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HIGHWAY SAWMILLS LIMITED ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Sale of timber limit after removal of timber—Whether disposition of depreciable property—Capital cost allowance—Undepreciable capital cost—Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(a), (b), 20(1), 20(5)(a), (c), (e)—Income Tax Regulations, ss. 1100(1)(e), 1100(2), 1101(3)(a), (b), 1102(2) and Schedule C.

The appellant company carried on the business of logging and milling on Vancouver Island. Between the years 1949 and 1955, it purchased blocks of land on which merchantable timber was standing. The whole of the purchase price was paid for the timber itself. No value was assigned to the land apart from the timber, it being the custom and the intention of the appellant to let the land be sold for taxes after all the merchantable timber had been removed. In computing its income from year to year the appellant claimed deductions in an amount equal to the capital cost of the timber cut during the year. In 1957, the appellant accepted an offer to sell for $22,620 the lands in one of its logged-over limits. The Minister ruled that this sum was the proceeds of disposition of depreciable property and reduced the appellant's capital cost allowance claim accordingly. The appellant contended that the sum was a capital receipt or windfall from the sale of bare land which is not depreciable property under s. 1102(2) of the Regulations, and that there being no proceeds of disposition of depreciable property, section 20(5)(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148, could not be applied to reduce the undepreciated capital cost of the timber limit. An appeal from the Minister's assessment was allowed by the Income Tax Appeal Board. On further appeal, the Exchequer Court reversed that decision and upheld the Minister's assessment. The taxpayer appealed to this Court.

Held (Ritchie J. dissenting): The appeal should be dismissed.

Per Cartwright, Abbott, Judson and Spence JJ.: The $22,620 received by the appellant was the proceeds of a disposition of a depreciable property. When the lands were acquired by the appellant they were properly described as "timber limits" both in ordinary popular language and in the sense in which those words are used in the statutory provisions. The phrase "timber limits" describes a parcel of land with merchantable timber standing upon it; it is used in the Regulations in contradistinction to the phrase "a right to cut timber from a limit". Under the scheme of the relevant sections of the Act and of the Regulations, a timber limit is treated as a class of

* PRESENT: Cartwright, Abbott, Judson, Ritchie and Spence JJ.

depreciable property; it is an asset the total capital cost of which the owner is entitled to deduct in calculating his income. It was impossible to accept the view that, when all the merchantable timber had been removed, the land that remained ceased to be a timber limit. The proceeds of disposition of that land fell within the terms of s. 20(1) of the Act and s. 1100(2) of the Regulations. In the present case, the appellant purchased the land in question as a capital asset to secure a supply of timber to be used in earning its income. The scheme of the legislation is to allow the taxpayer to deduct the whole of the net cost of such capital asset in arriving at its trading profits. The judgment of the Exchequer Court brought about this result. If, on the other hand, the contentions of the appellant were upheld, the result would be that it would have been permitted to deduct the total original cost of the capital asset although it had already recovered $22,620 of that cost.

Per Ritchie J., *dissenting*: For the purpose of schedule C "a timber limit" or "a right to cut timber from a limit" are to be deemed to belong to a class in which capital cost allowance is limited to the value of the timber cut during a taxation year and in which the land on which the timber stands is not included. The phrase "timber limit", as used in schedule C to connote the property in respect of which a taxpayer is entitled to a deduction, means "merchantable timber within defined limits". Land stripped of timber is not "property in respect of which a taxpayer has been allowed or is entitled to a deduction under regulations made under s. 11(1)(*a*) of the Act". That land is not "depreciable property of a taxpayer" within the meaning of s. 20(5)(*a*) of the Act. Therefore, the proceeds of disposition of the land here in question were not proceeds of a disposition of depreciable property.

Revenu—Impôt sur le revenu—Vente d'une concession forestière après que le bois a été enlevé—Est-ce une disposition de biens susceptibles de dépréciation—Coût en capital à titre d'allocation—Coût en capital non déprécié—Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 11(1)(a), (b), 20(1), 20(5) (a), (c), (e)—Règlements de l'Impôt sur le revenu, arts. 1100(1)(e), 1100(2), 1101(3)(a), (b), 1102((2), Cédule C.

