1957 Apr. 12 — 1958 Apr. 16

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

CAINE LUMBER COMPANY ....RESPONDENT.

Revenue—Income Tax—Capital cost allowance—Whether timber limit not operated by former owner purchased in non-arms length transaction depreciable property—Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 11(1)(a), 20(2)(a), (3), (4) and 127(5).

In 1924 C purchased a timber limit for $250 on which he did no cutting and made no claim for capital cost allowance. In 1951 he sold the limit for $15,000 to the respondent company which he controlled. The respondent began cutting in 1952 and claimed capital cost allowance for that year based on the price it had paid C. The Minister reduced the claim by computing the allowance on the basis of the price C had paid. In support of his assessment the Minister argued that the limit was depreciable property which became vested in the respondent in a transaction that was admittedly between the parties not dealing at arms length with the result that, as provided by s. 20(2) of *The Income Tax Act,* the capital cost of the property to the respondent was deemed to be the amount that was the capital cost to C. The respondent contended that, as the limit did not become depreciable property until the 1952 operations, s. 20(2) did not apply, and as C, in whose possession the limit remained idle, had neither claimed nor been entitled to a deduction, the limit was not the depreciable property referred to in that section.

Held: The view that an asset assumes the quality of depreciability only after actual depletion is unwarranted: a timber limit is presumed depreciable.

2. That as the respondent had applied for and been allowed a deduction in respect of the capital cost of the timber limit, it was a "depreciable property" as defined by s. 20(3) of the Act and as the limit became vested in the respondent in a transaction between persons not dealing at arm's length, the provisions of s. 20(2) clearly applied.

APPEAL from a decision of the Income Tax Appeal Board.

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

F. J. Cross for appellant.

J. L. Lawrence for respondent.

DUMOULIN J. now (April 16, 1957) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated May 2, 1956[1], allowing the present respondent's appeal in respect of an income tax assessment for the 1952 taxation year.

The case was heard at Vancouver, B.C., on April 12, 1957.

The facts are as follows and agreed to in a joint statement filed as the hearing opened.

One Martin S. Caine, of Prince George, B.C., operated a sawmill and planing mill up to the year, 1949, when he organized a private company under the name and style of: Caine Lumber Company Ltd.; herein impleaded as respondent. This newly incorporated firm, with its Head Office in the City of Prince George, took over Martin S. Caine's former business.

In 1942, Caine had purchased a timber limit for $250, which he resold to the Company, in 1951, at a price of $15,000, getting book credit for this amount.

Although from the date of purchase to that of the sale, Caine expended a sum of $2,678.60, on account of this timber land for taxes, roads and camps, he never exploited it nor undertook cuttings, and, therefore never claimed any capital cost allowance.

It is freely admitted that this deal, between Caine and his namesake Company, was not an "at arms length transaction" (*vide* 1948 11-12 Geo. VI, c. 52, s. 127(5)).

In the year 1952, timber operations started and accordingly Caine Lumber Company produced its claim to a

[1] 56 D.T.C. 221; 15 Tax A.B.C. 69.

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capital cost deduction, pursuant to s. 11(1)(*a*) hereunder of *The Income Tax Act,* based upon its own purchase price of $15,000.

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

(*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation,

The allowances referred to appear in Part XI of the Regulations, under the respective numeral and heading of 1100 and Schedule C.

Resuming now the recital of facts, Caine Lumber Company in its income tax return for 1952, according to the footage cut in that year, on a thousand feet ratio, divided by a capital price of $15,000, found an allegedly permissible deduction of $3,376.41. Initially, the Minister reduced this claim to $56.27, on the grounds that, conformably to the language of s. 20(2)(*a*), the purchase price of statutory moment was the original one of $250, at which Martin S. Caine acquired the limit in 1942.

Upon the Company filing a Notice of Objection, the Minister varied this assessment so as to include general and sundry maintenance expenses, previously incurred by Caine, in the sum of $2,678.60, thereby basing capital cost allowance on a purchase price of $2,928.60 instead of $250, and increasing by $602.94 the actual deduction to the taxpayer.

Appellant's position is stated in para. 9 of the Notice of Appeal reading:

9. The Appellant says that the said timber limit was depreciable property which did, after the commencement of 1949, belong to Martin S. Caine and had, by a transaction between persons not dealing at arms length, become vested in the Respondent, with the result that the capital cost of the property to the Respondent is deemed to be the amount that was the capital cost of the property to Martin S. Caine, by virtue of subsection (2) of Section 20 of the Income Tax Act.

The respondent counters that: (*vide* Reply to Appeal, paras. 8, 9 and 10)

8. . . . the said timber limit did not become depreciable property until the Respondent commenced operations on it in the year 1952 . . . and thus Section 20(2) of the Income Tax Act does not apply and the Respondent is entitled to the capital cost allowance as claimed by it.

9. . . . the said Martin S. Caine has never been allowed nor was he ever entitled . . . to claim a deduction . . . with respect to said property and hence the said timber limit was not the depreciable property referred to in Section 20(2).

10. . . . in the ordinary and proper sense standing timber is not depreciable property but is usually a growing or appreciating asset that is depleted by harvesting and in accordance with general business and accounting principles should be properly described as "depletable property" rather than "depreciable property".

