BETWEEN:

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

1961
Nov. 20

1962
June 25

AND

McCORD STREET SITES LIMITED ..RESPONDENT.

Revenue—Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 12(1)(a), 14(2)(3), 85(e), 139(1)(w), 2(a) and 125(1)—Bulk sale of a business including stock on hand or so called inventory—Taxability of proceeds from such sale—Deductibility of cost of such inventory—"An outlay or expense . . . made or incurred . . . for the purpose of gaining or producing income . . . from a business"—Deductibility of outlay or expense under s. 12(1)(a)—Duty on taxpayer to open and close out its inventory at the beginning and end of its taxation year—Appeal dismissed.

The respondent, under the name of Consolidated Oka Sand & Gravel Co. Limited, was engaged for many years mainly in the business of dredging sand from two water lots in the Lake of Two-Mountains, which it transported in its own fleet to other leased properties located at Ville LaSalle, in the Parish of Lachine, Quebec, for storage and distribution purpose. It also owned and managed certain revenue-producing properties which it developed on McCord St., in the City of Montreal.

On March 14, 1955, some time prior to the end of its taxation year, by a bulk or slump sale transaction it disposed of its entire sand business, including its name and good will, for $375,000. On the above date the respondent had on hand 40,000 tons of sand which was included in the bulk sale price and for which the purchaser had agreed to pay one dollar a ton. The cost of production was $52,808.90. The Minister of National Revenue, by reassessment, added the $40,000 so received to the Company's taxable income. The Company's appeal against the assessment was maintained by the Tax Appeal Board. The Minister of National Revenue appealed from the said decision. Counsel for the appellant, at the hearing, conceded that the sum of $40,000 in issue constituted a capital receipt, and not profit on the sale of sand, as claimed in the Minister's assessment, but took the position that it was nevertheless taxable on the ground that the production cost of the 40,000 tons amounting to $52,808.90, reduced to the equivalent of its fair market value as provided by s. 14(2), should be charged against the bulk sale proceeds which amounted to $40,000. In order to arrive at the above conclusion, the appellant looked upon the 40,000 tons as inventory the status of which should be determined as of the date immediately preceding the bulk sale to the appellant.

Held: That no part of the receipt from the bulk sale was a receipt from the appellant's business and was not liable to tax. *Frankel Corporation Ltd. v. The Minister of National Revenue* [1959] S.C.R. 713, followed.

2. That the cost of producing the sand which was sold in bulk was an outlay or expense made or incurred by the taxpayer for the purpose of gaining or producing income and was accordingly deductible under s. 12(1)(*a*) of the Act.

1962

MINISTER OF NATIONAL REVENUE v. McCORD STREET SITES LTD.

3. That the cost of the 40,000 tons in question having been incurred in the ordinary course of the Company's business it should be deducted only from sales realized in a like manner.

4. That insofar as inventory is concerned the only obligation on the taxpayer is to open and close out its inventory at the beginning and end of its taxation year, and as there was no inventory on hand at the end of the 1955 taxation year, s. 14(2) of the Act would not be applicable.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Kearney at Montreal.

Alfred Tourigny, Q.C. and *Paul Boivin, Q.C.* for appellant.

John N. Turner for respondent.

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

KEARNEY J. now (June 25, 1962) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board[1] dated June 21, 1960 allowing the appeal of the respondent and vacating a reassessment wherein the appellant sought to add $40,000 to the gross profit of $50,464.10 reported by the taxpayer for the taxation year 1955 and which the appellant now seeks to have restored.

During the year in question, the respondent, formerly known as Consolidated Oka Sand & Gravel Limited, made a disposition of its entire sand business by way of a bulk sale or slump transaction which, immediately prior to the sale, included 40,000 tons of unsold sand in respect of which it received in the slump transaction one dollar a ton. The issue in this case turns on the manner in which the $40,000 thus received and the costs incurred in producing it should be treated in the determination of the respondent's taxable income for the year.

