1949

June 23 & 24

Aug. 18

BETWEEN:

JOGGINS COAL COMPANY LTD. APPELLANT;

AND

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

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97 s. 5(1) (a)—Allowance for exhaustion of coal mine—Allowance made by Minister and apportionment between lessor and lessee where no agreement exists is final and conclusive—Court has no power to review such apportionmnt and determination—Appeals dismissed.

Held: That where there is no agreement between a lessor and a lessee of a mine as to the apportionment between them of the allowance for exhaustion established by virtue of s. 5(1) (*a*) of the Income War Tax Act, R.S.C. 1927, c. 97, as it read for the taxation years 1939, 1940 and 1941, such lessor and lessee must accept the apportionment of such allowance as made by the Minister of National Revenue and from such apportionment there is no appeal.

2. That the Minister has *full* power to make apportionment and his determination is *conclusive* and the Court has no power to review such apportionment as he has made.

APPEALS under the Income War Tax Act.

The appeals were heard before the Honourable Mr. Justice Cameron at Halifax.

C. B. Smith, K.C. and *W. S. K. Jones* for appellant.

R. T. Donald and *A. J. MacLeod* for respondent.

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

CAMERON J. now (August 18, 1949) delivered the following judgment:

These appeals have to do with assessments to income tax and excess profits tax for the years 1939-40-41. The appellant asserts that for each of the years its income was derived from mining coal in the "40 Brine Seam" in the Province of Nova Scotia; that it was the lessee of that mine from the Province of Nova Scotia as lessor, and that under the provisions of section 5(1) (*a*) of the Income War Tax Act,

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R.S.C. 1927, ch. 97, as amended, it was entitled to deduct from its taxable income 10 cents per ton for all coal mined by it on the ground that the Province of Nova Scotia, although the lessor of the mine, was not a taxpayer. Alternatively, it alleges that if the Province of Nova Scotia was not the lessor of the mine, that Tantramar Coal Company, Limited (hereinafter called Tantramar), was the lessor and that in the absence of an agreement between Tantramar and the appellant as to the apportionment of the allowance for exhaustion, the apportionment made by the Minister should be amended in view of the special facts and circumstances, later to be stated.

It is admitted that in each of the years in question the Minister exercised his discretion by fixing 10 cents per ton as the amount to be allowed for exhaustion of coal mines in the Province of Nova Scotia, and no exception is taken as to the amount of such allowance. The dispute is as to how much of that deduction, if any, should have been allowed to the appellant. There is no dispute as to the tonnage of coal mined.

Before considering the legal problems involved in the appeals, it is necessary to set out the facts in some detail.

The Province of Nova Scotia is the owner of all coal mines in that province. On June 2, 1923, the Province, as lessor, executed two mining leases Nos. 140 and 141 (Exhibits 9 and 10) in favour of Messrs. Sherwood and Swanson as lessees, these leases being renewals of two former leases similarly numbered. The renewals were for a period of 20 years and were therefore in effect throughout. Three seams of coal were included in the leases, namely, the "Fundy Seam," the "Dirty Seam" and the "40 Brine Seam", but it is only with the last-mentioned that the appellants are directly concerned.

Certain proceedings were taken by one Ralph S. Parsons in the Supreme Court of Nova Scotia in regard to properties included in these leases; and on April 1, 1936, following a judgment in that Court, the sheriff of the County of Cumberland sold, conveyed and assigned to Parsons all benefits in the said leases, *inter alia,* the expressed consideration being the sum of $8,000. That conveyance is Exhibit 1. I think it must be assumed that as of that date Parsons

became the lessee under Leases 140 and 141, and that he was accepted as such by the Province of Nova Scotia. But in his evidence Parsons stated that he never had any personal interest in the leases, but at all times had held them for Tantramar.

By agreement dated June 4, 1937 (Exhibit 11), Parsons entered into an agreement with Fundy Coal Company, Ltd., to sell to it, *inter alia,* all his interest in the said leases. There is no evidence that the consideration stated in that agreement was ever paid. On June 7, 1937, Fundy Coal Company, Ltd. assigned all its rights therein to Tantramar (Exhibit 12), the latter agreeing to indemnify the assignor from all its liability under the agreement of June 4, 1937. That document was recorded in the Mines Office for the Province. While there is no evidence that Parsons has assigned his interest in Leases 140 and 141 to Tantramar, I think that in view of his statement that he held the leases at all times for Tantramar, it may be assumed that at that date Tantramar was in fact the lessee under Leases 140 and 141.

