1964

Sept. 21, 22, 23

Oct. 19

BETWEEN:

INLAND RESOURCES CO. LTD. (Non-Personal Liability) (In Voluntary Liquidation) ..... APPELLANT;

AND

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

Revenue—Income—Income tax—Adventure or concern in nature of trade —Intention or motive of taxpayer—Preferred and secondary intention in purchase of asset—Purchase of asset to create an investment—Purchase of asset a speculation looking to resale—Onus of proving assessment wrong—Determination of market value of asset when purchased—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e) —British Columbia Companies Act, R.S.B.C. 1960, c. 67, s. 23(1).

The appellant, a mining company incorporated under the laws of British Columbia on March 28, 1951, acquired a mining property known as Hat Creek Coal Mine in British Columbia from St. Eugene Mining Corporation Ltd., which had purchased it for $19,000 in 1944. The appellant agreed to issue 900,000 fully paid and non-assessable shares of $1.00 par value to St. Eugene Mining Corporation Ltd. for the property, and by the same agreement Wilson Mining Corporation Ltd. agreed to underwrite or arrange a firm underwriting to provide the sum of $34,000 to appellant for the purchase of 400,000 shares of appellant company to yield 8½ cents per share to appellant. By the same agreement, Wilson Mining Corporation Ltd. obtained an option from St. Eugene Mining Corporation Ltd. to purchase 450,000 of the 900,000 shares issued by appellant to St. Eugene for the cost of such shares to St. Eugene, 7.4 cents per share.

There was no development of the Hat Creek property from 1951 until 1956, when negotiations were instituted with B C. Electric Co. Ltd, which led to an option agreement being executed by the appellant and Western Development and Power Ltd., a wholly owned subsidiary of B.C. Electric Co. Ltd. This agreement led to the sale of the property by the appellant to Western Development and Power Co. Ltd. in 1960 for $1,570,000 and 320,000 shares of Van-Tor Oil and Explorations Ltd.

The respondent reassessed the appellant for income tax on the profit realized from the sale, calculated as the selling price of $1,570,000, plus the market value of the Van-Tor Oil shares of $163,200, less the initial cost of the mining property calculated at $110,499 83 (being the value of 300,000 shares at 8½ cents per share) plus $13,504 49, being the development and carrying expenses borne by the appellant.

It was found on the evidence that at the time the option to purchase the property was given to Western Development and Power Ltd. the estimate of the size of the ore body was less than 100,000,000 tons. Later, but before the property was purchased by Western Development and Power Ltd., that company determined that the ore body was probably of about 700,000,000 tons. The evidence also disclosed

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that Wilson Mining Corporation Ltd. had considerable coal mining experience, and its officers and employees knew that in 1947 and 1951 it would be most difficult to successfully market lignite coal from the Hat Creek property; that they were fully aware of the fact that the oil and gas industry was developing in Alberta and British Columbia and would be competing and that the market for coal was dwindling.

Held: That in this type of case the test of whether there is an adventure or concern in the nature of trade is objective and the intention or motive of the taxpayer, although relevant, cannot alone determine what the acts amounted to and in some cases may be given very little weight.

2. That whether the alternative taken by the taxpayer in the event that his preferred intention becomes for some reason unrealizable, is taxable or not depends on whether the evidence discloses that this chosen alternative is or is not the operation of a trade, and this situation arises in all cases where assets such as those under review in this case are purchased for the alleged purpose of using the same to create an investment and there is a secondary alternative intention which by proper evidence can be inferred.

3. That the evidence in a case such as this must of necessity detail all the surrounding circumstances including the knowledge and skill of the taxpayer and any other facts or circumstances sufficient to indicate whether or not the purchasing of assets was a speculation looking to resale which must have been in contemplation in the event that the preferred intention could not be carried out.

4. That although the intention of the appellant may have been incidentally to develop the Hat Creek property as a mine its main intent was to sell the asset either outright or on some royalty basis along some other contractual arrangement of substantially the same category of transaction; and this constitutes an adventure or concern in the nature of trade within the meaning of the *Income Tax Act* and the profit therefrom is income within the meaning of the Act.