It was agreed by the parties that the record as constituted before the Tax Appeal Board, including the transcript of argument, should form part of the record in this Court.

Counsel for the respondent called no witnesses but relied on the evidence of Blanche Manning, Lucien Danis, Secre-

[1] 24 Tax A.B.C. 375.

tary and Treasurer respectively of the respondent Company, and Gordon S. Payne, C.A., its auditor, which was adduced before the Tax Appeal Board.

A reverse procedure was followed by the appellant—on whose behalf no witnesses had been heard before the Tax Appeal Board. Before this Court, however, counsel for the appellant called Omer-Georges-S. Vaillancourt, Accountant with the Department of National Revenue, Income Tax Division, and Gordon McHale, C.A.

It is not the facts themselves but the interpretation to be given to them which is in dispute.

The following is a brief history of the respondent company (hereinafter sometimes called "the taxpayer" or "the company") and a summary in chronological order of the main events which are relevant to the instant issue.

The company was incorporated by Letters Patent of the Province of Quebec under the name of "Oka Sand & Gravel Co. Limited". During the first few years of its existence it acquired a property in the city of Montreal, just off McCord Street, close to a shipping basin abutting the Lachine Canal, where it stored and disposed of sand which it had pumped and transported by its own equipment and marine fleet from the Lake of Two Mountains, in the neighbourhood of the Town of Oka. The respondent possessed deep water lots in the Lake of Two Mountains which it leased from the Minister of Hydraulic & Resources of the Province of Quebec and where it also held a mining concession, covering certain lots forming part of the said lake, in virtue of a grant issued by the Minister of Colonization and Mines of the Province of Quebec.

In 1928, Oka Sand & Gravel Co. Ltd. merged with a company called "Consolidated Sand" and these two companies were absorbed by a new company called "Consolidated Oka Sand & Gravel Co. Limited".

While retaining its McCord Street property, which had large storage facilities and on which the respondent had later constructed a garage and a commercial building from which it was in receipt of rentals, it decided to move its sand business to Ville LaSalle, in the Parish of Lachine, where it leased a property on St. Patrick Street from Raymond Marroni, and certain further contiguous lands from the Minister of Transport and on which it later

1962

MINISTER OF NATIONAL REVENUE v. McCORD STREET SITES LTD.

Kearney J.

constructed, *inter alia,* an office building. Both of these above-mentioned properties were located on or near the Lachine Canal. The respondent continued to operate its sand business through the medium of its Ville LaSalle and the Lake of Two Mountains properties, and the McCord Street property became a real estate investment from which gross profits—which are not in issue—were realized.

As appears by Exs. A-1 and A-2 filed before the Tax Appeal Board, one Raymond Miron, acting for and on behalf of Oka Sand & Gravel Inc., a company in the process of being incorporated, made in two separate documents a conditional offer to purchase as a going concern the entire sand business of the respondent company, with the exception of its property located on McCord Street for a total consideration of $375,000.

By Ex. A-1 Mr. Miron offered $27,000 for all the respondent's interests relating to its Ville LaSalle and Lake of Two Mountains properties and appurtenances upon its simultaneous acceptance of a second offer (Ex. A-2), wherein he offered to purchase the respondent's marine vessels and accessories for $308,000, payable $158,000 upon the signature of the deed and $150,000 by promissory note falling due six months from the signing of the deed and secured by a statutory mortgage in favour of the vendor on the said marine vessels. Exhibit A-1, *inter alia,* required that the respondent undertake to change its name so as not to include any of the words "Oka", "Sand" and/or "Gravel" and to permit the purchaser to cause to be incorporated a company to be known as "Oka Sand & Gravel Inc." The offer also states that in the event of its acceptance the purchaser shall purchase all the vendors' stock of sand on the leased premises at Ville LaSalle at a price of one dollar a ton. The quantity thereof was to be determined by the certificate of a surveyor acceptable to both parties, but, as appears later, this became unnecessary.