By indenture dated April 19, 1938 (Exhibit 13), Tantramar as lessor granted to the Shore Coal Company, Ltd. as lessee, *inter alia,* the right and privilege of mining and extracting coal from the "Fundy Seam" and the "Dirty Seam", reserving a rental of 15 cents per ton on all coal mined; the lessor agreeing to pay royalties due the Department of Mines and other charges, but not the rent due the Department of Mines under Leases 140 and 141. That document is referred to as a lease.

On June 1, 1939, an agreement (Exhibit 2) was entered into between Tantramar and Parsons as vendors and J. H. Winfield as purchaser.

By that agreement the sole and exclusive right or option to mine and purchase such coal as the purchaser desired to win from the "40 Brine Seam" under the terms and conditions thereinafter recited was granted by the vendors to the purchaser. A royalty ranging from 10 cents to 5 cents per ton was reserved to the vendors and the purchaser agreed to pay the royalties under Leases 140 and 141 on all coal won from the "40 Brine Seam", to the Province of Nova Scotia. One of the purposes of the purchaser therein

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—if not the main purpose—was to complete the construction of Bayview No. 8 shaft or slope for the purpose of winning coal from adjacent areas. It was therefore agreed that the purchaser should mine all marketable coal which it would be practical to win from the shaft, and upon that being done he was to have an indefeasible right to the exclusive use of that shaft for the purpose of winning coal from adjacent areas. The purchaser had the right to construct any other shaft and on certain conditions would then acquire a similar indefeasible right therein for the same purpose. The purchaser was given full right to assign or sublet the operation of mining coal and all his other rights under the agreement. It was further provided that if the purchaser at any time ceased active operations, any coal remaining in the seam should revert to and be the sole property of the vendors. That document was filed in the Mines Office and ratified by the Minister of Mines under section 28(2) of the Mines Act on December 17, 1940, as was also the document next referred to.

By agreement dated September 2, 1939, (Exhibit 3), Winfield assigned all his interest in the agreement of June 1, 1939, to the appellant company which agreed to carry out and perform all the covenants therein binding on Winfield.

It is established that throughout Parsons paid the Province the annual rental of $60 in respect of Leases 140 and 141; but that under the terms of the lease the Province repaid such rentals in full to him when the royalties received exceeded the rent, and Parsons then in turn paid the refund to Tantramar. It is also established that the appellant in each of these years paid the Province the royalties on coal mined by it on the "40 Brine Seam" and also paid to Tantramar and Parsons the royalties payable to them by the agreement of June 1, 1939. Parsons endorsed these royalty cheques over to Tantramar, reserving no part for himself.

In its returns the appellant deducted from its income in each of the years 10 cents per ton for all coal mined by it. Tantramar, however, applied for a similar allowance. It was suggested that Tantramar and the appellant should agree as to the apportionment of the allowance but that was not done. In 1939 Tantramar had received royalties

at the rate of 10 cents per ton from the appellant and in its return claimed a depletion allowance of 10 cents per ton. Its claim was allowed in full and while the appellant had claimed an allowance of $2,910.90, that was disallowed, the whole apportionment having been made to Tantramar. In 1940 the appellant paid Tantramar royalties at varying rates, the total amounting to $7,578.86. That was its total income for that year and the respondent allowed depletion to it in a like sum, Tantramar therefore paying no tax. The remainder of the exhaustion allowance, amounting to $1,223.46, was apportioned to the appellant who had made a claim for $10,044.50. In 1941 a similar procedure was followed and the appellant, while claiming $12,510.90, was allowed a deduction of only $2,520.29.

In effect, therefore, the appellant was allowed only to deduct what remained after Tantramar was permitted a deduction of an amount sufficient to relieve it of all income tax. The royalties paid by the appellant to Tantramar in 1940 and 1941 were at various times 10 cents, 5 cents and 7½ cents per ton, and since at times they were less than 10 cents a ton, the surplus allowance for exhaustion over and above what was claimed by Tantramar became available and was allowed to the appellant. It is difficult to reconcile the figures but I am informed that the discrepancies arose because in some cases computations were made on the basis of long tons and in others on short tons. In any event, there is no suggestion that in any year the full deduction of 10 cents per ton was not allowed to one or both of the claimants.