5. That the onus is on the appellant to prove on the balance of probabilities that the respondent's assessment is wrong and in this case that has been done.

6. That the most cogent evidence available in the determination of the fair market value in 1951 of the Hat Creek property was the actual price paid for it by Western Development and Power Ltd. in 1960.

7. That the fair market value of the Hat Creek property in 1951 was $1,300,000, which was the value placed on this mine by the directors of the appellant at the material time.

8. That the appeal is allowed in part.

APPEAL under the provisions of the *Income Tax Act*.

The appeal was heard by the Honourable Mr. Justice Gibson at Victoria.

J. S. Maguire, Q.C. and *R. C. Bray* for appellant.

R. A. C. McColl and *F. D. Jones* for respondent.

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

GIBSON J. now (October 19, 1964) delivered the following judgment.

This is an appeal by the appellant against a reassessment of income tax made by the respondent by notice dated May 16, 1963, for the taxation year 1960 whereby it was assessed tax in the sum of $797,347.84.

The appellant is a specially limited mining company which was incorporated under the laws of British Columbia on March 28, 1951, and has its head office in the City of Vancouver, B.C., and at the present is in voluntary liquidation having disposed of its physical assets to Western Development and Power Ltd. which was at the material time a wholly owned subsidiary of B.C. Electric Co. Ltd.

Upon its incorporation, the appellant acquired a coal mine known as Hat Creek Coal Mine which was situated near the Town of Ashcroft in the Province of British Columbia.

This coal mine was originally owned by a company known as St. Eugene Mining Corporation Ltd. which had acquired it by agreement dated August 4, 1944, from one Manfred McGeer for $19,000.

By agreement dated January 13, 1947, which was filed as Exhibit A-16 on this appeal, St. Eugene Mining Corporation Ltd. agreed to sell to the appellant company (then yet to be incorporated) the Hat Creek Coal Mine for the issuance of 900,000 fully paid and non-assessable par value shares of the appellant company; and by the same agreement the Wilson Mining Corporation Ltd. agreed by the contract to underwrite or arrange a firm underwriting to provide the sum of $34,000 to the appellant company for the purchase of 400,000 shares of the appellant company to be incorporated to yield the price of 8½¢ per share to the appellant company.

In addition, by the same agreement, the Wilson Mining Corporation Ltd. obtained an option from St. Eugene Mining Corporation Ltd. to purchase 450,000 shares of the 900,000 shares to be issued to St. Eugene Mining Corporation Ltd. (pursuant to arrangements above stated) for the price of the cost of such shares to St. Eugene

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Mining Corporation Ltd., namely, one-half of $32,753.91 or the price of about 7.4¢ per share.

The said sum of $32,753.91 represented the money which St. Eugene Mining Corporation Ltd. had spent on the property between the time of its acquisition of this mine in 1944 and January 13, 1947, the date of this agreement.

No name was chosen for the company to be incorporated at the date of this agreement, *viz.*, January 13, 1947, but subsequently in 1951 when the company was incorporated the name chosen for the appellant company and granted by way of provincial Charter from the Province of British Columbia was Inland Resources Company Ltd. (Non-personal Liability).

Between 1947 and 1951 the evidence was that Mr. R. R. Wilson and his two sons, Mr. R. W. Wilson, an engineer, and Mr. Keith Wilson, the secretary of Wilson Mining Corporation Ltd., had written a considerable number of letters to various corporations and to others trying to get them interested in markets for the products of the mine, which in the main was coal, but which also included limestone, tile and other by-products.

Then in the year 1953, the appellant company was successful in obtaining a Crown grant of the Hat Creek Mine.

Shortly after 1951, according to the evidence, the situation was that oil and gas were being put on the market in British Columbia and in the Province of Alberta, and the coal business was in the decline, and the possibility of establishing another cement plant diminished with the establishment of Lafarge Cement Company Ltd. on the Fraser River in Vancouver.

