1968
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THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

CONSOLIDATED MOGUL MINES LIMITED (now called MOGUL MINES LIMITED) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Deductions—Prospecting, exploration and development expenses—Mining and management company—Whether principal business "mining or exploring for minerals"—Income Tax Act, R.S.C. 1952, c. 148, s. 83A(3)(b).

The taxpayer company claimed that in each of the years 1957 to 1960 its principal business was "mining or exploring for minerals" and sought to deduct, under s. 83A(3) of the *Income Tax Act*, the "prospecting, exploration and development expenses" incurred by it in Canada during those years. The evidence disclosed that during the years in question, the taxpayer carried out exploration work on properties in which it held some kind of interest, but that its chief task was the development and management of properties owned by other companies. The Minister contended that the taxpayer's principal business was the management of its large investment portfolio and the providing of management, technical and financing services to other mining companies. The assessment was set aside by the Tax Appeal Board and by the Exchequer Court. The Minister appealed to this Court.

Held: The appeal should be dismissed.

The principal business of the taxpayer company in the years in question was mining or exploring for minerals within the meaning of s. 83A(3)(*b*) of the *Income Tax Act*. The taxpayer could be engaged in the business of mining or exploring for minerals just as well as the owner if, under its contract with that owner, it did the mining or exploring for minerals. The respondent was in fact engaged in mining or exploring for minerals.

Although the source of the income of a corporation is an important element to be considered in determining which is its principal business, it is not the only matter to be considered and not necessarily the determinant factor. As stated by the Tax Appeal Board, the financing function of a mining company is an integral part of its business.

Revenu—Impôt sur le revenu—Déductions—Dépenses de prospection, d'exploration et de mise en valeur—Compagnie minière—Son entre-

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

prise principale est-elle «l'exploitation minière ou l'exploration pour la découverte de minéraux»—Loi de l'impôt sur le revenu, S.R.C. 1952, ch. 148, art. 83A(3)(b).

La compagnie intimée prétend que son entreprise principale durant chacune des années 1957 à 1960 était «l'exploitation minière ou l'exploration pour la découverte de minéraux» et tente de déduire, en vertu de l'art. 83A(3) de la *Loi de l'impôt sur le revenu,* les «dépenses de prospection, d'exploration et de mise en valeur» faites par elle au Canada durant les années en question. La preuve est à l'effet que durant ces années, la compagnie a fait des travaux d'exploration sur des propriétés sur lesquelles elle détenait certains droits, mais que son travail principal consistait à mettre en valeur et à gérer des propriétés appartenant à d'autres compagnies. Le Ministre a soutenu que l'entreprise principale de la compagnie se résumait à gérer ses portefeuilles de placements et à fournir à d'autres compagnies minières des services de gérance ainsi que des services techniques et financiers. La cotisation a été mise de côté par la Commission d'appel de l'impôt et par la Cour de l'Échiquier. Le Ministre en a appelé à cette Cour.

Arrêt: L'appel doit être rejeté.

L'entreprise principale de la compagnie intimée durant les années en question était l'exploitation minière ou l'exploration pour la découverte de minéraux dans le sens de l'art. 83A(3)(*b*) de la *Loi de l'impôt sur le revenu.* Le contribuable peut se livrer à l'exploitation minière ou l'exploration pour la découverte de minéraux aussi bien que le propriétaire de la propriété si, en vertu de son contrat avec ce propriétaire, il fait l'exploitation minière ou l'exploration pour la découverte de minéraux. La compagnie intimée, en fait, se livrait à cette occupation.

Quoique la source du revenu d'une corporation est un élément important dans la détermination de ce qu'est son entreprise principale, ce n'est pas la seule chose que l'on doit considérer et ce n'est pas nécessairement le facteur déterminant. Tel que constaté par la Commission d'appel de l'impôt, le financement d'une compagnie minière est une partie intégrale de son entreprise.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], rejetant un appel d'une décision de la Commission d'appel de l'impôt. Appel rejeté.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], dismissing an appeal from a decision of the Income Tax Appeal Board. Appeal dismissed.

