BRITISH COLUMBIA POWER CORPORATION, LIMITED ... APPELLANT;

AND

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

1967

*Mar. 16, 17
Oct. 3

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Deductions—Legal expenses—Litigation successfully attacking validity of expropriation legislation—Whether a deductible expense—Communications by corporation to shareholders—Whether costs a deductible expense—Income Tax Act, R.S.C. 1952, c. 148, s. 12(1)(a), (b).

The appellant's principal capital asset consisted of all the issued common shares of the British Columbia Electric Company Limited. When the British Columbia government expropriated those shares, the appellant commenced litigation in order to obtain a greater compensation. The action was successful and the appellant obtained a higher price for the shares. In computing its income for the years 1962 and 1963, the appellant sought to deduct its outlays for the litigation costs on the ground that they fell within the exception in s. 12(1)(*a*) of the *Income Tax Act,* R.S.C. 1952, c. 148, and not within para. (*b*) thereof. The appellant sought also to deduct from its income for those two years the costs of communications to its shareholders, the purpose of which was to inform them of the expropriation and of ensuing developments occurring form time to time. The Exchequer Court upheld the Minister's assessment and ruled that the appellant was not entitled to deduct the litigation costs or the costs of communications to the shareholders. The taxpayer appealed to this Court.

Held: The appeal should be allowed in part.

The litigation outlays fell within s. 12(1)(*b*) of the *Income Tax Act* and were therefore not deductible. The case was governed by the judgment in *M.N.R. v. Dominion Natural Gas Co. Ltd.,* [1941] S.C.R. 19, where the proposition was established that legal expense incurred in order to preserve an existing capital asset was a payment on account of capital. In the present case, the action was brought and the legal expenses incurred in order to preserve the appellant's title to the shares. Such a payment falls within s. 12(1)(*b*) of the Act.

*PRESENT: Abbott, Martland, Ritchie, Hall and Spence JJ.

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As to the costs of communications to the shareholders, the reasonable furnishing of information from time to time to shareholders by a company respecting its affairs is properly a part of the carrying on of the company's business of earning income and is an expense properly deductible.

Revenu—Impôt sur le revenu—Déductions—Dépenses légales—Procès attaquant avec succès la validité d'une législation d'expropriation—Dépense est-elle déductible—Communications par une compagnie à ses actionnaires—Le coût est-il une dépense déductible—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 12(1)(a), (b).

L'actif principal de la compagnie appelante se composait de toutes les actions communes émises de la British Columbia Electric Company Limited. Lorsque le gouvernement de la Colombie-Britannique a exproprié ces actions, l'appelante a commencé des procédures devant les tribunaux dans le but d'obtenir une plus grosse indemnité. Les procédures ont été couronnées de succès et l'appelante a obtenu un plus haut prix pour les actions. En calculant son revenu pour les années 1962 et 1963, l'appelante a tenté de déduire les sommes qu'elle avait déboursées en frais de procès pour le motif que ces sommes tombaient dans l'exception de l'art. 12(1)(*a*) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148, et non pas sous le para. (*b*) de cet article. L'appelante a tenté aussi de déduire de son revenu pour ces deux années, le coût des communications à ses actionnaires, dont le but était de leur annoncer l'expropriation et de les tenir, de temps à autre, au courant des développements subséquents. La Cour de l'Échiquier a maintenu la cotisation du Ministre et a jugé que l'appelante n'avait pas droit de déduire les frais de procès ni le coût des communications aux actionnaires. Le contribuable en appela devant cette Cour.

Arrêt: L'appel doit être maintenu en partie.

Les sommes déboursées en frais de procès tombaient sous l'art. 12(1)(*b*) de la *Loi de l'impôt sur le revenu* et en conséquence n'étaient pas déductibles. Cette cause était gouvernée par le jugement dans *M.N.R. v. Dominion Natural Gas Co. Ltd.*, [1941] R.C.S. 19, où il a été établi qu'une dépense légale faite en vue de conserver un actif en capital était un paiement à compte de capital. Dans le cas présent, les procédures légales ont été instituées et les dépenses légales ont été faites en vue de conserver le droit de l'appelante aux actions. Un tel paiement tombe sous l'art. 12(1)(*b*) de la Loi.