La compagnie appelante s'occupait de la coupe de bois et possédait des moulins sur l'île de Vancouver. Entre 1949 et 1955, elle a acheté des terres sur lesquelles il y avait du bois sur pied en état d'être livré au commerce. Tout le prix d'achat portait sur le bois lui-même. Aucune valeur n'a été attribuée à la terre indépendamment du bois. C'était la coutume et l'intention de l'appelante de laisser la terre être vendue pour taxes après que le bois en avait été enlevé. Dans le calcul de son revenu de chaque année, l'appelante réclamait des déductions pour un montant égal au coût en capital du bois coupé durant l'année. En 1957, l'appelante a accepté une offre de vendre pour $22,620 une de ses terres dont elle avait enlevé le bois. Le Ministre a décidé que ce montant était le produit d'une disposition de biens susceptibles de

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dépréciation et a réduit, en conséquence, l'allocation du coût en capital de l'appelante. L'appelante a soumis que le montant était un reçu en capital ou une aubaine provenant de la vente d'une terre dénudée qui n'est pas un bien susceptible de dépréciation en vertu de l'art. 1102(2) des Règlements, et comme il n'y avait pas eu de produit d'une disposition de biens susceptibles de dépréciation, on ne pouvait pas se servir de l'art. 20(5) de la *Loi sur l'Impôt sur le revenu*, S.R.C. 1952, c. 148, pour réduire le coût en capital non déprécié de la concession forestière. Un appel de la cotisation du Ministre a été maintenu par la Commission d'appel de l'Impôt. Sur appel subséquent à la Cour de l'Échiquier, la cotisation du Ministre fut maintenue. Le contribuable en appela devant cette Cour.

Arrêt: L'appel doit être rejeté, le Juge Ritchie étant dissident.

Les Juges Cartwright, Abbott, Judson et Spence: Les $22,620 reçus par l'appelante étaient le produit d'une disposition de biens susceptibles de dépréciation. Lorsque l'appelante a acquis les terres, celles-ci étaient proprement décrites comme étant des «concessions forestières» et dans le langage ordinaire populaire et dans le sens dans lequel ces mots sont employés dans les dispositions statutaires. Les mots «concessions forestières» décrivent un lopin de terre sur lequel il y a du bois sur pied en état d'être livré au commerce; ces mots sont employés dans les Règlements par contraste avec la phrase «le droit de couper le bois d'une concession». Sous le système des articles pertinents de la Loi et des Règlements, une concession forestière est traitée comme étant une classe de biens susceptibles de dépréciation; c'est un bien duquel le propriétaire a droit de déduire le coût total en capital dans le calcul de son revenu. Il est impossible d'accepter le point de vue que la terre qui subsiste après que le bois en état d'être livré au commerce a été enlevé, cesse d'être une concession forestière. Le produit de la disposition de cette terre tombait sous les termes de l'art. 20(1) de la Loi et de l'art. 1100(2) des Règlements. Dans le cas présent, l'appelante a acheté la terre en question comme un bien en capital pour s'assurer une provision de bois en vue de se gagner un revenu. Le but de la législation est de permettre au contribuable de déduire le plein montant du coût net d'un tel bien en capital dans le calcul de ses profits commerciaux. Le jugement de la Cour de l'Échiquier a amené ce résultat. D'un autre côté, si la prétention de l'appelante était maintenue, il en résulterait qu'on lui permettrait de déduire le coût original total d'un bien en capital malgré qu'elle ait déjà récupéré $22,620 de ce coût.

Le Juge Ritchie, *dissident:* Pour les fins de la Cédule C, une «concession forestière» ou «le droit de couper le bois d'une concession» sont censés appartenir à une classe dans laquelle l'allocation du coût en capital est limitée à la valeur du bois coupé durant l'année de taxation et dans laquelle la terre sur laquelle il y a du bois sur pied n'est pas incluse. Les mots «concession forestière», tels qu'employés dans la Cédule C pour désigner la propriété à l'égard de laquelle un contribuable a droit à une déduction, signifient «du bois en état d'être livré au commerce à l'intérieur d'une concession définie». Une terre dénuée de son bois n'est pas «un bien à l'égard duquel il a été accordé à un contribuable une déduction en vertu des règlements édictés sous le régime de l'art.

11(1)(*a*) de la Loi, ou à l'égard duquel le contribuable a droit à une telle déduction». Cette terre n'est pas «un bien d'un contribuable susceptible de dépréciation» dans le sens de l'art. 20(5)(*a*) de la Loi. En conséquence, le produit de la disposition de la terre en question n'était pas le produit d'une disposition de biens susceptibles de dépréciation.

APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier du Canada[1], maintenant un appel d'une décision de la Commission d'Appel de l'Impôt. Appel rejeté, le Juge Ritchie étant dissident.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], allowing an appeal from a decision of the Income Tax Appeal Board. Appeal dismissed, Ritchie J. dissenting.

Kenneth E. Meredith, for the appellant.

G. W. Ainslie, for the respondent.

The judgment of Cartwright, Abbott, Judson and Spence JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment[1] of Dumoulin J. allowing an appeal from a decision of the Tax Appeal Board and restoring the re-assessment of tax in the sum of $14,758.97 for the appellant's 1957 taxation year.

The appellant carried on the business of logging and milling on Vancouver Island.

Between the years 1949 and 1955 the appellant purchased from the Esquimalt and Nanaimo Railway Company, blocks of land on which merchantable timber was standing. In each case the appellant acquired an estate in fee simple subject to a reservation of mineral rights and other reservations not material to the question raised in this appeal. The purchase price of each block was based on cruises made by the vendor and purchaser assigning prices to the various kinds of standing timber on the land pur-

[1] [1965] 2 Ex. C.R. 297, [1965] C.T.C. 142, 65 D.T.C. 5080.

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chased. No value was assigned to the land apart from the timber, it being the custom and the intention of the appellant to let the land be sold for taxes after all the merchantable timber had been removed.

In computing its income from year to year the appellant claimed deductions in an amount equal to the capital cost of the timber cut during the year from the lands above referred to.

In 1957 Alaska Pine and Cellulose Company Limited, hereinafter referred to as "Alaska Pine", offered to purchase these lands from the appellant, its intention being to use them as a tree farm. The appellant accepted the offer which it regarded as a windfall. The appellant conveyed the lands to Alaska Pine in fee simple but reserved to itself the right to cut and remove all the merchantable timber standing, lying or being upon the said lands. Prior to the end of the appellant's taxation year on September 30, 1957, it removed all this timber.

It is agreed that the net proceeds from the sale of the land to Alaska Pine amounted to $22,620. In his notice of re-assessment the respondent added this amount to the appellant's income for 1957 by an item worded as follows:

> Reduction of Capital Cost Allowance claimed in 1957 on Blocks 871, 891, 1035 and 1069, and a partial recovery of Capital Cost Allowance on blocks previously shown as depleted. Sold March 4, 1957, for $22,620.00.

The appellant served a notice of objection to the re-assessment. As to this item the objection was rejected by the Minister who stated in his notification that the re-assessment in respect of this item was made in accordance with the provisions of the *Income Tax Act* and in particular:

> on the ground that the proceeds of disposition of depreciable property sold to Alaska Pine Company Limited pursuant to an Agreement dated 4th March, 1957 was $22,620.00 in accordance with the provisions of paragraphs (*a*) and (*c*) of sub-section (5) of section 20 of the Act and therefore for the purpose of paragraph (2) of subsection (1) of section 11 of the Act and paragraph (*e*) of sub-section (1) of section 1100 of the Income Tax Regulations the undepreciated capital cost of the taxpayer's timber limits and rights to cut timber has been properly determined.

The appellant served a notice of appeal to the Tax Appeal Board. Paragraph 10 of the reply to this notice reads as follows:

> The Respondent pleads and relies upon the provisions of sections 11(1)(*a*) and 20(5) of the Income Tax Act and sections 1100(1)(*e*), 1101(3) and 1105 and Schedule C of the Income Tax Regulations.

There is no dispute as to amounts or as to the material facts. The question is whether or not on the true construction of the applicable sections of the *Income Tax Act* and Regulations this addition of $22,620 to the income of the appellant was properly made.

In the reasons of the Tax Appeal Board it is said:

> Even if I were to accept a definition of a timber limit as including not only the timber but also the land, nevertheless it is my conviction that land is not depreciable property and that the proceeds from the sale of the land cannot be brought into income for the purposes of taxation under the provisions of s. 20 of the Act or any of the Income Tax Regulations.

The reasons conclude as follows:

> In any event, I have reached the conclusion that the respondent erred in the assessment appealed against in attempting to tax the proceeds from the sale of land as being applicable to the disposition of *depreciable property*, when, on the evidence before me, there was no depreciable property whatsoever involved in the sale by the appellant to Alaska Pine Company Limited.

