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BETWEEN:

GRANBY TOGS LIMITED .....APPELLANT;

AND

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

Revenue—Excess Profits Tax—Minister authorized to decide whether new business continuation of previous business—Meaning of "substantial interest" "a person or persons who has or have a substantial interest in the business" "by being members of the partnership that operated the business"—The Excess Profits Tax Act, 1940, S. of C. 1940, c. 32, s. 3 as amended by S. of C. of 1946, c. 47, s. 1.

The proviso to s. 3 of *The Excess Profits Tax Act, 1940,* S. of C. 1940, c. 32, as amended, exempts from the tax certain joint stock companies which commenced business after June 26, 1944 for the first fiscal period of the new business unless, in the case of a joint stock company that commenced business after October 12, 1945, a person or persons who has or have a substantial interest by ownership of shares in the company that operates the business had, in the opinion of the Minister, a substantial interest in a previous business of which the new business is, in the opinion of the Minister, a continuation. The appellant, incorporated as a joint stock company to manufacture clothing, commenced after October 12, 1945, manufacturing children's sportwear in a plant and with equipment it purchased from Dominion Gaiter Manufacturing Co. The latter was a partnership which carried on the business of a clothing manufacturer. Z, who owned all the shares of the appellant company, owned a one third interest in Dominion Gaiter Manufacturing Co.

The appellant was assessed for excess profits on its first fiscal period of business. The assessment was affirmed by the Minister on the ground that the taxpayer was not entitled to exemption under s. 3 of the Act as, in the opinion of the Minister, it had continued the business formerly operated by the partnership of Dominion Gaiter Manufacturing Co. and the same person or persons has or have a substantial interest in both companies. The appellant appealed from the assessment.

Held: That Parliament considered the expressing of an opinion as to whether a new business is the continuation of a previous business an administrative rather than a quasi-judicial act and, by s. 3 of *The*

Excess Profits Tax Act, 1940, as amended, vested in the Minister in the fulfilment of his administrative duty, authority to express such opinion and tax the taxpayer accordingly.

2. That the Court will not interfere with the exercise of a discretion by the Minister unless it be shown that the Minister has acted in contravention of some principle of law. *Pioneer Laundry v. Minister of National Revenue* [1940] A.C. 127; *Minister of National Revenue v. Wright's Canadian Ropes Ltd.* [1947] A.C. 109 at 122.

3. That Z had a substantial interest in the appellant company through ownership of nearly all its shares and by his one third interest had a substantial though not a controlling interest in the partnership. *Manning Timber Products Ltd. v. Minister of Revenue* [1952] 2 S.C.R. 481 affirming [1951] Ex. C.R. 338; *Palser v. Grinling* [1948] 1 All E.R. 1 at 11, applied.

4. That the phrases "a person or persons who has or have a substantial interest in the business" and "by being members of the partnership that operated the business" as used in s. 3 of the Act, apply to one or more persons under the general rule for the construction of taxing statutes that the singular includes the plural and the plural includes the singular. *Partington v. Attorney General* L.R. 4 H. of L. 100 at 122, approved in *Versailles Sweets Ltd. v. Attorney General of Canada* [1924] S.C.R. 466 at 468.

APPEAL under *The Excess Profits Tax Act, 1940.*

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

J. J. Spector, Q.C. and *Philip Vineberg* for appellant.

Antoine Geoffrion, Q.C. and *J. D. C. Boland* for respondent.

FOURNIER J. now (April 11, 1958) delivered the following judgment:

This is an appeal from the decision of the Minister of National Revenue dated May 2, 1952, affirming the assessment for Excess Profits Tax in respect of the appellant's taxation year 1946-47, ended May 31, 1947, on the ground that the taxpayer is not entitled to the exemption set out in the proviso to s. 3 of *The Excess Profits Tax Act,* as in the opinion of the Minister the taxpayer continued the business formerly operated by the partnership of Dominion Gaiter Manufacturing Co. and that the same person or persons had or have a substantial interest in both companies.