Quant au coût des communications aux actionnaires, une mise au courant raisonnable, de temps à autre, par une compagnie à ses actionnaires relativement aux affaires de cette compagnie fait, à bon droit, partie de l'exercice des affaires de la compagnie de gagner un revenu et est une dépense qui est déductible.

APPEL d'un jugement du Juge adjoint Sheppard de la Cour de l'Échiquier du Canada[1], maintenant la cotisation du Ministre. Appel maintenu en partie.

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[1] [1967] 1 Ex. C.R. 109, [1966] C.T.C. 454, 66 D.T.C. 5310.

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APPEAL from a judgment of Sheppard, Deputy Judge of the Exchequer Court of Canada[1], upholding the Minister's assessment. Appeal allowed in part.

D. McK. Brown, Q.C., H. H. Stikeman, Q.C., and *D. M. M. Goldie,* for the appellant.

P. M. Thorsteinsson and *D. G. H. Bowman,* for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Exchequer Court[1] which decided that the appellant was not entitled, in computing, for the purposes of tax, its income for the years 1962 and 1963, to deduct certain litigation costs, or to deduct certain expenses incurred for communications to its shareholders. The amounts involved for litigation costs were $742,623.89 in the year 1962 and $414,199.81 in 1963. The expense for communications to shareholders was $6,020.31 in 1962 and $3,126.27 in 1963.

The appellant was incorporated under the *Companies Act of Canada* on May 19, 1928, and was empowered to own, control and manage companies and enterprises in the public utility field. It owned all of the issued common shares of British Columbia Electric Company Limited, hereinafter referred to as "the Electric Company", a public utility company incorporated under the *Companies Act of British Columbia* in 1926. The income of the appellant was mainly derived from dividends paid to it by the Electric Company.

With effect on August 1, 1961, the British Columbia Legislature enacted the *Power Development Act, 1961.* This statute, *inter alia,* provided that:

1. Each share, issued or unissued, of the capital stock of the Electric Company vested in Her Majesty the Queen, in right of the Province.
2. The term of office of each director of the Electric Company holding office when the Act came into force was terminated.
3. The Lieutenant-Governor in Council should appoint the directors of the Electric Company.

[1] [1967] 1 Ex. C.R. 109, [1966] C.T.C. 454, 66 D.T.C. 5310.

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4. Holders of common shares of the Electric Company at the time the Act came into force were to receive as compensation for their shares $110,985,045.

5. Upon the request of the appellant, the Electric Company would purchase all the undertaking and property of the appellant at a price equivalent to $38.00 for each issued share of the appellant's capital stock less the amount paid for the Electric Company shares, referred to in paragraph 4 above. This worked out at approximately $68,500,000 for assets worth about $11,000,000.

Directors of the Electric Company were subsequently appointed by the Lieutenant-Governor in Council, who took possession of the undertaking and who paid to the appellant the sum of $110,985,045.

On September 21, 1961, the appellant submitted for fiat a petition of right asking that full and complete compensation for the Electric Company shares be determined by the Court. This was refused by the Provincial Secretary.

On November 13, 1961, the appellant commenced an action against the Attorney-General of British Columbia, the Electric Company and others, and asked for a declaration that the Act was ultra vires of the British Columbia Legislature.

In December 1961, the appellant reduced its capital and paid to its shareholders $18.70 per share, in a total amount of $89,236,605.70.

On March 29, 1962, two further Acts were passed. The *Power Development Act, 1961, Amendment Act, 1962,* increased the compensation for the Electric Company shares to $171,833,052. It vacated the appellant's option for the sale of its undertaking and property. The sum of $60,848,007 was thereafter paid to the appellant.