The moot point turns on the proper interpretation of s. 20(2)(*a*) and 20(3)(*a*) of the 1948 *Income Tax Act*, c. 52, now quoted:

20(2) Where depreciable property did, at any time after the commencement of 1949, belong to one person (hereinafter referred to as the original owner) and has, by one or more transactions between persons not dealing at arms length, become vested in a taxpayer, the following rules are, notwithstanding section 17, applicable for the purposes of this section and regulations made under paragraph (*a*) of subsection (1) of section 11:

(*a*) the capital cost of the property to the taxpayer shall be deemed to be the amount that was the capital cost of the property to the original owner;

* * *

20(3) In this section and regulations made under paragraph (*a*) of subsection (1) of section 11,

(*a*) "depreciable property of a taxpayer" as of any time in a taxation year means property in respect of which the taxpayer has been allowed, or is entitled to a deduction under regulations made under paragraph (*a*) of subsection (1) of section 11 in computing income for that or a previous taxation year;

* * *

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

(*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation,

(*b*) such amount as an allowance in respect of . . . a timber limit, if any, as is allowed to the taxpayer by regulation.

I, at once, note that s. 20(2) plainly points out who the actual taxpayer is: none other but the respondent. Then, a consequent application of s. 20(3)(*a*) thrusts upon Caine Lumber Company the quality of taxpayer and eliminates all doubt as to this timber land becoming not merely depreciable but also depreciated property from 1952 onwards, in connection to which respondent filed an allowance claim in the sum of $3,376.41.

But let us proceed to a broader perusal of the statutory enactments and of the parties' conflicting arguments. In my comprehension, at least, it savours of a play on words, respondent reading into the pertinent sections the alteration "depreciated property" in lieu of "depreciable property".

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The view that an asset assumes the quality of depreciability solely after depletion is akin to maintaining that man may be called mortal only when stark dead. Moreover, it appears self-evident that any property, such as this timber limit, ceases to be depreciable precisely after undergoing total depreciation. I can conceive of no better application of the age-long distinction between the elementary conditions known as *in posse* and *in actû*.

Respondent's second contention that Martin S. Caine, having left the property idle, never was entitled *"or able to claim a deduction* . . . with respect to it" practically defeats itself in suggesting the apposite reply. Truly, Caine, owner of a depreciable asset was potentially *"entitled"* to a deduction, that he was actually *"unable to claim"* because the requisite depletion never occurred.

A civil employee, for instance, is "entitled" to a pension the moment he permanently joins the service, but becomes the "recipient" thereof the day he leaves it. I need not elaborate these points further.

Lastly, respondent propounded a third and quite unexpected argument which I hesitatingly approach, since in despite of a close scrutiny I may have misconstrued it. To the best of my understanding it underscored in s. 20(3)(*a*) of the Act the words ". . . in computing income for that or a previous taxation year . . ." going on to hold the expressions: "that or a previous taxation year" as precluding all claims to subsequent deductions. The inferential conclusion, comprising also respondent's previous objections, was that s. 20(2), as drafted, failed to encompass this appeal's subject-matter. On this particular score, my only comment is that it fares no better than its two cognate contentions.

To summarize, albeit repetitiously, my opinion in the case, s. 20(2)(*a*) clearly contemplates a situation such as the instant one; its unambiguous wording applies, with alternative consequences, to every connotation, eventual or actual, of which the adjective "depreciable" is capable.

Proper interpolations made, the applicable taxing instrument would then read:

20(2) Where depreciable property did, at any time after the commencement of 1949, belong to one person (hereinafter referred to as the

original owner) [namely *Martin S. Caine*] and has, by one or more transactions between persons not dealing at arms length, become vested in a taxpayer, [i.e. *Caine Lumber Company, Ltd.*] the following rules are . . . applicable . . .

(*a*) The capital cost of the property to the taxpayer [*Caine Lumber Company, Ltd.*] shall be deemed to be the amount that was the capital cost of the property [$2,928.60] to the original owner [*Martin S. Caine*];

Directions for construing a taxing statute, suggested by Lord Cairns in *Partington v. Attorney General*[1] were approvingly quoted by Duff J., as he then was, in re *Versailles Sweets Limited v. The Attorney General of Canada*[2], hereunder cited:

[By Duff J.] The rule for the construction of a taxing statute is most satisfactorily stated, I think, by Lord Cairns in *Partington v. Attorney General:*

[By Lord Cairns] I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because as I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

The words of the statute, as I see them, certainly fall short of the meaning wishfully attached to them in, amongst others, para. 10 of respondent's Reply to Appeal.

For the reasons stated above, the appeal is allowed. Respondent's income tax for the year ending on December 31, 1952, is hereby restored to the amount fixed by the appellant in its notification to respondent, dated November 29, 1954, as consistent with the statute, on the basis of a total capital cost to Martin S. Caine of $2,928.60. Appellant will recover the taxable costs.

Judgment accordingly.

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[1] L.R. 4 H.L. 100 at 122.

[2] [1924] S.C.R. 466 at 468.