On March 10, by-laws were passed at a meeting of directors of the company and ratified at subsequent meetings of its shareholders whereby the offers contained in Exs. A-1 and A-2 were accepted and two of the respondent's officers were authorized to sign the necessary deeds of sale, and, at the same meetings, appropriate by-laws were passed to have the name of the respondent changed to McCord Street Sites Limited (see Exs. A-3 and A-4).

By March 14, 1955 Oka Sand & Gravel Inc. had been incorporated but apparently the Letters Patent authorizing the change of name of the respondent had not yet been issued. Two deeds of sale, on the above date, were executed (see Exs. A-5 and A-6) between Consolidated Oka Sand & Gravel Co. Ltd. as vendor to Oka Sand & Gravel Co. Inc. as purchaser. As appears in Ex. A-5, which I might call "the offer for Ville LaSalle and Lake of Two Mountains properties", the parties waived the necessity for a future survey and agreed that the quantity of sand on hand at that date should be considered as consisting of 40,000 tons. As a consequence, on the signing of the deed, apart from receiving $27,000 for its Ville LaSalle and Lake of Two Mountains assets of the company, the latter received $40,000 for the sand then on hand. In short, the respondent, for the assets mentioned in Ex. 5 received on its execution the sum of $67,000 and the purchaser undertook to fulfill the obligations of the respondent under the leases included in the sale.

All the prior conditions having been fulfilled, the down payment of $158,000 was made and the transfer of the respondent's marine fleet was effected, thus completing the bulk sale of its entire sand business. Thereafter the only portion of the business previously carried on by the respondent which it retained and continued, after March 14, 1955, to operate, consisted in the ownership and administration of its property and buildings located on McCord Street and from which it derived rentals, which, in 1955, amounted to $16,737 (see statement of operations filed at the instant hearing by Mr. Vaillancourt as Ex. A).

It is admitted by the parties that s. 85(*e*) of the Act, whereby it is provided, *inter alia,* that the sale of an inventory shall be deemed to have been sold in course of carrying on a taxpayer's business missed by a narrow margin being applicable to the bulk sale effected, in the present case, on March 14, 1955, since it applies only to sales made after April 5, 1955. It would appear, indeed, that, when on September 19, 1955 the respondent filed its original income tax return for its taxation year terminating on April 30, 1955, it was under the impression that s. 85(*e*) had been

1962

MINISTER OF NATIONAL REVENUE v. McCORD STREET SITES LTD.

Kearney J.

made applicable as of January 1, 1955; hence the variations in the respondent's tax return, as mentioned in paragraphs 1 and 2 of the notice of appeal.

Legally speaking, the estimates of his taxable income made by a taxpayer in form T-2 return is of little or no concern. On the contrary, the Minister's reassessment of such return and the validity of the objections thereto, relied upon by the taxpayer, are of the utmost importance. While taking exception to the reassessment of its taxable income made by the Minister, amounting to $90,464.10, the taxpayer acknowledges that it amounted to $50,464.10 (see Ex. A-7, dated April 19, 1960, filed by Mr. Payne; also Ex. A, a comparative statement, dated November 16, 1961, prepared by Mr. Vaillancourt). It follows, therefore, that $40,000, being the difference between the two above-mentioned figures, constitutes the only amount in dispute.

The appellant has also altered the position which he originally adopted. As appears at page 2 of the reassessment referred to in his notice of appeal, the $40,000 in issue was added as "profit on the sale of sand" included in the slump sale in question. In his argument, as I understood it, counsel for the appellant submitted that the Minister no longer seeks to tax the said $40,000 as a sale, because, for reasons which I shall refer to later, he acknowledges that it should be regarded as a capital receipt. Instead, he takes the position that the said $40,000 being the proceeds from an inventory sold as part of its business should serve to cancel out *pro tanto* the costs incurred by the taxpayer in respect of all the sand extracted in the course of its business during 1955.