The *British Columbia Hydro and Power Authority Act* amalgamated the Electric Company and the British Columbia Power Commission under the name of British Columbia Hydro and Power Authority.

The appellant amended its pleadings to allege the invalidity of these two statutes.

The trial of the action commenced on May 1, 1962, and was completed on February 25, 1963. Chief Justice Lett delivered judgment on July 29, 1963, holding that all three

statutes were *ultra vires* of the British Columbia Legislature. A considerable part of the 144 day trial was occupied with evidence as to the value of the Electric Company shares, and a value was determined in the judgment of $192,828,125.

On the day the judgment was delivered, the appellant informed the Premier of British Columbia, by telegram, that its principal concern was to obtain fair compensation. He replied on August 1, 1963, accepting the amount found due by the Chief Justice. By agreement a reference was made to the Chief Justice to determine what amount should be paid to the appellant for its shares in the Electric Company. He fixed a figure of $197,114,358 and the appellant, on September 27, 1963, sold those shares to Her Majesty in right of the Province of British Columbia, for that amount, crediting the two payments of $110,985,045 and $60,848,007 already received.

On November 1, 1963, the shareholders of the appellant resolved to wind up the company, and on November 6, 1963, an order was made appointing a liquidator.

The first issue on this appeal is as to whether the appellant, in the determination of its income tax, is legally entitled to deduct its outlays for the litigation costs. Its right to do so depends upon whether it can establish that such outlays fall within the exception to para. (*a*) and do not fall within para. (*b*) of s. 12(1) of the *Income Tax Act*, R.S.C. 1952, c. 148, which provide:

> 12. (1) In computing income, no deduction shall be made in respect of
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> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from a property or business of the taxpayer,
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> (*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part.

I have reached the conclusion that the outlays in question do fall within s. 12(1)(*b*) and for that reason are not deductible. This makes it unnecessary to determine whether or not, apart from s. 12(1)(*b*), they fall within the exception to s. 12(1)(*a*).

In my opinion this case is governed by the judgment of this Court in *The Minister of National Revenue v. Dominion Natural Gas Company Limited*[2].

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[2] [1941] S.C.R. 19, [1940] 4 D.L.R. 657.

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The question in that case was as to whether Dominion Natural Gas Company Limited could properly deduct from its income legal expenses incurred by it for litigation, concerning its franchise rights in the City of Hamilton. The case ultimately reached the Privy Council: *United Gas and Fuel Company of Hamilton, Limited v. Dominion Natural Gas Company Limited*[3]. In brief, in 1904, Dominion had been granted a franchise by the Township of Barton enabling it to lay its pipe lines and distribute gas in the township. In the same year, United Company had been granted a franchise from the City of Hamilton. Later, portions of the township became annexed to the City of Hamilton. The United Company, which in 1931 had been granted an exclusive franchise in the city, sued Dominion for a declaration that Dominion was wrongfully maintaining its mains in the streets of the city, an injunction to restrain such use of the streets and the distribution of gas in Hamilton, and a mandatory injunction to compel the removal of its mains from such streets.

The position in which Dominion was then placed was that it faced a challenge to its legal right to continue the use of its mains and to distribute gas in the Hamilton area. It defended the action successfully, and incurred legal expense in so doing.

It was held in this Court that those expenses were not deductible for income tax purposes. Chief Justice Duff and Davis J. held that they did not fall within the category of "disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" within s. 6(*a*) of the *Income War Tax Act*, R.S.C. 1927, c. 97, as they were not working expenses incurred in the process of earning "the income". They also held that the expense was a capital expense, incurred "once and for all" and for the purpose of procuring "the advantage of an enduring benefit" within the sense of the language of Lord Cave in *British Insulated and Helsby Cables Ltd. v. Atherton*[4]. That well known statement is as follows:

> But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.

[3] [1934] A.C. 435, 3 D.L.R. 529.