Section 3 of *The Excess Profits Tax Act* provides:

3. *Corporations and persons liable to tax.* In addition to any other tax or duty payable under any Act, there shall be assessed, levied and paid a

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tax in accordance with the rate set out in the Second Schedule to this Act upon the excess profits of every corporation or joint stock company residing or ordinarily resident in Canada or carrying on business in Canada:

Proviso.—Provided that where a corporation or joint stock company other than a controlled company whose standard profit is restricted by section fifteen A of this Act, in the opinion of the Minister

(*a*) has commenced business after the twenty-sixth day of June, nineteen hundred and forty-four, or

(*b*) carried on a substantially different business to which subsection four of section five of this Act is applicable and uses therein physical assets substantially different from those he used in the business he previously carried on,

the tax imposed by this section is not applicable to the profits of the first fiscal period of the new business or to the profits of the first fiscal period in which the said subsection four becomes applicable, as the case may be, unless, in the case of a corporation or joint stock company that has commenced business after the twelfth day of October, nineteen hundred and forty-five a person or persons who has or have a substantial interest in the business either by ownership of shares in the corporation or joint stock company that operates the business or otherwise had, in the opinion of the Minister, either by ownership of shares in the company that operated the business or by being members of the partnership that operated the business or otherwise, a substantial interest in a previous business of which the new business is, in the opinion of the Minister, a continuation.

The effect of s. 3 is to make subject to the tax all corporations or joint stock companies residing or carrying on business in Canada. But the proviso thereto exempts from the tax, during their first year of operations, companies that carry on a substantially new business with substantially new assets or began business after June 26, 1944, unless the company commenced business after October 12, 1945, or continued a previous business and some person or persons had a substantial interest both in the previous and in the new business.

The appellant, Granby Togs Ltd., was incorporated in 1946 and commenced business in that year, so it was exempt under subsection (*a*) of the proviso unless it fell within the ambit of the two exceptions of the exemption. Was it a new business or the continuation of a previous business? Was some person or persons "substantially interested" both in its business and in the business that it continued?

Those are the two questions to be determined in this case in acordance with the provisions of the Act above dealt with and the facts established before the Court.

The facts are hereinafter summarized.

Granby Togs Ltd. was incorporated at the instance of Abraham Zavalkoff. He was one of three partners who were carrying on a business as Dominion Gaiter Manufacturing Co. As such, they operated their business from 1924 to 1949. They were equal partners in the business. In 1949 the partnership was incorporated as Dominion Gaiter Manufacturing Co. Ltd., and all three had equal shares in this company and continued to operate the same business as previously.

Their main business was the manufacture, production and sale of children's coats. Certain accessories of these children's coats, such as hats, leggings, furs, were purchased from other manufacturers and sold by them as part of a matching ensemble. During the war years, finding it difficult to obtain these accessories from other makers, they leased a plant in Granby to manufacture all incidental items, such as leggings, furs, hats, to be sold as sets. They proceeded to do so and continued to do so though they undertook also war work till 1945, when the war ended. After the war, the partners decided to abandon their activities at the Granby plant and to purchase the accessories from outsiders.

Abraham Zavalkoff, one of the partners in the Dominion Gaiter Manufacturing Co., had Granby Togs Ltd. incorporated. It purchased most of the equipment of the Granby plant from the partnership along with new equipment. All the shares of this company were owned by Abraham Zavalkoff, with the exception of one qualifying share which was issued in the name of one of his partners, who became a director for some time, then retired.