Briefly, it is said for the respondent that the appellant is endeavouring to impose a tax indirectly which he is prevented by legal precedents from imposing directly.

Mr. Vaillancourt produced as Exhibit A a comparative statement of operations for the year ended April 30, 1955, purporting to show the appellant's computation on one side of the sheet and the respondent's on the other. As mentioned previously, the gross profit derived in the form of

rents from the McCord Street property, as set out in the said exhibit, can be disregarded and the exhibit need not be considered beyond the point were the Department's figures show taxable income or gross revenue from the sand business at $90,464.10 and where a corresponding figure shown by the taxpayer amounts to $50,464.10.

Mr. Payne filed as Exhibit 7 an explanatory computation in support of the figure of $50,464.10 which I propose to make use of, as it shows more clearly than Ex. A how the item of $50,464.10 was arrived at.

Mr. McHale filed as Ex. B a letter which sets out his opinion and reasons for agreeing in principle with Mr. Vaillancourt's conclusion.

The following extracts from Exs. A, A-7 and B, I think, are sufficiently inclusive to bring into relief the conflicting views of the parties.

Statement of Operations for the year ended April 30, 1955
Appellant's Figures
Exhibit A

Sales[1]			$305,803.71
Cost of Sand			
Inventory of sand April 30, 1954		$ 15,562.28	
Cost of sand extracted in 1955		$239,777.33	
Cost of sand sold during 1955[2]		$255,339.61	
deduct: cost of sand sold in bulk	$52,808.09		
less: reduction to market value	$12,808.09		
Market value of sand sold in bulk		$ 40,000.00	
Gross profit			$215,339.61
			$ 90.464.10

[1] Does not include $40,000 received on bulk sale.
[2] Includes cost of sand sold in bulk.

1962

MINISTER OF NATIONAL REVENUE
v.
McCORD STREET SITES LTD.

Kearney J.

RESPONDENT'S FIGURES

EXHIBIT A-7

McCORD STREET SITES LIMITED

(formerly Consolidated Oka Sand & Gravel Co. Limited)

1955 Income Tax Appeal

Outline of Taxpayer's Contention

If the sale of the sand business had occurred after Section 85E became effective, the figures would have been as follows:—

Sales during operation of the sand business	$305,803.71	
"Slump" sale of inventory	40,000.00	
Total Sales of Sand	$345,803.71	
Cost of Sand		
Inventory April 30, 1954	$ 15,562.28	
Cost of Sand Produced	239,777.33	
	$255,339.61	
Inventory, April 30, 1955	nil	$255,339.61
Gross Profit as it would be if Section 85E were in effect		$ 90,464.10

But as Section 85E was not in effect, we eliminate the $40,000 from the calculation, on the grounds that no "part of the receipts from the sale was a receipt from the taxpayer's business", so that the Gross Profit (profit before deducting operating expenses) on which the taxpayer claimed to be taxable, is as follows:

Sales while in the sand business		$305,803.71
Cost of Sand		
Inventory April 30, 1954	$ 15,562.29	
Cost of Sand Produced	239,777.33	
	$255,339.61	
Inventory, April 30, 1955	nil	$255,339.61
Gross Profit reported by taxpayer		$ 50,464.10

Mr. McHale, in his letter of November 17, 1961 (Ex. B), addressed to counsel for the appellant, stated in part:

> You have asked me to express an opinion on the accounting principles followed in preparing the financial statements of the above company for its year ended 30th April 1955.
>
> It is a basic and generally accepted accounting principle that in order to determine the profit arising from any transaction, the cost of the items sold must be matched against the proceeds of sale. This is true whether the transaction is of a capital or a revenue nature.
>
> * * *

The profit arising from the normal sales of the company would therefore be as follows:

Sales		$305,803.71
Cost of sales—inventory April 1, 1954	$ 15,562.28	
Cost of production	239,777.33	
	$255,339.61	
Less: cost of inventory on hand 14th March 1955, i.e. immediately before the bulk sale	52,808.09	202,531.52
Profit arising in normal course of business		$103,272.19
Less: reduction to market value as required by s. 14(2) of the Income Tax Act		12,808.09
Profit as determined by the Tax Department		$ 90,464.10

However, when we examine the accounts of the company, we find that against the proceeds of sales in the normal course of business (166,874 tons) were charged the costs of extraction of 210,384 tons, while against the proceeds of the bulk sale (43,510 tons) were charged no costs whatever. In my opinion, costs of $52,808.09 should be charged against the bulk sales proceeds of $40,000.

When it happens, as in a case like this, that by a fiction of law something which clearly constituted stock-in-trade, without undergoing any physical change, suddenly becomes a capital asset, I believe such an occurrence is almost bound to create anomalies insofar as generally accepted accountancy practice is concerned.

Even if it were taken for granted that Mr. McHale's method of computation is more in accordance with good commercial accounting practice than the one adopted by the respondent, this would not put an end to the issue. In my opinion, usually accepted accounting principles must give way to unusual situations, more particularly when they arise not only from the statutory provisions of the *Income Tax Act* but from the dictates of jurisprudence as well. In comparing the two methods of computation, it should be borne in mind, I think, that where income tax is concerned it is the law and not accounting practice which must prevail.

It is important to note that the parties agree that for the year ended April 30, 1955, the respondent's sales amounted to $305,803.71 and both have excluded therefrom the sum of $40,000 received as a result of the bulk sale. One does not have to seek far for the reason which

1962

MINISTER OF NATIONAL REVENUE v. McCORD STREET SITES LTD.

Kearney J.

prompted this exclusion; it is to be found in the judgment of our Supreme Court in *Frankel Corporation Ltd.* and *The Minister of National Revenue*[1], a case concerned with the effect of a bulk sale made in 1952 which in many respects is similar to the instant one. Martland J., at pp. 725 and 726, set out a long extract from the judgment of the learned trial judge (Thurlow J.) which contains the latter's reasons for reaching the following conclusions:

> . . . . It follows, in my opinion, that no part of the receipts from this sale was a receipt from the appellant's business.

At the bottom of page 726, Martland J. makes the following statement:

> I agree with these conclusions. In my opinion the evidence establishes: (1) that the appellant ceased its trading in non-ferrous metals by December 31, 1951; and (2) that the sale of the inventory of non-ferrous metals as a part of the assets sold by the agreement of December 19, 1951, by the appellant to Federated was not a sale in the business of the appellant, but was made as a part of a sale of a business of the appellant, and consequently the proceeds of that sale were not income from a business within the meaning of s. 4 of the *Income Tax Act*.

Having previously stated at p. 723 that "Section 85E of the Act had no application to this case, as it became effective in respect of sales made after April 5, 1955, Mr. Justice Martland at p. 728 observed:

> . . . . The issue here is not as to what amount should be deemed to be received by the appellant for those goods, but whether the actual amount received was income from the appellant's business, ...

It is of some significance, I think, that here, like in the *Frankel* case, s. 85(*e*) had not come into effect; yet, as appears by Ex. A-7, the appellant's computed figure of $90,464.10 is exactly the same as if it did apply.

To avoid unnecessary confusion, I will here add a comment on the following discrepancy in the figures presented on behalf of the respective parties.

It appears from the exhibits and evidence adduced before the Tax Appeal Board that the parties used the figure of 40,000 tons and $40,000. Mr. McHale, whose evidence was first heard before this Court, makes use of the figure "43,510 tons" while retaining the figure of $40,000. I do not know how this arose. It may be that one set of figures was based on estimate and the other after the sand had

[1] [1959] S.C.R. 713.

been surveyed; but, because of the conclusion I have reached, any discrepancy in calculation resulting therefrom cannot, in my opinion, affect the issue.