There was no development of the Hat Creek Mine from 1951, but in 1956, one Sharp attempted to obtain an option to buy on a royalty basis the mine from the appellant but the St. Eugene Mining Corporation Ltd. interests in the appellant company were not in favour, and nothing came of the Sharp offer.

Subsequent to that, in the year 1956, and continuing into the year 1957, negotiations were had with B.C. Electric Co. Ltd. for the purpose of getting them interested in this mine for the purpose of producing a thermal plant fired with the coal from it.

As a result of these negotiations, an option agreement was entered into dated August 7, 1957, between the appellant and Western Development and Power Co. Ltd., which was a wholly owned subsidiary of B.C. Electric Co. Ltd. This option agreement was filed as Exhibit A-85 on this appeal.

This option gave Western Development and Power Co. Ltd. the right to do certain exploratory work on the Hat Creek Mine of the appellant for the purpose of ascertaining the extent and quality of the coal bed, and this they did and it was necessary for them to extend this option to complete their exploratory work, and an agreement extending this option was entered into dated August 8, 1958, between the parties, which was filed as Exhibit A-140 on this appeal. By this option extension Western Development and Power Co. Ltd. obtained three periods of extension, namely, to February 9, 1959, to August 10, 1959, and thirdly, to February 8, 1960, for each of which successive extensions they paid the appellant certain monies, as more particularly set out in the agreement. In the agreement, also, there was spelled out what exploratory work Western Development and Power Co. Ltd. proposed to do during each of the periods of such extension if, in fact, they wished to obtain the benefit of each of these extensions for their enquiry work.

As a result of this exploratory work done by Western Development and Power Co. Ltd., it ascertained that there probably were deposits of about 700,000,000 tons of coal. Prior to this the actual extent of this deposit was not known but the appellant company through Wilson Mining Corporation Ltd. had done some but not very extensive exploratory work and the estimate they made of the probable tonnage of coal was substantially less than that proven by the exploratory work of Western Development and Power Ltd. Their highest estimate was something under 100,000,000 tons of coal.

The sale was finally completed in 1960 with the subsidiary of B.C. Electric Company Ltd. for the sum of $1,570,000, Exhibit A-144, which was filed and was an excerpt from the meeting of the Directors of the appellant

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company held on February 26, 1960. The resolution passed at that meeting read as follows:

> Be it resolved that the sale of all of the Company's properties known as the "Hat Creek Group" to Western Development and Power Limited pursuant to an Option Agreement dated the 7th day of August, 1957, and extended by Agreement dated the 8th day of August, 1958, and varied and exercised by Agreement dated the 8th day of February, 1960, subject to the terms and conditions of said agreements, be and the same is hereby ratified and confirmed.

It was then explained at this meeting of Directors as follows:

> Mr. Wilson then explained the variations between the new Agreement of February 8th, 1960, and the original Agreement dated August 7th, 1957. Western Development had attempted to cut the original price of $2,000,000 00 (payable over the next four years) by approximately two thirds. This was turned down and, after several meetings of negotiations, it was agreed that Inland Resources would accept $1,570,000.00 in cash and 320,000 shares of Van Tor as final. This change amounts to approximately a 6% discount on a present day basis.

As appears in the following resolution, which was also passed by the appellant company, it was resolved that the company go into voluntary liquidation after this sale was completed. This resolution read as follows:

> Be it resolved that the Company be wound up voluntarily pursuant to Part VIII of the "Companies Act" and that Frederick Field be appointed Liquidator of the estate and effects of the Company for the purpose of winding up its affairs and distributing its property.

Shortly thereafter, the Minister of National Revenue made an assessment against the appellant which was amended subsequently and which concerned the value placed by the Minister on the Van-Tor Oil and Explorations Ltd. shares.