The documentary evidence shows that the declaration of partnership of Dominion Gaiter Manufacturing Co., filed on May 27, 1929, states that the partnership was carrying on business as manufacturer of clothing. It operated its plant in Montreal to manufacture children's coats and it purchased the accessories from outsiders up until 1941. During that year, the partnership opened a plant in Granby, Quebec, where it manufactured the accessories. This is the plant taken over by the appellant, Granby Togs Ltd., in 1946. According to its letters patent,

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the appellant was incorporated also as a manufacturer of clothing. By contract between the appellant company and the partnership, the appellant took over the Granby plant, including most of the machinery and equipment therein contained, and commenced manufacturing children's sportwear, using for such purpose mostly the equipment purchased from the partnership and employing some of the employees who formerly worked for the partnership.

Pursuant to the above contract, all the appellant's business was factored and financed by the partnership and its products were sold by salesmen working for the partnership. The partnership made also initial advances of assets to the appellant to start its operations. It collected the bills due to Granby Togs Ltd., deposited the amounts in the company's account. The business transactions of the company seem to have been handled by the partnership at its office in Montreal. Its compensation was the consideration provided for in the contract. Accounts were prepared and settled by the parties at irregular intervals after reports and advice were given by auditors to them.

I believe the above were the relevant facts which the Minister had to consider before expressing his opinion that Granby Togs Ltd., the appellant, was a joint stock company which had commenced business after October 12, 1945, to continue a previous business operated by the partnership known as Dominion Gaiter Manufacturing Co. and not a new company incorporated to carry on substantially different business and using physical assets substantially different from those used in the Granby plant of the partnership.

Those were also the facts on which he had to base his opinion that the same person or persons had a substantial interest in both the appellant company and the partnership.

The general rule laid down in s. 3 of *The Excess Profits Tax Act* is that in addition to any other tax or duty payable under any Act there shall be assessed, levied and paid a tax upon the excess profits of every corporation or joint stock company residing or carrying on business in Canada.

This rule is subject to a proviso exempting from the payment of this excess profit tax the companies which *in the opinion of the Minister* have commenced business after June 26, 1944, or carried on a substantially different business and used therein physical assets substantially different from those used in the business previously carried on.

But the exemption does not apply when in the opinion of the Minister the taxpayer is a new corporation or company continuing the business formerly operated by another company or partnership and that the same person or persons has or have a substantial interest in both the new company and the former company or partnership.

It was established and the parties agreed that the appellant, Granby Togs Ltd., had been incorporated and commenced business after October 12, 1945. It is also in evidence that Abraham Zavalkoff was the owner of approximately one hundred per cent (100%) of the shares of the appellant company and held a one-third ($\frac{1}{3}$) interest in the partnership of the Dominion Gaiter Manufacturing Co.

The Minister, after finding as a fact that Abraham Zavalkoff during the fiscal period in question had a substantial interest in the business of the appellant through the ownership of shares in the appellant company,

Was of the opinion that

(*a*) Abraham Zavalkoff was one of the members of a partnership that had operated the business of the Dominion Gaiter Manufacturing Co., and

(*b*) the business of the appellant was a continuation of a previous business of manufacturing leggings, collars, hats and other accessories which had been carried on by Dominion Gaiter Manufacturing Co.,

and he based his assessment accordingly.

He now submits that the appellant comes within the exception to the proviso to s. 3 of *The Excess Profits Tax Act, 1940,* and that the tax was correctly imposed in accordance with the Act.

There is no dispute as to the fact that Abraham Zavalkoff had a substantial interest in the appellant company through the ownership of nearly all its capital

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stock, nor that he was one of the three members of the partnership which operated the business of the Dominion Gaiter Manufacturing Company before, during and after the fiscal year in question.

The Minister did not express any opinion in his defence as to whether the partnership interest of Abraham Zavalkoff in Dominion Gaiter Manufacturing Company was a substantial interest, but he did so in his decision of May 2, 1952.

It is an admitted fact that he held a one-third interest in the partnership. Could this one-third interest be considered as a substantial interest? There were three partners holding each a one-third interest, so it can be said that his interest was as substantial as that of each of the other partners. I do not think that the percentage test itself is sufficient to determine that the interest is substantial. One should consider all the facts and circumstances of the case, keeping in mind that a substantial interest does not mean a controlling or majority interest. *Vide Manning Timber Products Ltd. v. Minister of National Revenue*[1], affirmed by the Supreme Court of Canada in 1952[2].