It is worth noting, however, that other computations made in the appellant's Exhibits A and B differ somewhat *inter se* and both are radically different in respect of treatment of "inventory" from what is found in the respondent's Exhibit 7. Mr. Vaillancourt, in his report, has added back the figure of $40,000, being the proceeds of the bulk sale, under the title of "Market value of sand sold in bulk". In Exhibit B, Mr. McHale, except by way of comment, makes no mention of the sum of $40,000 but both witnesses regard the 40,000 tons of sand as inventory which should be made subject to s. 14(2) of the Act; it provides:

> For the purpose of computing income, the property described in an inventory shall be valued at its cost to the taxpayer or its fair market value, whichever is lower, or in such other manner as may be permitted by regulation.

In doing so Mr. McHale mentions that he is giving effect to s. 14(2) as of March 14, 1955, but before the bulk sale. No such mention appears in the Vaillancourt statement.

I might here interject that I doubt very much whether the appellant was justified in adopting an unmistakeable slump sale, at one dollar or less a ton, and far below cost, as being synonymous with or a proper criterion for determining the fair market value of the goods in question. However, because of the conclusions I have reached on other grounds, this point is of no importance and may be disregarded.

In Exhibit 7 Mr. Payne, because the company's taxable year ended on April 30, 1955, at which date it had no inventory, inserts a "nil" report in respect of it. Moreover, it is his opinion that, since the $52,808.09 was expended in order to gain income within the meaning of s. 12(1)(*a*) of the Act and although it never attained its purpose, this amount of $52,808.09 should be charged against $305,803.71 and not against the bulk sale proceeds, which he eliminates from his calculation on the grounds that "no part of the receipts from the sale was a receipt from the taxpayer's business".

1962

MINISTER OF NATIONAL REVENUE v. McCORD STREET SITES LTD.

Kearney J.

Let us first consider whether in law and in fact it can be said that the expenditure in question was for the purpose of gaining income? Section 12(1)(*a*) of the *Income Tax Act*, R.S.C. 1952, c. 148, states:

> 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.

That the answer must be in the affirmative, in my opinion, is self-evident, because during years and years the company had been making identical expenditures for no other purpose and by March 14, 1955 the entire amount of $52,808.09 had been expended.

I think a reasonable conclusion to be drawn from the evidence is that, had the taxpayer foreseen that the sand in question was destined to be sold in a slump sale at a considerable loss, the expenditure made in extracting it would never have been incurred.

A recent decision of our Court in respect of s. 12(1)(*a*) is that of Cameron J. in *Wilson* and *The Minister of National Revenue*[1] at page 217:

> . . . . it is not now necessary to establish that the expense was made or incurred for the purpose of earning the income of the year in which it was made or incurred. It is sufficient to show that it was made for the purpose of gaining or producing income from the business.

Mr. Justice Cameron refers to a statement of the President of this Court, which is found in *The Royal Trust Co.* and *The Minister of National Revenue*[2], reading thus:

> The essential limitation in the exception expressed in Section 12(1)(*a*) is that the outlay or expense should have been made by the taxpayer "for the purpose" of gaining or producing income "from the business". It is the purpose of the outlay or expense that is emphasized but the purpose must be that of gaining or producing income "from the business" in which the taxpayer is engaged. If these conditions are met the fact that there may be no resulting income does not prevent the deductibility of the amount of the outlay or expense. Thus, in a case under the *Income Tax Act* if an outlay or expense is made or incurred by a taxpayer in accordance with the principles of commercial trading or accepted business practice and it is made or incurred for the purpose of gaining or producing income from his business its amount is deductible for income tax purposes.

I consider that the cost of the 40,000 tons in question, which was incurred in the course of the company's business, should be deducted from sales realized in the same manner.

[1] [1960] Ex. C.R. 205.

[2] [1957] C.T.C. 32 at 44.

Because the proceeds of the slump sale do not fall into the above-mentioned category, and for reasons immediately following, such proceeds, in my opinion, should not be charged against the cost of said tonnage.