The net result of these re-assessments by the Minister was to calculate the taxable income of this appellant for the taxation year 1960 in the sum of $1,609,191.68. The reasons for this re-assesment and the adjustments are as follows:

Previous Taxable Income	$ NIL
Add: Profit on sale of Hat Creek Coal Mine as follows:	
Sale proceeds	
Cash	$1,570,000.00
320,000 shares of Van-Tor Oil and Explorations Ltd. @ quoted market value February 9, 1960—$0 51 each	163,200.00
	$1,733,200.00

Less: Initial cost of mine at fair market value	$110,499.83	
Development and carrying expenses	13,504.49	124,004.32
Revised Taxable Income		$1,609,195.68

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From this re-assessment the Minister has assessed as taxable income the difference between the cash received of $1,575,000 plus the value of the 320,000 shares of Van-Tor Oil and Explorations Ltd. which are found to be $263,200 and has substracted from that sum the sum of $110,499.83 allegedly being the initial cost of the mine at fair market value which the Minister arrived at by multiplying 1,300,000 shares of the appellant company times $8\frac{1}{2}¢$, and also by deducting the sum of $13,504.49, being development and carrying expenses. The net difference the Minister assessed the appellant as its revised taxable income being in the sum of $1,609,195.68.

The $8\frac{1}{2}¢$ value of the shares appears to have been determined by the Minister by using the purchase of the shares in the appellant company contained in paragraph 7 of the agreement dated January 13, 1947, Exhibit A-16, between St. Eugene Mining Corporation and Wilson Mining Corporation Ltd.

Under clause 7 of that agreement the Wilson company contracted to underwrite or arrange a firm underwriting to provide the sum of $34,000 by the purchase of 400,000 shares of the appellant company then to be incorporated to yield the price of $8\frac{1}{2}¢$ per share.

Under clause 6 of the same agreement the Wilson company obtained an option to purchase 450,000 shares in the appellant company for the price of something less than $7.4¢$ per share.

When the shares were actually issued by the appellant company in 1951 the appellant company showed the value of these shares on its books at $1 per share or at $1,300,000. This appears in the journal entries from the appellant's books, a copy of which was filed as Exhibit A-66 and the copies of the income tax returns of the appellant which were filed as an exhibit on this appeal.

At the same time, on the books of Wilson Mining Corporation Ltd., the value of these shares during all the

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material times appeared at their cash outlay to them, namely, 8½¢ per share; and on the books of St. Eugene Mining Corporation Ltd. the value of these shares appearing on their books at approximately 7.4¢ per share.

It is the allegation of the appellant that it sold its capital assets and that the receipts of monies and shares received was a capital receipt on the realization of such assets and not an income receipt in view of the evidence of the record of the appellant in operating a mine and not dealing in mines.

In this connection, the only actual operation of the mine was in producing a small quantity of coal to consumers in the Village of Ashcroft, B.C.

In the alternative, the appellant submits that if it should be found that the difference between the purchase and sale price of the said mine is income within the meaning of the *Income Tax Act*, the calculation of the amount of income should not exceed $365,295.51. Its submission in this regard is that the calculation should be made as follows:

(a) Proceeds from sale of mine:		
Cash	$1,570,000.00	
320,000 shares of Van-Tor Oils and Explorations Limited at 34 cents	108,800.00	$1,678,800.00
(b) Initial cost of mine at fair market value	1,300,000.00	
Development and carrying expenses	13,504.49	1,313,504.49
Increase in value		$ 365,295.51

More than a hundred exhibits were put in evidence and there were called as witnesses for the appellant Mr. R. W. Wilson, son of Mr. R. R. Wilson, of the Wilson Mining Corporation Ltd., his brother Mr. Keith Wilson, who was the secretary of the Wilson company at all material times, and also Mr. Alexander Smith, an engineer who worked for Mr. R. R. Wilson, and subsequently with St. Eugene Mining Corporation Ltd.

The respondent called no evidence but did submit certain proof in documentary form which was filed as exhibits.

The evidence disclosed that St. Eugene Mining Corporation Ltd. was one of the so-called Ventures Group who were a metal mining group of companies and that

these companies expended during these material years in respect of companies other than the appellant very sizeable amounts of money in the exploration and development of metal mines.