The remarks of Viscount Simon in *Palser v. Grinling*[3] seem to me to be properly applied to this case. I quote:

> (5) *What does "substantial portion" mean?* It is plain that the phrase requires a comparison with the *whole rent,* and the whole rent means the entire contractual rent payable by the tenant in return for the occupation of the premises together with all the other covenants of the landlord. "Subsantial" in this connection is not the same as "not unsubstantial", *i.e.* just enough to avoid the *de minimis* principle. One of the primary meanings of the word is equivalent to considerable, solid, or big. It is in this sense that we speak of a substantial fortune, a substantial meal, a substantial man, a substantial argument or ground of defence. Applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances in each case, . . .

In the present case, wherein three persons (the father and two sons) are the only partners in the partnership, all three having an equal interest and taking an equal part in the operations of the business of the partnership, in my opinion each partner may be said to have a considerable and solid interest in the business; in other words, *a substantial interest* though they do not have a majority or controlling interest.

[1] [1951] Ex. C.R. 338. [2] [1952] 2 S.C.R. 481.
[3] [1948] 1 All E.R. 1 at 11.

In the concluding paragraph of s. 3, it is stated that "a person or persons who has or have a substantial interest in the business" and "by being members of the partnership that operated the business . . ." These phrases apply to one or more persons. It is argued that the wording of these phrases would exclude from the exception to the exemption the person who is the owner of shares in the new company and a member of the partnership, because the section uses the words "being members of" and not "a member of the partnership".

I cannot agree with this contention. Though in taxing acts the words are to be construed in their natural meaning, there are rules of construction to be followed. A general rule of interpretation is that the singular imports the plural and the plural includes the singular. As to the interpretation of fiscal statutes, I think that the general principles stated in the following cases are applicable to the present dispute.

In *Partington v. Attorney General*[1] Lord Cairns says:

> 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. . . .

And in *Versailles Sweets, Limited v. Attorney General of Canada*[2], Duff J., (as he then was) dealing with the same subject, said:

> . . . The rule for the construction of a taxing statute is most satisfactorily stated, I think, by Lord Cairns in *Partington v. Attorney General.* Lord Cairns, of course, does not mean to say that in ascertaining "the letter of the law", you can ignore the context in which the words to be construed stand. What is meant is, that you are to give effect to the meaning of the language; you are not to assume *any governing purpose in the Act except to take such tax as the statute imposes* . . .

I believe the above rules of interpretation would justify the paraphrasing, in the present case, of the last paragraph of section 3 as follows: "Abraham Zavalkoff, a person who has a substantial interest by ownership of shares in the company that operated the business, had, by being a member of the partnership that operated the business . . ."

[1] [1869] L.R. 4 H. of L. 100 at 122. [2] [1924] S.C.R. 466 at 468.

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To be construed otherwise would imply or presume that the "exception to the exemption proviso" was applicable only when more than one person was involved. This would be bad law, because there is no such thing as presumption of exemption in taxing statutes.

In *Kennedy v. Minister of National Revenue*[1], Audette J. held:

> . . . There is no such thing as presumption of exemption, if anything, the presumption would be in favour of the taxing power. 37 Encly. Law and Prac. 891. Immunity from taxation by statute will not be recognized unless granted in terms too plain to be mistaken.

In *Lumbers and The Minister of National Revenue*[2], Thorson J. said:

> . . . a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions of some exempting section of the *Income War Tax Act*: he must show that every constituent element necessary to the exemption is present in his case and that every condition required by the exempting section has been complied with. . . . (Affirmed [1944] C.T.C. 67; [1944] S.C.R. 167.)