With respect to the question of inventory, it can be said, I think, that the difference, amounting to $40,000, between the appellant's and respondent's figures of taxable income arises because the appellant, while admitting that the slump sale receipt of $40,000 must be eliminated from the company's profit and loss account, considers that it ought to be brought into and taken into consideration as inventory and applied against the cost thereof as of March 14, 1955.

The respondent, on the other hand, submits that the Minister, in effect, is attempting to disallow a sum of $40,000 (costs amounting to $52,808.09, scaled down by $12,808.09, as required by s. 14(2) of the Act) (*supra*) which is non-taxable as a receipt, by erroneously treating the status of "inventory" as of March 14 instead of April 30, 1955.

On a strict interpretation of the following relevant provisions of the Act, which I think is the only appropriate one in the circumstances, I believe the status of inventory should be determined as of the last day of the company's fiscal year.

Nowhere in the Act is there a provision requiring a taxpayer, under any circumstances, to report his inventory prior to the end of his fiscal year.

Section 4 states that, "subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

Section 139(2)(*a*) of the Act defines "Taxation Year" as follows:

> (2) For the purpose of this Act, a "taxation year" is
> (*a*) in the case of a corporation, a fiscal period, . . .

When s-s. (3) was added to s. 14 by Statutes of Canada 1959, c. 45, it continued to speak of a "taxation year":

> 14. (3) Notwithstanding subsection (2), for the purpose of computing income *for a taxation year* the property described in an inventory at the commencement of the year shall be valued at the same amount as the amount at which it was valued at the end of the immediately preceding year for the purpose of computing income for that preceding year. (Italics are mine.)

1962

MINISTER OF NATIONAL REVENUE v. McCORD STREET SITES LTD.

Kearney J.

Turning to s. 139, s-s. (1), para. (*w*), we find that "inventory" is defined as follows:

> (*w*) "inventory" means a description of property the cost or value of which is relevant in computing a taxpayer's income from a business *for a taxation year;* (Italics are mine.)

Subsection (1) of s. 125, which speaks of books and records, states:

> 125. (1) Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (including *an annual inventory* kept in prescribed manner) at his place of business or residence in Canada . . . . (Italics are mine.)

I think that the foregoing statutory provisions (to which no exceptions are to be found in the Act) make it clear that, insofar as inventory is concerned, the only obligation which rested on the respondent was to open and close out its inventory at the beginning and at the end of its taxation year 1955, and, in my opinion, the evidence undoubtedly shows the respondent, in this respect, fully complied with the Act. I might add that in the *Frankel* case (*supra*), at page 727, it was submitted on behalf of the Minister as an alternative argument

> . . . . that, even if the sale of the inventory of non-ferrous metals was a part of the sale of a business, nevertheless, to effect such sale, such inventory was removed or "diverted" from the appellant's stock-in-trade *before* it was sold and such removal or diversion required that there be placed in the appellant's trading account the market value of the goods so sold, thus giving rise to a trading receipt equal to the amount realized upon such sale. (Italics are mine).

In other words, the Minister (who was respondent in the above case) in effect was seeking to remove the inventory of non-ferrous metals from stock-in-trade and bring it back as a closing inventory as of the moment before it was sold. But Mr. Justice Martland, at page 728, held that "the contention of the respondent on this point also fails".

It is admitted that we are here dealing with an exceptional type of case and one which, in my opinion, was not envisaged taxwise until s. 85(*e*) was introduced into the Act. Because of the *Frankel* case, as I interpret it, and on a strict reading of the provisions of the Act previously referred to, I think it can be said the respondent has successfully discharged the burden of establishing that the reassessment in

question, as made by the appellant, is unjustified and that the respondent's taxable income should be reduced by $40,000.

I would, therefore, dismiss the appeal with costs and refer the record back to the Minister for reassessment accordingly.

Judgment accordingly.