G. W. Ainslie and *M. A. Mogan,* for the appellant.

R. E. Shibley, Q.C., and *M. O'Brien,* for the respondent.

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[1] [1966] Ex. C.R. 350, [1966] C.T.C. 16, 66 D.T.C. 5008.

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The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the decision of Gibson J. in the Exchequer Court of Canada[1] pronounced on December 21, 1965, whereby that learned judge dismissed an appeal from the decision of the Income Tax Appeal Board made on February 9, 1965. By the latter decision, the board had allowed an appeal by the taxpayer from the assessments made by the Minister as to the years 1957, 1958, 1959 and 1960, and referred the said assessments back to the Minister for reassessment in accordance with the agreement of counsel.

As was said by Mr. Weldon, giving the reasons for judgment of the Tax Appeal Board, and repeated by Gibson J. in his reasons, there is only one issue to be decided in this appeal, namely, was the principal business of Mogul in the taxation years under appeal mining or exploring for minerals for the purposes of s. 83A(3)(*b*) of the *Income Tax Act*, R.S.C. 1952, c. 148? That section reads, in part, as follows:

> 83A (3) A corporation whose principal business is
>
> (*a*) production, refining or marketing of petroleum, petroleum products or natural gas, or exploring or drilling for petroleum or natural gas, or
>
> (*b*) mining or exploring for minerals,
>
> may deduct, in computing its income under this Part for a taxation year, the lesser of
>
> (*c*) the aggregate of such of
>
> (i) the drilling and exploration expenses, including all general geological and geophysical expenses, incurred by it on or in respect of exploring or drilling for petroleum or natural gas in Canada, and
>
> (ii) the prospecting, exploration and development expenses incurred by it in searching for minerals in Canada,
>
> as were incurred after the calendar year 1952 and before April 11, 1962, to the extent that they were not deductible in computing income for a previous taxation year,
>
> . . .

The respondent company was created by letters patent under the *Companies Act* of the Province of Ontario under date of May 29, 1945, with the name "Mogul Gold Mines Limited (No Personal Liability)". The name was subsequently changed to "Consolidated Gold Mines Lim-

ited" and, since the appeal to this Court was launched, to the name "Mogul Mines Limited". It is significant that the name has always made reference to mining.

The purposes and objects as set out in the letters patent are as follows:

(*a*) TO acquire, own, lease, prospect for, open, explore, develop, work, improve, maintain and manage mines and mineral lands and deposits, and to dig for, raise, crush, wash, smelt, assay, analyze, reduce, amalgamate, refine, pipe, convey and otherwise treat ores, metals and minerals, whether belonging to the Company or not, and to render the same merchantable and to sell or otherwise dispose of the same or any part thereof or interest therein; and

(*b*) TO take, acquire and hold as consideration for ores, metals or minerals sold or otherwise disposed of or for goods supplied or for work done by contract or otherwise, shares, debentures or other securities of or in any other company having objects similar, in whole or in part, to those of the Company hereby incorporated and to sell and otherwise dispose of the same.

Cameron J. in *American Metal Company of Canada Ltd. v. Minister of National Revenue*[2], in referring to the words of the Statutes of Canada, 1947, c. 63, s. 16(4) "a corporation whose chief business is that of mining or exploring for minerals . . .", said at p. 306:

"Chief business" is not defined in either of the Acts, and the phrase, so far as I am aware, has not been the subject of judicial interpretation. In my view, it is a question of fact to be determined by an examination and comparison of all the facts concerning each of the various types of business in which the company is engaged.

It is to be noted that the statute presently under consideration also contains no definition of "principal business" although "business" is defined in s. 139(1)(*e*) in a manner not here relevant. I adopt Cameron J.'s view and seek to apply the same tests.

The evidence of G. D. Pattison, the secretary-treasurer of the respondent company throughout, was that although the respondent had been inactive from the time of its incorporation until 1954, it had in that year entered actively into the business of mining generally and proceeded to develop one of its properties known as "Harvey Hill Mine" as well as to explore a great number of others. Harvey Hill Mine, in the District of Megantic, Quebec, was brought

[2] [1952] C.T.C. 302.