Dumoulin J. was of opinion that the lands acquired by the appellant in fee simple and disposed of by it to Alaska Pine were "timber limits" within the meaning of Schedule C of the Income Tax Regulations and "depreciable property" in respect of which the appellant had been allowed a deduction under regulations made under s. 11(1)(*a*) of the *Income Tax Act*.

It is common ground that the blocks of land with the merchantable timber standing on them were acquired by the appellant as capital assets. It was pointed out by Locke J. in *Caine Lumber Co. Ltd. v. Minister of National Revenue*[1], that:

> The provisions of s. 11 of the Act and of the Regulations are required in order to afford a means of properly ascertaining the trading profit of persons engaged in such businesses as mining and lumbering, where capital assets are depleted by the operations.

[1] [1959] S.C.R. 556 at 559, [1959] C.T.C. 221, 59 D.T.C. 1123, 18 D.L.R. (2d) 593.

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The sections of the Act and Regulations with which we are chiefly concerned are:

Section 11(1) (*a*) and (*b*):

11 (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:

(*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;

(*b*) such amount as an allowance in respect of an oil or gas well, mine or timber limit, if any, as is allowed to the taxpayer by regulation;

Section 12 (1) (*b*):

12 (1) In computing income, no deduction shall be made in respect of

* * *

(*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,

Section 20 (1):

20 (1) Where depreciable property of a taxpayer of a prescribed class has, in a taxation year, been disposed of and the proceeds of disposition exceed the undepreciated capital cost to him of depreciable property of that class immediately before the disposition, the lesser of

(*a*) the amount of the excess, or

(*b*) the amount that the excess would be if the property had been disposed of for the capital cost thereof to the taxpayer,

shall be included in computing his income for the year.

Section 20 (5), so far as relevant reads:

(5) In this section and regulations made under paragraph (*a*) of subsection (1) of section 11,

(*a*) 'depreciable property of a taxpayer' as of any time in a taxation year means property in respect of which the taxpayer has been allowed, or is entitled to, a deduction under regulations made under paragraph (*a*) of subsection (1) of section 11 in computing income for that or a previous taxation year;

(*b*) 'disposition of property' includes any transaction or event entitling a taxpayer to proceeds of disposition of property;

(*c*) 'proceeds of disposition' of property include

(i) the sale price of property that has been sold, . . .

(clauses (ii), (iii) and (iv) are not applicable.)

(*d*) 'total depreciation allowed to a taxpayer' before any time for property of a prescribed class means the aggregate of all amounts allowed to the taxpayer in respect of property of that class under regulations made under paragraph (*a*) of subsection (1) of section 11 in computing income for taxation years before that time; and

(*e*) 'undepreciated capital cost to a taxpayer of depreciable property' of a prescribed class as of any time means the capital cost to the taxpayer of depreciable property of that class acquired before that time minus the aggregate of

(i) the total depreciation allowed to the taxpayer for property of that class before that time,

(ii) for each disposition before that time of property of the taxpayer of that class, the least of

(A) the proceeds of disposition thereof,

(B) the capital cost to him thereof, or

(C) the undepreciated capital cost to him of property of that class immediately before the disposition, and

(iii) each amount by which the undepreciated capital cost to the taxpayer of depreciable property of that class as of the end of a previous year was reduced by virtue of subsection (2).

Regulations, Section 1100(1)(*e*):

1100(1) Under paragraph (*a*) of subsection (1) of section 11 of the Act, there is hereby allowed to a taxpayer, in computing his income from a business or property, as the case may be, deductions for each taxation year equal to . . .

(*e*) such amount as he may claim not exceeding the amount calculated in accordance with Schedule C in respect of the capital cost to him of a timber limit or a right to cut timber from a limit;

Regulations, Section 1100(2):

(2) Where a taxpayer has, in a taxation year, otherwise than on death, disposed of all property of a prescribed class that he had not previously disposed of and has no property of that class at the end of the taxation year, he is hereby allowed a deduction for the year equal to the amount that would otherwise be the undepreciated capital cost to the taxpayer of property of that class at the expiration of the taxation year.

Regulations, Section 1101(3)(*a*) and (*b*):

(3) For the purpose of this Part and for the purpose of Schedules C and D,

(*a*) a timber limit or a right to cut timber from a limit shall be deemed to be a separate class of property, and

(*b*) where a taxpayer has more than one timber limit or rights to cut timber from more than one limit, each limit or right shall be deemed to be a separate class of property.