It is now necessary to determine whether the appellant comes within the ambit of the concluding provisions of the section where the Minister's opinion may have the effect of excluding Granby Togs Limited from the exemption proviso.

In my view, the question "Is the business of the appellant a continuation of a previous business of Dominion Gaiter Manufacturing Co.?"—a question of fact—should be answered in the affirmative. In clear words, the section empowers the Minister to express his opinion on that fact. Though there is no limit to the right of appeal from a Minister's decision, generally the Court will not interfere with the exercise of a discretion by the Minister except on grounds of law. If he exercises his discretion on wrong legal principles, it is the duty of the Court to remit the case for reconsideration of the subject matter, stripped of these wrong principles. See decision of Privy Council in *Pioneer Laundry and Minister of National Revenue*[3].

[1] [1929] Ex. C.R. 36; [1928-34] C.T.C. 1 at 4.

[2] [1943] Ex. C.R. 202; [1943] C.T.C. 281 at 290-1.

[3] [1940] A.C. 127.

It was later stated in *Minister of National Revenue and Wrights' Canadian Ropes, Limited*[1], Lord Greene speaking (p. 122):

> . . . It is for the taxpayer to show that there is ground for interference, and if he fails to do so the decision of the Minister must stand. Moreover, unless it be shown that the Minister has acted in contravention of some principle of law the Court cannot interfere. . . .

In 1942 the Supreme Court of Canada, dealing with a case under s. 98 of the *Special War Revenue Act,* held:

> S. 98 confers upon the Minister an administrative duty which he exercised and as to which there is no appeal; and in any event it was clear that he acted honestly and impartially and gave respondent every opportunity of being heard; and his determination must be held to be binding.

In the case of *Pure Spring Co. Ltd. and The Minister of National Revenue*[2], Thorson J. held:

> The governing principle that runs through the cases is that when Parliament has entrusted an administrative function involving discretion to an authority other than the Court it is to be performed by such authority without interference by the Court, either directly or indirectly. Where a person has been given jurisdiction to form an opinion and act accordingly, the Court has no right to review such opinion or the considerations on which it was based; the accuracy of the opinion is quite outside its jurisdiction. . . .

The dispute being on a question of facts and the Minister being duly authorized to express his opinion on same and act accordingly, unless it would appear that he acted in contravention of some principle of law I do not think that the Court should interfere.

I have already found that a person who has a substantial interest in a company, through the ownership of shares, and who was a partner in a partnership of three persons having an equal interest and taking an equal part in the operations of the business of the partnership, had a considerable or substantial interest in that partnership, though he may not have a majority or controlling interest.

I have also found that the word "members" includes "a member" and that a person would fall within the framework of "members of the partnership".

As to the continuation of a previous business, it should be noted that the word "business" is not defined either in the *Income War Tax Act* or *the Excess Profits Tax Act.* There is no doubt that the term "business" is wide and

[1] [1947] A.C. 109.

[2] [1946] Ex. C.R. 471 at 490.

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indefinite and that it is extremely difficult to determine whether a series of operations constitute different businesses or merely branches or aspects of the same business. In the present case, both the appellant and the Dominion Gaiter Manufacturing Co. are on record as "manufacturers of clothing". Can their operations be considered as different businesses or only different branches or aspects of a same undertaking or business? Opinions may be far apart on the distinction.

After having heard the evidence and having made a careful study of the section I have come to the conclusion that the legislator did not entrust to the Court the power to determine the facts that should constitute "a continuation of a previous business". I am rather of the opinion that Parliament considered the decision as an administrative function involving the opinion of the Minister on the relevant facts in each case and assessing the taxpayer accordingly.

Therefore, I find that the authority vested in the Minister by s. 3 of *The Excess Profits Tax Act* to express an opinion as to whether a new business is the continuation of a previous business is an administrative act rather than a quasi-judicial one and that the Minister's action was required to fulfil his administrative duty.

For these reasons, the appeal is dismissed with costs.

Judgment accordingly.