It is clear from all the evidence that the respondent, for the purpose of apportioning the allowance, treated Tantramar as the lessor and the appellant as lessee.

For the taxation year 1939, section 5(1) (*a*) was as follows:

> 5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*a*) Such reasonable amount as the Minister, in his discretion, may allow for depreciation, and the Minister in determining the income derived from mining and from oil and gas wells and timber limits shall make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair, and in the case of leases of mines, oil and gas wells and timber limits, the lessor and the lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and

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in case the lessor and the lessee do not agree, the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive.

It is submitted by the appellant that this subsection confers on it a statutory right to an allowance for exhaustion in such amount as the Minister may deem just and fair. The case of *Pioneer Laundry & Dry Cleaners Ltd.* v. *Minister of National Revenue* (1) is cited in support of that contention. That case had to do with depreciation. Lord Thankerton in delivering judgment in the Privy Council said at p. 485:

> Their Lordships are unable to agree with these views, and they agree with the opinion of Davis J. in which the Chief Justice concurred, and in which he states (p. 249): "The appellant was entitled to an exemption or deduction in 'such reasonable amount as the Minister, in his discretion, may allow for depreciation.' That involved, in my opinion, an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles."
>
> In their Lordships' opinion, the taxpayer has a statutory right to an allowance in respect of depreciation during the accounting year on which the assessment in dispute is based. The Minister has a duty to fix a reasonable amount in respect of that allowance and, so far from the decision of the Minister being purely administrative and final, a right of appeal is conferred on a dissatisfied taxpayer; but it is equally clear that the Court would not interfere with the decision, unless—as Davis J. states—"it was manifestly against sound and fundamental principles."

I think that it follows from that judgment that the Minister had a duty to fix such an amount for exhaustion for the year 1939 as he might deem just and fair; and that had the appellant been the owner of the coal being exhausted—and not a lessee—it would unquestionably have been entitled to a deduction of the full amount fixed by the Minister as just and fair—namely, 10 cents per ton. But that judgment had to do solely with the interpretation of the first part of the subsection. The question of apportionment of an allowance for exhaustion between a lessor and lessee referred to in the remaining part of the subsection did not arise. So far as I am aware, the only judicial reference to the words beginning, "And in the case of leases of mines . . ." is that of Estey, J. who, in his judgment in *D. R. Fraser & Co.* v. *The Minister of National Revenue* (2) said:

> It was suggested that the concluding words of section 5(1) (*a*) "his determination shall be conclusive" meant that the Minister's determination should be final. It would appear rather that these words relate only

(1) (1939) 4 D.L.R. 481. (2) (1947) S.C.R. 157 at 169.

to a disagreement which may arise between the lessor and the lessee, in which case the Minister makes the apportionment and "his determination shall be conclusive". It does not refer back to the earlier part of the section dealing with the granting or refusing of an allowance.

In that case, of course, he was considering the subsection as amended in 1940, but the then wording of that part of the subsection was identical with the wording of the last part of the subsection in 1939.

As I have said, the appellant claims to be a lessee of the mine. It asserts first that by agreement of June 1, 1939, Tantramar and Parsons assigned all their rights in the mining lease to it, and that until such time as it might default under the agreement and the lease reverted to Tantramar and Parsons, the Province of Nova Scotia was the lessor and the appellant the lessee of the mine, Tantramar and Parsons having no interest therein for the years in question. If that be the case, then the appellant says that as the Province of Nova Scotia is not a taxpayer the full depletion allowance should be made to the appellant. I reject this latter suggestion entirely, inasmuch as it is the responsibility of the Minister, in the absence of an agreement, to apportion the allowance as between the lessor and the lessee, presumably taking into consideration their relative interests in the capital asset being exhausted and not on the basis of whether they are or are not taxpayers. Alternatively, the appellant says that if Exhibit 2 was not an assignment of the lease by Tantramar, it was in effect a sublease in which Tantramar was sub-lessor and the appellant, by assignment from Fundy Coal Company, became sub-lessee, and that the apportionment in 1939 of all the allowances to Tantramar and none to the appellant should be amended.