Schedule C reads as follows:

Schedule C

1. For the purpose of paragraph (*e*) of subsection (1) of section 1100, the amount that may be deducted in computing the income of a taxpayer for a taxation year in respect of a timber limit or a right to cut timber from a limit is the lesser of

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(a) an amount computed on the basis of a rate (computed under section 2 of this Schedule) per cord or board foot cut in the year, or

(b) the undepreciated capital cost to the taxpayer as of the end of the year (before making any deduction under section 1100 for the year) of the timber or right.

2. The rate for a taxation year is

(a) if the taxpayer has not been granted an allowance in respect of the limit or right for a previous year, an amount determined by dividing the capital cost of the limit or right to the taxpayer minus the residual value by the quantity of timber in the limit or the quantity of timber the taxpayer has obtained a right to cut, as the case may be (expressed in cords or board feet) as shown by a bona fide cruise, and

(b) if the taxpayer has been granted an allowance in respect of the limit or right in a previous year,

(i) if no rate has been determined under subparagraph (ii), the rate employed to determine the allowance for the most recent year for which an allowance was granted, and

(ii) where it has been established that the quantity of timber that was in the limit or that the taxpayer had a right to cut was in fact substantially different from the quantity that was employed in determining the rate for the previous year, or where it has been established that the capital cost of the limit or right was substantially different from the amount that was employed in determining the rate for the previous year, a rate determined by dividing the undepreciated capital cost to the taxpayer of the limit or right as of the commencement of the year minus the residual value thereof by the estimated remaining quantity of timber that is in the limit or that the taxpayer has a right to cut, as the case may be (expressed in cords or board feet) at the commencement of the year.

3. In lieu of the deduction otherwise determined under this Schedule, a taxpayer may elect that the deduction for a taxation year be the lesser of

(a) $100, or

(b) the amount received by him in the taxation year from the sale of timber.

4. In this Schedule, 'residual value' means the estimated value of the property if the merchantable timber were removed.

While in view of these somewhat complex statutory provisions it may seem an over-simplification, it appears to me that the result of this appeal depends upon whether the sum of $22,620 received by the appellant in its 1957 taxation year for the lands from which the merchantable timber had been removed was the proceeds of a disposition of depreciable property of the appellant within the meaning of the provisions quoted above.

In order to be brought within the terms of Regulation 1100(1)(*e*) and Schedule C the lands with which we are concerned must answer one or other of the descriptions "a timber limit" or "a right to cut timber from a limit". I think it plain that when those lands were acquired by the appellant they were properly described as "timber limits" both in ordinary popular language and in the sense in which those words are used in the statutory provisions. In my opinion, the phrase "timer limits" describes a parcel of land with merchantable timber standing upon it. It refers, that is to say, to a corporeal hereditament. The phrase "a timber limit" is used in Regulation 1100 (i) (*e*), Regulation 1101(3)(*a*) and (*b*), and Schedule C in contradistinction to the phrase "a right to cut timber from a limit", which is one apt to describe a profit à prendre.

A timber limit under the scheme of the relevant sections of the Act and Regulations is treated as a class of depreciable property; it is an asset the total capital cost of which the owner is entitled to deduct in calculating his taxable income. Without these statutory provisions the owner would have no right to make such deductions from income. The right to make the deductions is subject to the obligation, if he disposes of the asset, to add to his income the proceeds of that disposition to the extent that such proceeds do not exceed the capital cost to him. I am unable to accept the view that when all the merchantable timber had been removed the land which remained ceased to be a timber limit, and, in my opinion, the proceeds of the disposition of that land fall within the terms of s. 20(1) of the *Income Tax Act* and of Regulation 1100(2).

The answer to the question what tax is payable in any given circumstances depends, of course, upon the words of the legislation imposing it. Where the meaning of those words is difficult to ascertain it may be of assistance to consider which of two constructions contended for brings about a result which conforms to the apparent scheme of the legislation. In the present case the appellant purchased the land in question as a captial asset to secure a supply of timber to be used in earning its income. The scheme of the legislation is to allow the taxpayer to deduct the whole of

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the net cost of such capital asset in arriving at its trading profit. The judgment of the Exchequer Court in this case brings about this result. If, on the other hand, the contention of the appellant was upheld the result would be that it would have been permitted to deduct the total original cost of the capital asset although it had already recovered $22,620 of that cost.