[4] [1926] A.C. 205 at 213.

Kerwin J. (as he then was) and Hudson J., at p. 31, held that the legal costs were a "payment on account of capital" (quoting the words of s. 6(1)(*b*) of the *Income War Tax Act*) because "it was made (to use Viscount Cave's words) with a view of preserving an asset or advantage for the enduring benefit of a trade".

Crockett J. held that the expenses were excluded under s. 6(1)(*a*).

Referring to this case, in his judgment in *The Minister of National Revenue v. The Kellogg Company of Canada Limited*[5], Chief Justice Duff, at p. 60, said:

> It was held by this Court that the payment of these costs was not an expenditure "laid out as part of the process of profit earning" but was an expenditure made "with a view of preserving an asset or advantage for the enduring benefit of the trade" and, therefore, capital expenditure.

In the *Kellogg* case the taxpayer was held entitled to deduct the legal expenses there involved, which had been incurred in defending a suit brought for alleged infringement of a registered trade mark. Chief Justice Duff, at p. 60, in distinguishing that case from the *Dominion* case, said:

> The right upon which the respondent relied was not a right of property, or an exclusive right of any description, but the right (in common with all other members of the public) to describe their goods in the manner in which they were describing them.

The *Dominion* case was distinguished in *The Minister of National Revenue v. Goldsmith Bros. Smelting & Refining Company Limited*[6], in which the taxpayer was held to be entitled to deduct the legal expense involved in defending successfully a charge of participating in an illegal combine, on the basis that the *Dominion* case was concerned with money paid to preserve a capital asset.

The facts in *Evans v. The Minister of National Revenue*[7] were distinguished from those in the *Dominion* case because the issue in relation to which legal expense had been incurred did not relate to an item of fixed capital, but to a right to receive income.

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[5] [1943] S.C.R. 58, 3 Fox Pat. C. 13, 2 C.P.R. 211, 2 D.L.R. 62.

[6] [1954] S.C.R. 55, [1954] C.T.C. 28, 54 D.T.C. 1011, 20 C.P.R. 68, 2 D.L.R. 1.

[7] [1960] S.C.R. 391, [1960] C.T.C. 69, 60 D.T.C. 1047, 22 D.L.R. (2d) 609.

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In *Premium Iron Ores Ltd. v. The Minister of National Revenue*[8], the legal expenses had been incurred in resisting the claim of a foreign government to collect income tax. The preservation of a capital asset was not in issue.

The authority of the *Dominion* case is not weakened by subsequent alterations in the statute, in so far as it deals with the question as to what constitutes a payment on account of capital. The definition of what constitutes an allowable deduction under s. 12(1)(*a*) of the *Income Tax Act* is broader in its terms than that contained in s. 6(1)(*a*) of the *Income War Tax Act*, as was pointed out by Abbott J. in *British Columbia Electric Railway Company Limited v. The Minister of National Revenue*[9]. However, there is no material difference between s. 12(1)(*b*) of the *Income Tax Act* and s. 6(1)(*b*) of the *Income War Tax Act* dealing with payments on account of capital.

The appellant's submission was that the purpose of the action in which its costs were incurred was to test the validity of provincial legislation which, if valid, would have had the effect of divesting the appellant of its shares in the Electric Company. The action was not for the purpose of bringing into existence an asset or advantage of enduring benefit to the appellant or for the purpose of recovering a capital asset.

Reliance was placed on the decision of Lawrence J. in *Southern v. Borax Consolidated, Limited*[10]. In that case the taxpayer had incurred legal expense in resisting an action brought by the City of Los Angeles claiming the invalidity of its title to land in California on which its subsidiary had erected wharves and buildings. It claimed the right to deduct these expenses in computing its income tax, the issue being as to whether they were wholly and exclusively laid out for the purposes of the trade, within the provisions of the English Act.