The explanation given as to why the Ventures Group handed to Wilson Mining Corporation Ltd. the Hat Creek Mine for development was that Mr. R. R. Wilson in particular and also his company, Wilson Mining Corporation Ltd., had a background of substantial knowledge in the coal mining field and that their knowledge and experience was such that the possibility of developing the Hat Creek Mine as a coal mine would be greater than if the Ventures Group themselves through the St. Eugene Mining Corporation Ltd. or any other company had embarked on this endeavour.

The evidence substantiates the fact that Mr. R. R. Wilson and the Wilson people in the company of Wilson Mining Corporation did have very considerable coal mining experience and were recognized as experts in the field in British Columbia. There was much correspondence in this connection and from which it was suggested that the inference should be drawn that the Wilson group were trying to get the Hat Creek Mine operating as a mine. In this respect the letters were written to Powell River Ltd., Pacific Mills Ltd., B. C. Cement Co. and others.

The tenor of this correspondence indicated that the intent of the appellant at all material times was to establish at the Hat Creek mine site a cement plant or a plant for the development of power or for processing pulp, for all of which uses it was necessary to have very substantial amounts of cheap heat.

The advantage of Hat Creek Mine was that there were very substantial quantities of low grade lignite coal there and that any of the users could join in with the appellant to benefit from the use of the coal, all of which uses were consistent with the intent on the part of the appellant to get the mine operating as a mine.

This effort by the appellant through the Wilson mining group was mainly directed in finding a market for the coal and not in expending money on the Hat Creek property for the purpose of ascertaining the precise limits and quantities of the field. The evidence indicated that

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the appellant was of the view that there was no point in spending money unless there was a market.

Counsel stated that section 23(1) of the *British Columbia Companies Act*, R.S.B.C. 1960, c. 67, provided that in the charter incorporating a company such as this it was necessary to include in the objects clause a power to sell the assets. This may not be a strict construction of the particular wording of this subsection of the statute but the statement of counsel for the appellant which was concurred in by counsel for the respondent was to the effect that the Registrar in the companies branch of the office of the Provincial Secretary of the Province of British Columbia insisted that such a sale provision be put in the objects clause of all such charters.

In this connection, the relevant statute at the material times was the Statutes of British Columbia, (1948)c. 58, the wording of which was carried into section 23(1) of the 1960 Revised Statutes of British Columbia.

The appellant alleges and the evidence disclosed that the Wilson Mining Corporation had for many years various mining interests and that they had never attempted at any time to sell any of their mines and that this particular case in the year 1956 was the first time that there was any suggestion made to sell the Hat Creek Mine of the appellant.

As stated, the thought of selling originated with the offer by one Sharp which came unsolicited, and it was a royalties transaction which involved bringing the property into production but this transaction was not entered into because the share interest in the appellant company represented by the St. Eugene Mining Corporation Ltd. objected to entering into this agreement, saying in effect that the price was too low and that Sharp really did not intend to develop the property, but wished to make a profit by selling to some third party.

The evidence was that in 1956 the B. C. Electric Co. would not join with the appellant in any joint effort to develop the mine but would agree only to a sale and purchase because it was a public utility. This is set out in a letter from Mr. Keith Wilson dated October 22, 1956, filed as Exhibit A-114 in this appeal and the reply of refusal by the British Columbia Electric Co. Ltd. which is filed as Exhibit A-115 in this appeal.

As a result negotiations in 1957 resulted in the option agreement being entered into (Exhibit 85), the option being extended (Exhibit A-140) and the option being finally exercised in February, 1960 (Exhibit A-143).

The appellant alleges that during the period of 1947 to 1960 it exerted a continuous effort to develop the Hat Creek Coal Mine property as a mine and to bring it into production; that the letters, Exhibits A-55, A-56 and A-57, written by Mr. R. R. Wilson during the period of February 28 to October 9, 1948, in which he offered to sell the property, were firstly, not authorized and secondly, in any event, were not part of the long range program of bringing the mine into production; instead all the action taken by the appellant company was consistent with bringing the plant into production until economic circumstances in 1956 changed the situation which resulted in the subsequent sale of this property to the subsidiary of B. C. Electric Co. Ltd., namely, Western Development and Power Ltd.

