No argument was advanced by the appellant herein to justify the adoption of a contrary view in this case.

It was conceded by counsel for respondent—and with this view, we agree—that the action of the Minister in modifying the tax return submitted by the appellant, would have no future binding effect.

The appeal, as indicated, is dismissed with costs.

It is to be noted that that decision was made under the provisions of the *Income War Tax Act* and related to the taxation year 1946; and that the single question before the Court was whether an appeal lay under s. 69B(1) of the *Income War Tax Act* to the Income Tax Appeal Board in cases where no tax was claimed or levied by the assessment. It undoubtedly was influenced by the wording of s. 58(1) of Part VIII—"Any person who objects to the *amount* at which he is assessed . . ." although, as pointed out, Part VIII of the Act did not apply for the 1946 and subsequent taxation years (s. 69F). The Court also held that while the wording of s. 69A(1) differed somewhat from that found in s. 58(1), that difference was not indicative of a change of view as to the substance in the matter. In view of the fact that the sole question for determination was whether an appeal in the circumstances could be brought under s. 68B(1), it may perhaps be argued that the statement "Under these circumstances there was no assessment if there was no tax claimed" may have been unnecessary to the decision, and in any event that statement clearly refers to s. 58(1) of the *Income War Tax Act* which was of no effect after 1945.

In addition there are other changes and sections in the Act as it was in 1959 which are of importance in determining the question as to whether a "nil" assessment might then be an original assessment. Section 69A(1), referred to in the *Okalta* case, is identical to s. 59(1) of the Act as it was in 1959 and confers on the taxpayer a right of appeal to the Tax Appeal Board when he has served a Notice of Objection to an assessment—not, it will be noted, to the *amount* of the assessment. Section 54(1) of Part VII of the *Income War Tax Act*, which

1961

ANJULIN FARMS LTD. v. MINISTER OF NATIONAL REVENUE

Cameron J.

provided that "The Minister shall send a Notice of Assessment to the taxpayer verifying or altering the *amount of the tax*" has been succeeded by s. 46(2):

46.(2) After examination of a return the Minister shall send a Notice of Assessment to the person by whom the return was filed.

That provision, it seems to me, requires the Minister to send a Notice of Assessment to every person who has filed a return. Section 44 requires that a return of income be filed by (*inter alia*) all corporations, by individuals who are taxable, and at the written request of the Minister, by an individual whether he be taxable or not. Section 45 states that all persons required by s. 44 to file a return of income shall in the return estimate the amount of tax payable. I would think that a non-taxable person who does file a return would be entitled to estimate his tax at "nil" dollars, since he is required to estimate the amount of the tax. Section 46(2) does not appear to limit the duty of the Minister in sending a Notice of Assessment to those cases in which a tax is payable since it directs the Minister to send such notice "to the person by whom the return was filed". Since the Minister has the power in cases of fraud or misrepresentation to re-assess or make additional assessments at any time, I find great difficulty in interpreting s-s. (4) as meaning that the Minister may assess *at any time* after he has sent out a "Notice of Assessment" stating that the return has been assessed and that the tax levied is fixed at "nil" dollars (as in Exhibit 4); whereas under that subsection, if a tax of one dollar had been originally levied, he could not re-assess more than four years thereafter. In the instant case, also "assessment Y" is called a "Notice of Re-assessment" and states "A further examination has been made of your income tax return for the taxation year indicated. The resulting re-assessment in tax is shown above. . . .".

Then s. 57(1) seems to indicate that a Notice of Assessment may be an assessment at "nil" dollars. It reads:

57.(1) If the return of a taxpayer's income for a taxation year has been made within four years from the end of the year, the Minister

(*a*) may, upon mailing a notice of assessment for the year, refund, without application therefor, any overpayment made on account of the tax, and. . . .

There are doubtless many cases in which taxpayers have paid instalments of taxes or their employers have deducted tax and remitted it to the taxing authorities, when, in fact, it is found at the end of the taxation year that no tax is payable. The taxpayer then files his return and if the assessor agrees with his computation that no tax is payable, the Minister may "upon mailing the *notice of assessment* for the year refund . . . . any overpayment" which, in such a case, would be the total amount paid in. Unless the Minister in such a case is prevented entirely from making such a refund—which clearly is not intended —such a Notice of Assessment would of necessity be a "nil" assessment.

The word "assessment" is not defined in the Act except that it includes a re-assessment (s. 139(1)(*d*)). For the reasons above stated, however, I have come to the conclusion that in construing s. 46(4) as it was in 1959, the word "assessment" therein includes an assessment at "nil" dollars and that therefore the original assessment in this case was that of June 7, 1955. It follows that under the law as it was in 1959, the "assessment Y" dated July 16, 1959, stated to be a "re-assessment" and being more than four years after the original assessment, was invalid and of no effect.

I should state here, in case the matter goes further, that in the alternative claim of the appellant on the merits, it was agreed that in the event that I should find that the assessment under appeal was a valid assessment (*a*) the deduction for wages of Linda Graburn and Judith Graburn for $1,000 each should be dropped; and (*b*) that as claimed by the appellant in its appeal and admitted by the Minister in his reply, the appellant was entitled to an additional deduction of $1,644.72 for capital cost allowance pursuant to s. 11(1)(*a*) of the Act and an additional amount of $1,129.71 as an allowance pursuant to s. 11(1)(*b*) of the Act. In view of my finding, it is unnecessary to consider the other alternative claim of the appellant that in the circumstances it is entitled to deduct losses of prior years from its 1954 income.

1961

ANJULIN FARMS LTD. v. MINISTER OF NATIONAL REVENUE

Cameron J.

In view of my finding, it becomes unnecessary to consider the alternative submission of counsel for the appellant that the appellant is entitled to succeed under the provisions of the new s-s. (4) of s. 46, as enacted by s. 15 of c. 43, Statutes of Canada, 1960, and which came into force on August 1, 1960.

Accordingly, the appeal will be allowed and the reassessment of July 16, 1959, set aside. The appellant is entitled to be paid its costs after taxation.

Judgment accordingly.