Lawrence J., holding that these expenses were properly deductible, said at p. 120:

> It appears to me that the legal expenses which were incurred by the respondent company did not create any new asset at all, but were expenses

[8] [1966] S.C.R. 685, [1966] C.T.C. 391, 66 D.T.C. 5280, 58 D.L.R. (2d) 289.

[9] [1958] S.C.R. 133 at 136, [1958] C.T.C. 21, 77 C.R.T.C. 29, 58 D.T.C. 1022, 12 D.L.R. (2d) 369.

[10] [1941] 1 K.B. 111, 23 Tax Cas. 597, [1940] 4 All E.R. 412.

which were incurred in the ordinary course of maintaining the assets of the company and the fact that it was maintaining the title and not the value of the company's business does not, in my opinion, make it any different.

At p. 117 he had said:

> The title of the company, which must be assumed, in my opinion, to have been a good title, remains the same; there is nothing added to the title or taken away, and the title has simply been maintained by this payment.

This decision was cited with approval by Lord Greene M.R., in *Associated Portland Cement Manufacturers Ltd. v. Inland Revenue Commissioners*[11], where he said:

> The money that you spend in defending your title to a capital asset, which is assailed unjustly, is obviously a revenue expenditure.

It may be noted, however, that this was not the issue actually before the Court in that case. What was actually decided was that payments made to two retiring directors, in order to prevent competition with the company's business, were in the nature of capital expenditure and not deductible.

Favourable reference was also made to the case of *Southern v. Borax* in some of the judgments in the House of Lords in *Morgan v. Tate & Lyle Ltd.*[12], in which the taxpayer was permitted to deduct from income the cost of a campaign to oppose the threatened nationalization of the sugar industry.

In that case the question of whether the expenses were of a capital nature was not raised, and so the only issue was as to whether, under rule 3(*a*), the expenses represented money "wholly and exclusively laid out or expended for the purposes of the trade".

This case may be contrasted with the earlier decision of the Privy Council in *Ward & Company, Limited v. Commissioner of Taxes*[13], which decided that expenses incurred by a New Zealand brewery in distributing anti-prohibition literature prior to a poll of the electors upon the possible introduction of legislation prohibiting intoxicants, was not a deductible expense for income tax

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[11] [1946] 1 All E.R. 68 at 72, 27 Tax Cas. 103.

[12] [1955] A.C. 21, 35 Tax Cas. 367, [1954] 2 All E.R. 413.

[13] [1923] A.C. 145.

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purposes. The relevant statutory provision in that case precluded deduction of expenditure "not exclusively incurred in the production of the assessable income".

The *Ward* case was distinguished in *Morgan v. Tate & Lyle Ltd.*, as it was by Kerwin J. in the *Dominion* case because of the difference in wording between the New Zealand statute and the relevant provisions under consideration in each of those cases.

The reasoning in *Southern v. Borax* was critically analysed by Dixon J. (as he then was) in his dissenting reasons in *Hallstroms Pty. Ltd. v. Federal Commissioner of Taxation*[14], when he said:

> Upon the facts as they appear from the case stated set out in the report (1941) 1 K.B., at pp. 111-114; 23 Tax Cas., at pp. 597-599, I do not think that this decision can be supported. The costs were incurred in order to retain a capital asset of the company employed in the business as fixed capital and to avoid the payment, in consequence of its loss, of a charge upon revenue of indefinite duration. Next to the outlay of purchase money and conveyancing expenses in acquiring the title to the land, it would be hard to find a form of expenditure in relation to property more characteristically of a capital nature.
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> The basis of the decision of Lawrence J. may be seen from two passages in his judgment. In the first, his Lordship said: "In my opinion the principle which is to be deduced from the cases is that where a sum of money is laid out for the acquisition or the improvement of a fixed capital asset it is attributable to capital, but that if no alteration is made in the fixed capital asset by the payment, then it is properly attributable to revenue, being in substance a matter of maintenance, the maintenance of the capital structure or the capital assets of the company", (1941) 1 K.B., at pp. 116, 117; 23 Tax Cas., at p. 602. The first or positive statement contained in this passage is open to no substantial objection, but the second, the converse and negative proposition that if no alteration is made in the capital asset by the payment it is a revenue expenditure, appears to me to have no foundation in principle or authority. No alteration in a fixed capital asset was effected by the outlay that was in question in what has become the leading case upon the subject (*British Insulated and Helsby Cables Ltd. v. Atherton,* (1926) A.C. 205; 10 Tax Cas. 155) and there was none, to take one or two examples only, in *English Crown Spelter Co. Ltd. v. Baker,* (1908) 5 Tax Cas. 327; 99 L.T. 353; in *Countess Warwick Steamship Co. Ltd. v. Ogg,* (1924) 2 K.B. 292; 8 Tax Cas. 652; in *Collins v. Joseph Adamson & Co.,* (1938) 1 K.B. 477 (at all events as to one of the two payments) and in *Henderson v. Meade-King Robinson & Co. Ltd.,* (1938) 22 Tax Cas. 97, at p. 105. The New Zealand decision in *Commissioner of Taxes v. Ballinger & Co. Ltd.,* (1903) 23 N.Z.L.R. 188 seems much in point and is quite opposed to the view of Lawrence J.
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> The second passage in the judgment of Lawrence J. reads thus: "It appears to me that the legal expenses which were incurred by the respondent company did not create any new asset at all, but were expenses

[14] (1946), 72 C.L.R. 634 at 650.

which were incurred in the ordinary course of maintaining the assets of the company and the fact that it was maintaining the title and not the value of the company's business does not, in my opinion, make it any different. (1941) 1 K.B., at p. 120; 23 Tax Cas., at p. 605)."

It is possible to find in this statement two reasons not necessarily interdependent. One is the lack of any fresh acquisition of assets. That, in my view, does no more than put aside one possible state of facts in which the payment would have certainly been of a capital nature. The other is that the defence of the title against impeachment amounted to maintenance, the costs forming part of the business expenditure in the ordinary course upon maintaining the company's assets. An analogy which suggests itself is the cost of restoring the front door of the business premises after an attempted entrance by bandits. No ground was disclosed in the case stated, as set out in the reports, and none exists in the known customs or propensities of Californian city authorities, for supposing that the company was exposed to regular or recurrent attacks upon the validity of its title. His Lordship probably did not doubt that the purpose of the litigation was to decide once and for all whether the taxpayer had or had not a valid title; but, as appears from the first of the foregoing passages cited from his judgment, his Lordship regarded outlays making no alteration in a fixed capital asset as amounting in substance to a matter of maintenance. I should have thought that the decided cases illustrated the fact that these are not exhaustive alternatives. A decision of the Canadian Supreme Court that is entirely at variance with the view of Lawrence J. is the *Minister of National Revenue v. Dominion Natural Gas Co. Ltd.* (1941) S.C.R. (Can.) 19.

This view of *Southern v. Borax* was affirmed by the High Court of Australia in *Broken Hill Theatres Proprietary Ltd. v. Federal Commissioner of Taxation*[15], where it is stated at p. 434:

> We would add that we all think, as Dixon J. thought in *Hallstroms'* case, that, on the facts as stated, the decision of Lawrence J. in *Southern v. Borax Consolidated* cannot be supported.

It must be borne in mind that the only issue which had to be determined in *Southern v. Borax* was whether the expense there involved was wholly and exclusively laid out for the purposes of the trade, under the relevant English statutory provision somewhat equivalent to, but not identical with, our s. 12(1)(*a*). The existence in our Act of both paras. (*a*) and (*b*) of s. 12 shows that Parliament contemplated that there might be expenses made for the purpose of gaining or producing income, which were of a capital nature, and which, under para. (*a*) taken alone, might be deducted, but, by virtue of para. (*b*), notwithstanding the fact that they so qualified under para. (*a*), could not be deducted. There was no equivalent to para. (*b*) under consideration in that case.