These economic circumstances, the appellant alleged, in evidence, were the advent of oil and gas in British Columbia, the establishment of Lafarge Cement Co. Ltd. in the Fraser River in Vancouver, which put back ten years the possibility of establishing another cement plant in British Columbia and the fact that the Morden Dam on the Fraser River was not proceeded with which alone the appellant alleges would have provided sufficient market to have warranted a cement plant at the Hat Creek Mine.

The appellant also argues that although there were no large expenditures on the property, the explanation given by Dr. Alexander Smith and Mr. R. W. Wilson and Mr. Keith Wilson was that it was primarily necessary to find a market for the coal and that the existence of the resources were sufficiently well known, and as a consequence it was good business not to foolishly or unwisely spend such money on development and exploration of the property at that time; in addition, there was no evidence that there was any lack of financial help in putting the mine into production. On the contrary, the Ventures Group, at least, had spent substantial monies on other properties and were in a position to spend it on the Hat Creek property; and the evidence of Mr. Keith Wilson was that

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public financing was available if the market warranted bringing this mine into production at any time.

The appellant also argued that going into liquidation after the sale of this asset to Western Development and Power Ltd. was a logical step because the appellant had no other physical assets.

The appellant also argued that the valuation put on it by the parties in 1947, namely, $1,300,000 pursuant to that agreement of January 13, 1947, and carried through by the implementation of the agreement dated September 17, 1951, Exhibit A-69, whereby the shares were issued for a value on the books of the appellant company of $1,300,000 was a realistic value in view of the selling price in 1960 to the B. C. Electric Co. by way of its subsidiary Western Development and Power Co. Ltd.

The appellant also argues that the real estate cases have no application because of a certain peculiar aspect of them which has no relevance to a mine property, *viz.*, a real estate parcel can be broken up and sold in parcels whereas a mine has no market other than as an entity.

Counsel for the appellant submitted that it was not dealing in a mine (*Sutton Lumber v. M.N.R.*[1], *Warnford Court (Canada) Limited v. M.N.R.*[2]); or alternatively, if the receipt from the sale to Western Development and Power Co. Ltd. was income then the fair market value of the mine asset when acquired by the appellant in 1951 (or also in 1947) was $1,300,000.

Counsel for the respondent submitted that there were two questions to be decided, *viz.*, firstly, whether an adventure or concern in the nature of trade existed in the matter of the disposal of the Hat Creek Mine, or secondly, if an adventure or concern in the nature of trade did exist, then what was the correct valuation in law of the coal deposits at the time of the acquisition of them by the appellant.

In support of his submission that this transaction constituted an adventure or concern in the nature of trade, counsel for the respondent referred to Exhibit A-10 which was an article by Mr. Campbell, an officer and engineer of Wilson Mining Corporation Ltd. which sets out that there was knowledge of ore body in the Hat Creek Mine before

[1] [1953] 2 S.C.R. 77.

[2] [1964] Ex. C.R. 944; 30 Tax A.B.C. 417; 63 D.T.C. at 83.

1900; submitted that the appellant and its officers and directors knew of the restricted market for coal, especially lignite coal, at all material times; submitted that the argument of appellant that it was frustrated in its efforts to develop the mine was without substance and that on the evidence there was no such original intention, but instead the original intention which continued was to sell the mine; submitted that the fact that the Ventures Group spent no money in developing this mine but handed the problem over to the Wilson group who also spent no money on developing it, but instead devoted their efforts to the disposal of it, rebutted any suggestion that this mine should be categorized as a capital asset of the appellant.

On this evidence the Court must determine whether the assessment made by the Minister, Exhibit 1, is correct in law.

The question for consideration, therefore, is whether on the facts as disclosed by the evidence at this trial the profits realized from the sale of Hat Creek mine property by the appellant to Western Development and Power Ltd., which it acquired in 1951 and which it sold in 1960, are profits from a business or property within the meaning of sections 3 and 4 of the *Income Tax Act*, and the extended meaning of "business" as defined in section 139(1)(*e*) or as submitted by the respondent whether this Hat Creek property was acquired by the appellant for the purpose of developing it as a mine and that it was only because this purpose was frustrated by economic factors in 1956 more particularly set out above in the resume of the evidence that the Hat Creek Mine was sold realizing therefrom a fortuitous profit by way of capital gain.