For the reasons stated above and for those given by Dumoulin J., with which I am in substantial agreement, I would dismiss the appeal with costs.

RITCHIE J. (*dissenting*):—I have had the advantage of reading the reasons for judgment of my brother Cartwright which are concurred in by the other members of the Court and in which he has outlined the circumstances giving rise to this appeal and has reproduced the relevant provisions of the *Income Tax Act* and regulations.

The following facts appear to me to be undisputed:

1. The capital cost to the appellant of the timber limits in question was determined exclusively by reference to the extent and quality of the standing timber and no value whatever was assigned to the land.
2. "The undepreciated capital cost" of the property so acquired immediately before March 4, 1957, was $49,379.90.
3. On March 4, 1957, the land excluding timber was sold by the appellant to Alaska Pine and Cellulose Company Limited for a net return of $22,620.
4. In computing its income for the 1957 taxation year, the appellant deducted $45,411.42 as a capital cost allowance in respect of the timber cut from the limits during that year.
5. By notice of reassessment dated January 3, 1960, the Minister of National Revenue reassessed the capital cost allowance so claimed by subtracting therefrom the proceeds of the disposition of the land (*i.e.* $22,620) thus leaving the maximum amount deductible by way of capital cost allowance at a figure of $26,759.30 instead of $49,379.90.

6. The timber limits in question were acquired by the appellant for the purpose of removing merchantable timber therefrom and were of no further use to it after the timber had been removed.

The question to be determined on this appeal is whether, in computing his taxable income for a taxation year, a taxpayer who owns a timber limit is required to deduct the sale price of land exclusive of timber from the "undepreciated capital cost" of the limit at the date of sale and this in turn depends, as Mr. Justice Cartwright has pointed out, upon whether such a sale constitutes "a disposition of depreciable property" within the meaning of these words as they are used in the *Income Tax Act*.

For greater clarity, and notwithstanding the fact that the subsections have been reproduced by my brother Cartwright, I think it desirable to set out the portions of the *Income Tax Act* which define "depreciable property of a taxpayer" and "undepreciated capital cost to a taxpayer of depreciable property".

20. (5) In this section and regulations made under paragraph (*a*) of subsection (1) of section 11,

(*a*) 'depreciable property of a taxpayer' as of any time in a taxation year means property in respect of which the taxpayer has been allowed or is entitled to, a deduction under regulations made under paragraph (*a*) of subsection (1) of section 11 in computing income for that or a previous taxation year; . . .

(*e*) 'undepreciated capital cost to a taxpayer of depreciable property' of a prescribed class of any time means the capital cost to the taxpayer of depreciable property of that class acquired before that time minus the aggregate of

(i) the total depreciation allowed to the taxpayer for property of that class before that time,

(ii) for each disposition before that time of property of the taxpayer of that class, the least of

(A) the proceeds of disposition thereof,

(B) the capital cost to him thereof, of

(C) the undepreciated capital cost to him of property of that class immediately before the disposition and

(iii) each amount by which the undepreciated capital cost to the taxpayer of depreciable property of that class as of the end of a previous year was reduced by virtue of subsection (2).

In determining the "undepreciated capital cost to a taxpayer of depreciable property" the taxpayer can only be

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required to subtract from the capital cost of the property such items as are specified in s. 20(5)(*e*) and it is clear from the terms of his confirmation of the present reassessment that the Minister has treated the sale price of the land, excluding timber, sold by the appellant on March 4, 1957, as being "the proceeds of disposition" of "depreciable property of a prescribed class" within the meaning of s. 20(1) and s. 20(5)(*e*)(ii)(A).

The "prescribed class" of depreciable property here in question is a "timber limit" and the property of that class "in respect of which the taxpayer . . . is entitled to a deduction . . ." is prescribed by the provisions of Schedule C 1, so that it is a matter of first importance to determine the meaning to be attached to the phrase "timber limit" as it occurs in that Schedule. There does not appear to me to be any difficulty about the meaning of the word "limit" and I take it to be plain that the phrase means the "timber within defined limits or boundaries". The question which remains to be determined, however, is what meaning Parliament intended to be attached to the word "timber" in the context. The provisions of Schedule C 1 read as follows:

Schedule C

(1) For the purpose of paragraph (*e*) of subsection (1) of section 1100, the amount that may be deducted in computing the income of a taxpayer for a taxation year in respect of a timber limit or a right to cut timber from a limit is the lesser of

(*a*) an amount computed on the basis of a rate (computed under section 2 of this Schedule) per cord or board foot cut in the year, or

(*b*) the undepreciated capital cost to the taxpayer as of the end of the year (before making any deduction under section 1100 for the year) of the timber or right.