[15] (1952), 85 C.L.R. 423.

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To the extent that *Southern v. Borax* is authority for the proposition that a legal expense which is incurred to protect from attack a taxpayer's title to a capital asset is not a capital but a revenue expenditure, it cannot be reconciled with the decision of this Court in the *Dominion* case. Dominion's gas franchise was a capital asset. The attempt by United to establish that such franchise was non-existent within the boundaries of the City of Hamilton was an attack upon its title to that asset. The attack was found to be unwarranted and Dominion's franchise remained a valid franchise as it had always been. Nothing was added to or taken away from it as a result of the proceedings. But the proposition established by this Court was that legal expense incurred in order to preserve an existing capital asset was a payment on account of capital. A payment of that kind falls within s. 12(1)(*b*).

In the present case, the appellant was faced with legislation the effect of which was to vest title to the shares which it had owned, in the Crown, at a price fixed by the statute. These shares constituted the appellant's principal capital asset. In the opinion of the appellant the compensation fixed was not adequate. In order to obtain what it considered to be a fair compensation (which the learned trial judge has found, on ample evidence, to have been the appellant's primary purpose) it was necessary to seek to set the legislation aside. The action was brought and the legal expenses incurred in order to preserve the appellant's title to the shares. Thereafter, the appellant was able to dispose of the shares to the Crown at a more favourable price. In essence, the main purpose and the result of the litigation was to improve the consideration received for the disposition of a capital asset.

In my opinion the principle established in the *Dominion* case must apply to the facts in the present case, and, consequently, the appeal on this point fails.

The second, and relatively minor item relates to the claim for deduction of the cost of communications to shareholders. The purpose of these letters was to inform shareholders, first, as to the situation which faced the appellant when the legislation was passed, and, later, as to developments which had occurred from time to time.

The learned trial judge refused to allow a deduction in respect of these expenses, holding that they related to capital and not to earning income within s. 12(1)(*a*).

With respect, I am of the opinion that these expenses should be viewed differently from the legal expenses previously discussed. Those expenses represented payments to preserve a capital asset. The expenses now under discussion did not, and I do not regard them as falling within s. 12(1)(*b*). Are they properly deductible under s. 12(1)(*a*)?

The ultimate control in law of a limited company rests with its shareholders and it is they who have the legal power to determine its policy. This power cannot be properly exercised unless the shareholders are informed periodically with respect to the company's affairs. A public company incorporated under the *Companies Act,* R.S.C. 1952, c. 53, is required, by s. 121, to furnish its shareholders with copies of its balance sheet, statement of income and expenditure and statement of surplus prior to its annual meeting.

In my opinion, the reasonable furnishing of information from time to time to shareholders by a company respecting its affairs is properly a part of the carrying on of the company's business of earning income and a corporate taxpayer should be entitled to deduct the reasonable expense involved as an expense of doing business.

I am, therefore, of the opinion that this expense was properly deductible.

The appellant also urged that the judgment of the learned trial judge, which awarded to the respondent two-thirds of his taxed costs against the appellant and to the appellant one-third of its taxed costs against the respondent, should be varied by awarding to the appellant all its costs and by depriving the respondent of any costs. It was submitted that, as the appellant had succeeded in part at the trial, thus justifying its resort to the Court for relief, it should be entitled to all its costs.

In my opinion the matter of costs was at the discretion of the learned trial judge and the appellant has failed to establish that the discretion was not properly exercised according to law.

In the result, I would allow the appeal in part and refer the assessment in question back to the Minister of National

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Revenue for reconsideration and reassessment in accordance with the reasons for judgment herein. As the appellant has failed in respect of the major part of its appeal, I would award costs of the appeal to this Court to the respondent.

Appeal allowed in part; costs to the respondent.

Solicitors for the appellant: Russell & Dumoulin, Vancouver.

Solicitor for the respondent: D. S. Maxwell, Ottawa.