In this case as in all these cases, the test of whether there is an adventure or concern in the nature of trade is objective and the intention or motive of the taxpayer although relevant cannot alone determine what the acts amounted to and in some cases may be given very little weight.

Whether the alternative taken by the taxpayer in the event that his preferred intention becomes for some reason unrealizeable, is taxable or not depends on whether the evidence discloses that this chosen alternative is or is not the operation of a trade.

This situation arises in all cases where assets such as this are purchased for the alleged purpose of using the same to

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create an investment and there is a secondary alternative intention which by proper evidence can be inferred.

The evidence in a case such as this must of necessity detail all the surrounding circumstances including the knowledge of the taxpayer, the skill of the taxpayer or any other fact or circumstances sufficient to indicate whether or not the purchasing of the assets was a speculation looking to resale which must have been in contemplation in the event that the preferred intention could not be carried out.

In *Regal Heights Limited v. M.N.R.*[1], Mr. Justice Judson stated at page 905:

> There is no doubt that the primary aim of the partners in the acquisition of these properties, and the learned trial judge so found, was the establishment of a shopping centre but he also found that their intention was to sell at a profit if they were unable to carry out their primary aim.

In this particular case, in my opinion, there is no doubt that the Wilsons, especially Mr. R. R. Wilson, who was an expert in the coal mining field along with other employees of the Wilson Mining Corporation Ltd., did know in fact that in 1947 and 1951 it would be most difficult to market successfully lignite coal from the Hat Creek Coal Mine.

It must be concluded that they were fully aware of the fact that the oil and gas industry was developing in Alberta and in British Columbia and would be competing and that the market for coal was dwindling. Indeed, the Wilson Mining Corporation Ltd. was the operator of a coal mine at that time, and its market was declining and it has since ceased operation. During the material times, it was undoubtedly within their knowledge that the market for coal in general was most restricted and in this particular case the market for this low grade lignite coal was even more restricted. The appellant's knowledge and intentions at the material times (which I find was the knowledge of its directors, namely, the Wilsons and Dr. Alexander Smith, who was also a director of the Ventures Group) following the judgment of Judson J. in *Regal Heights Ltd. v. M.N.R. (supra)* where it was held that the knowledge and intention of the appellant were throughout its existence identical with those of its promoters (who later became its directors) was that this Hat Creek Coal Mine was known to be a vast resource from before 1900 that any possible market

[1] [1960] S.C.R. 902.

at that time was very uncertain, and therefore the probability of it being developed as a mine by them was remote.

When it was acquired in 1944 by the Ventures Group through St. Eugene Mining Corporation Ltd. and subsequently made the subject of the agreement, Exhibit A-16, in 1947, between St. Eugene Mining Corporation Ltd. and Wilson Mining Corporation Ltd., it was known to the parties that this resource might not be converted into profit by development because of lack of market.

The Ventures Group, through St. Eugene Mining Corporation Ltd., although spending large sums of money on other mines, spent nothing on the Hat Creek Mine. Instead, they handed it over to the Wilson group who were expert in the coal mining field but they declined to spend any sums on it for development as a mine but instead sought to search out a market.

It is probably true, according to the evidence, and many exhibits that were filed to substantiate it that the intention of the appellant may have been incidentally to develop this as a mine but the main intent which I find on the evidence was to sell the asset either outright or on some royalty basis or by some other contractual arrangement of substantially the same category of transaction.

This, in my view, was an adventure or concern in the nature of trade within the meaning of the *Income Tax Act* and the profit therefrom is income within the meaning of the Act.

Having so found, it becomes necessary to ascertain what is the taxable income of the appellant for the taxation year 1960.

To ascertain this, it is necessary to determine what was the fair market value within the meaning of the Act either in 1947 or 1951 when this asset was acquired by the appellant.