At common law in the consideration of deeds and other documents of title "timber" is generally treated as connoting growing trees which are a part of the realty and pass with a conveyance of land unless expressly reserved. In this sense the word is defined in the Shorter Oxford English Dictionary as meaning "trees growing upon land and form-

ing part of the freehold inheritance" but growing trees are potentially severable from the land and when severed and reduced to logs and lumber they become personal property and have a value as "merchantable timber" altogether apart from the land and the Oxford English Dictionary also defines "timber" as being "applied to the wood of growing trees capable of being used for structural purposes hence collectively to the trees themselves."

It appears to me that the word "timber" as used in the phrase "timber limit" in Schedule C 1 is to be taken as meaning the kind of "timber" which is made the subject of the deduction allowed by that Schedule and in this regard it is significant that the deduction is not to be computed on the basis of timber as part of the *corporeal hereditament* but rather "on the basis of a rate per cord or board foot cut in the year" in which sense it seems to me that it must refer to the timber in growing trees capable of being severed from the land and being reduced to "cord or board foot" measure and not to growing trees together with the land on which they grow. In this sense the man who has a "right to cut timber from a limit" and the man who has acquired the land itself for the purpose of removing timber from it and has no further use for it have both acquired the same class of property, namely, "the wood in the growing trees" and with the greatest respect for those who hold a different view, I read regulation 1101(3) as reinforcing this view. The regulation reads:

1101.

(3) For the purpose of this Part and for the purpose of Schedules C and D,

(*a*) a timber limit or a right to cut timber from a limit shall be deemed to be a separate class of property, and . . .

Unlike the other members of the Court, I take this to mean that for the purpose of Schedule C "a timber limit" or "a right to cut timber from a limit" are to be deemed to belong to the *same* separate class of property and that they belong to a class in which capital cost allowance is limited

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to the value of the timber which is cut during a taxation year and in which the land on which the timber stands is not included. For these reasons I have concluded that the phrase "timber limit" as used in Schedule C 1 to connote the property in respect of which the taxpayer is entitled to a deduction means "merchantable timber within defined limits", and I am accordingly of opinion that land stripped of timber is not "property in respect of which a taxpayer has been allowed or is entitled to a deduction under regulations made under para. *(a)* of ss. (1) of s. 11 . . ." and is therefore not "depreciable property of a taxpayer" within the meaning of s. 20 (5) (*a*). It follows in my view that the proceeds of disposition of the land here in question were not proceeds of disposition of depreciable property within the meaning of s. 20(5)(*e*) or s. 20(1) and that the land was not property "of a prescribed class" within the meaning of 1100(2).

Having reached this conclusion, I am unable to find any authority in the *Income Tax Act* to justify the Minister in taking the proceeds of the sale of this land into consideration in determining the undepreciated capital cost of the timber limit in question for the purpose of computing the taxpayer's taxable income for the year 1957.

For these reasons I would allow this appeal and restore the judgment of the Tax Appeal Board.

I appreciate that, as pointed out by my brother Cartwright, the result of this decision is that the taxpayer would be allowed to deduct the total original cost of the timber limit notwithstanding the fact that it had sold the land on which the timber stood for $22,620. Unlike the other members of the Court, I do not regard this as a result which runs contrary to the expressed intention of Parliament but I am, on the other hand, of opinion that it would require an amendment to the statute in order to include land stripped of timber in the prescribed class of depreciable property for which provision is made in Schedule C 1.

The fact that the appellant had made an unexpected sale of cut-over barren lands which it was prepared to abandon is, in my opinion, a circumstance of a kind sometimes referred to in this context as a "windfall" and, with great respect for those who hold a different view, it appears to me to fall clear of what Mr. Justice Dumoulin has referred to as the "rather intricate statutory skein" presently supplied by those provisions of the *Income Tax Act* which are fully set out in the reasons for judgment of my brother Cartwright.

Appeal dismissed with costs, RITCHIE J. *dissenting.*

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