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into operation but its operations were suspended at the end of January 1957 due to a world-wide depression in the price of copper. The respondent's costs for exploration and development of the Harvey Hill Mine between the years 1955 and 1960 amounted to $588,469 and its general exploration expenses during the same years amounted to $430,892. Although it continued after the year 1957 to carry out considerable exploration work on properties in which it held some kind of interest, its chief task in the years which are now under appeal seems to have been the development and management of properties owned by other companies. In such companies the respondent had some share-interest usually acquired by the contract made between the respondent and such company. These contracts provided for the investment in the shares of the various companies and then the control of the expenditure of the proceeds of such sales of shares by the various companies in the exploration and development of the various mining prospects. The chief of those companies represented by such mining and management contracts were Consolidated Halliwell Limited with a mining property in Haiti, North Rankin Nickel Mines Limited at Rankin Inlet in the Canadian Northwest Territories, Coldstream Copper Mines Limited near Kashabowie, Ontario, St. Patrick's Copper Mines Limited in Ireland, and Silver Mines, Lead and Zinc Company Limited in County Tipperary in the Republic of Eire.

It should be noted that s. 83A(3) grants the right to make a deduction to a company whose "principal business is mining or exploring for minerals" without requiring that such mining or exploring for minerals should be done within Canada or should be done upon properties in which the taxpayer seeking the deduction has an interest in the property, although the deductions therefrom, if the taxpayer comes within the definition of one having its principal business as mining or exploring for minerals, can only be for drilling and exploration expenses incurred by it in Canada and prospecting, exploration and development expenses incurred by it in searching for minerals in Canada. Therefore, it is not relevant in determining whether the respondent comes within the definition that much of its

efforts were devoted to work in connection with properties outside of Canada and in connection with properties in which it had only a share-holding interest in the company owning such properties.

Counsel for the Minister took the position strongly that the respondent under its management and development contracts with such companies as Halliwell and North Rankin, etc., was not engaged in mining or exploring but in management, and that the mining and exploring was carried on by the company which owned the property. I am not ready to accept that distinction. The respondent may be engaged in the business of mining or exploring for minerals just as well as the owner of the property if, under the contract with that company, it does the mining or exploring for minerals.

I agree with the learned member of the Tax Appeal Board when he said:

> From the standpoint of: its corporate name; its purposes and objects as enumerated in said Letters Patent dated May 29, 1945; its Prospectus dated September 28, 1955; the development of its Harvey Hill Mine during the years 1955, 1956 and 1957 right to the point of production on a commercial basis at an expenditure of well over half a million dollars; its general and continuing mining, development and exploring activities during the relevant taxation years; its said management contracts under which it undertook very serious and extensive mining operations on behalf of several mining companies bringing them to a successful conclusion; the way so many mining companies seemed to turn to Mogul for scientific and technical services as well as for financing help, and its experienced and specialized officers and staff, to mention a few of the more obvious indications, Mogul unquestionably, gave every appearance of being, as was strongly argued by counsel for the appellant [here respondent], a company that was engaged in mining or exploring for minerals.

I am further of the opinion that the respondent not only "gave every appearance" but was in fact engaged in mining or exploring for minerals and that was certainly a large part of its business. Was that business, however, its principal business? Again counsel for the Minister stressed the large investment portfolio held by the respondent and submits that its principal business was the management of that investment portfolio. It may be said generally that although the source of the income of a corporation is an important element to be considered in determining which is its principal business it is not the only matter to be

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considered and not necessarily the determinant factor. See Cameron J. in *American Metal Company v. M.N.R., supra,* at p. 307.

As the learned member of the Tax Appeal Board remarked:

> So, it would appear to be reasonable to assume that the multiplicity of arrangements which exist between mining companies and the constant juggling of shareholdings for various necessary purposes is just part and parcel of the mining business. In my view, it shows lack of understanding of the mining business to point to the financing arrangements of a mining company as a separate business activity to that of mining. Obviously, the financing function of a mining company is an integral part of its business.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

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

Solicitor for the respondent: J. G. McDonald, Toronto.