The fair market value is conceded as the amount arrived at in an arm's length transaction between a vendor willing to sell and a purchaser willing to buy. The relevant statute was the 1951 *Income Tax Act*.

The problem of determining fair market value in this particular transaction is one of considerable difficulty in view of the evidence adduced.

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While recognizing that the onus is on the appellant to prove on the balance of probabilities that the assessment is wrong, I am of opinion in this case that it has done so.

The evidence is very slight but of necessity it must be so in a case such as this.

Certainly in the year 1947 when (Exhibit A-16) the agreement was entered into, what was the fair market value of the shares was a difficult thing to determine. The St. Eugene Mining Corporation Ltd. had purchased the Hat Creek Mine in 1944 for $38,000. It did agree to sell the mine to the company which subsequently became the appellant. Pursuant to the agreement dated January 13, 1947, Exhibit A-16, for the mine it did get 900,000 shares of the par value of $1 from the appellant company; and Wilson Mining Corporation Ltd. did by that agreement of January 13, 1947, agree to buy 400,000 such shares in the appellant company, at 8½¢ per share; and there was an option agreement entered into between St. Eugene Mining Corporation Ltd. and Wilson Mining Corporation Ltd. in that same agreement whereby the latter obtained an option to buy one-half the shares to be issued to St. Eugene Mining Corporation Ltd. for a price which worked out to approximately 4.1¢ per share.

However, none of the these facts, in my opinion, determine what was the fair market value in 1947.

In 1947, St. Eugene Mining Corporation Ltd. and the appellant were not at arm's length when this agreement was made; but St. Eugene Mining Corporation Ltd. and Wilson Mining Corporation Ltd. were dealing at arm's length within the meaning of the Act. On these facts the problem still is what was the fair market value of the Hat Creek Mine at that time.

In the determination what was the fair market value in 1951, when the shares were issued to St. Eugene Mining Corporation Ltd. or its nominees and to Wilson Mining Corporation Ltd. pursuant to clause 2 of the said agreement dated September 17, 1951, Exhibit A-69, probably the most cogent evidence that is available was the actual price paid for this asset by Western Development and Power Ltd., a subsidiary of B. C. Electric Co. Ltd., pursuant

to its option agreement entered into on August 7, 1957, which it subsequently exercised in 1960.

It is to be noted that in 1957, when the option agreement was entered into between the appellant and Western Development and Power Ltd. the knowledge of the extent of the reserves was that obtained from the appellant and Wilson Mining Corporation Ltd. which was to the effect that the reserves were something under 100,000,000 tons of ore. That was the known state of the facts on which the price was fixed. The price, it turned out, was $1,570,000 plus 320,000 shares of Van-Tor Oils and Exploration Ltd. (These shares the Minister subsequently found to have a value of $108,800.) The total market price determined, therefore by that agreement was $1,678,800.

Subsequent to this, as a result of the exploratory work done by Western Development and Power Ltd. during the option period and the extensions to the option period, the extent of the mine deposit was found to be 700,000,000 tons.

In view of this, considering all the other evidence, I am of the opinion that the fair market value for these shares at the material time, *viz.*, 1951, was $1,300,000, which was the value placed on this mine by the directors of the appellant at the material time. And during the period 1951 and 1960 the value of this mine asset did not increase.

For this reason, I am of the opinion that the income of the appellant for the taxation year which was subject to tax is the difference between the proceeds of the sale of the mine to Western Development and Power Ltd. which appears to be $1,570,000 plus $108,800 being the value of the 320,000 shares of Van-Tor Oils & Exploration Ltd., making a total of $1,678,000 less the initial fair market value, so found, of the property acquired by the appellant in 1951 in the sum of $1,300,000 plus the development and carrying costs of $13,504.49 or a total of $1,313,504.49 which results in a difference of $365,295.51.

The appeal, therefore, is allowed in part and the matter submitted back to the Minister for re-assessment not inconsistent with these reasons.

The appellant shall be entitled to its costs of this appeal.

Judgment accordingly.