In his defence the respondent denies that the appellant was at any time a lessee of the mine and alleges that it had merely a licence to mine coal, coupled with an interest to go upon the property for that purpose. I do not think it is necessary for the purpose of this appeal to decide that question. I am content to assume—but without actually determining the point—that the appellant was in fact a lessee of the mine. Nor do I think it is of any importance to decide whether the appellant was lessee to the Crown in the right of the Province or a sub-lessee from Tantramar

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or a lessee from the Crown. It is concerned only in what portion of the allowance is made to it. Assuming, therefore, that it was a lessee of one or the other, the latter part of the subsection must determine its rights. Admittedly, there was no agreement between the appellant and its lessor as to the apportionment, and therefore, "The Minister shall have full power to apportion the deduction between them and his determination shall be final and conclusive."

In effect, the subsection provides that the Minister must accept any agreement between the lessor and lessee as to the apportionment of the deduction; but that if they fail to reach an agreement, then they must accept his apportionment and from that there is no appeal. The Minister has *full* power to make the apportionment and his determination shall be *conclusive*. In my opinion, therefore, the Court has no power to review such apportionment as he has made. His power in that regard may seem to be an arbitrary one, but in fact it is not so. Full opportunity is given to the parties themselves who have entered into the lease and who presumably have full knowledge of their respective capital interests in the asset being exhausted, to conclude the matter themselves. And it is only when they have failed to do so that the Minister has jurisdiction to decide the matter for them.

And I think, also, that if the Minister on the material before him reaches the conclusion that the full deduction should be allowed to the lessor and none to the lessee (as was done in this case for the year 1939), that it is quite within his power to do so. In apportioning the allowance his main consideration would be the relevant positions of the lessor and lessee as to their interests in the capital asset in the process of being wasted, and the cost thereof. So far as the appellant is concerned, the evidence before the Minister established that it had paid nothing at the time it acquired the right to mine the coal; and that the only capital cost to it for the coal it mined was the total of the royalties paid to the Province and to Tantramar, all of which expenditures over the three years in question had been allowed to the appellant as operating expenses, which it had claimed they were. See *Fraser Lumber Co.* v.

Minister of National Revenue (*infra*). Moreover, full depreciation had been allowed on all items for which depreciation was claimed and to which the appellant was entitled. On the other hand, it would appear that Tantramar had paid substantial amounts to Parsons for Leases 140 and 141. He said that Tantramar had reimbursed him for practically all that he had paid the sheriff at the time he had received the sheriff's deed, and while he did not specify the amount, the expressed consideration of the deed was $8,000. Some part of that sum was no doubt attributable to the "40 Brine Seam," but on the evidence it is impossible to say exactly how much.

I think, also, that reading subsection 5(1) (*a*) as it was in 1939, and the apportionment by the Minister being conclusive, the Court is not entitled to inquire as to whether the apportionment was against sound and fundamental principles. That principle applied to the fixation of a just and fair amount for exhaustion, but not, I think, to the apportionment by the Minister which is conclusive. But in any event, it is not shown that the Minister violated any sound and fundamental principles. Full opportunity was given to the appellant over many months to present its full case before the appeal was disallowed; all the necessary material was before the Minister and he was not influenced by anything not relevant to the matter. I am not prepared, therefore, to find that the Minister proceeded on any wrong principle.

What I have said above refers to the apportionment made by the Minister for the taxation year 1939. But it applies with equal force to the apportionments made for the years 1940 and 1941. In these years the section read as follows:

Depletion 5.1. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

(*a*) The Minister in determining the income derived from mining and from oil and gas wells and timber limits may make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair, and in the case of leases of mines, oil and gas wells and timber limits the lessor and the lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and the lessee do not agree the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive.

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The section as it then read was considered in the case of *D. R. Fraser Co. Ltd.* v. *The Minister of National Revenue* (1). It was decided by the Privy Council (affirming the judgment of the Supreme Court of Canada (2), which had affirmed the judgment in this Court (3),) that the subsection as so amended conferred on the Minister a discretion to determine whether any allowance at all should be made, and also as to how much should be allowed, and that there was no statutory right to any allowance for exhaustion. The subsection itself in plain terms confers on the Minister also the sole right to apportion the allowance between a lessor and lessee when they themselves have failed to agree thereon. In the instant case, for the years 1940 and 1941, the Minister did determine that an allowance should be made and that it should be at the rate of 10 cents per ton; and then, as he had authority to do, he apportioned it in a certain way between Tantramar and the appellant in the proportions I have indicated above. From that apportionment there can, I think, be no appeal, the determination of the Minister being conclusive.

In my opinion, therefore, all the appeals must fail and they will be dismissed with costs.

Judgment accordingly.