1949

*June 6, 7
*Dec. 5

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

AND

T. E. McCOOL LIMITED ..... RESPONDENT,

AND

T. E. McCOOL LIMITED ..... APPELLANT,

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income Tax—Timber Limits—Claim for Depletion—Discretion of Minister must be based on sufficient facts—Interest on unpaid purchase price not interest on borrowed capital—The Income War Tax Act, R.S.C., 1927, c. 97, ss. 5 (1) (a) (b), 6 (a) (b), 65—The Exchequer Court Act, R.S.C., 1927, c. 34, s. 36.

The *Income War Tax Act*, s. 5 (1) (*a*) provides that the Minister of National Revenue in determining the income derived from timber limits may make such allowance for their exhaustion as he may deem just and fair. Section 5 (1) (*b*) provides that there may be deducted from income such reasonable rate of interest on borrowed capital used in the business to earn the income as the Minister in his discretion may allow.

*PRESENT: Kerwin, Rand, Kellock, Estey and Locke JJ.

The respondent company acquired certain timber limits and other assets from T. E. McCool under an agreement by which it assumed McCool's liabilities and gave him or his nominees, members of his family, all its issued stock, 600 shares, and its demand note for $123,097 bearing interest at five per cent. The agreement assigned no specific value to the timber limits, which McCool had bought for $35,000, but the company in filing its income tax return, claimed depletion on the basis of a valuation of $150,000, which it alleged was the price it paid for them and was less than their market value. It also claimed as a deduction the interest paid on the demand note.

The Minister ruled that the limits be valued for the purposes of the Act at the cost price to McCool and that the depletion allowable be based on that figure, and that interest be not allowed on the note in arriving at the taxable profit.

Held: (Locke J. dissenting) that the Minister having decided that an allowance for depletion should be made, there was an insufficiency of evidence before him upon which he could in the exercise of his discretion determine the amount thereof and therefore the matter should be referred back to him.

Per: Locke J., dissenting, the Minister having decided that an allowance for depletion should be made on the basis of value there was evidence before him upon which he might properly find the fair value as being $35,000. The onus was on the taxpayer to show that the Minister had been influenced by irrelevant considerations or had otherwise acted in an arbitrary or illegal manner justifying the intervention of the Court and this had not been done.

Per: Locke J. Evidence of value not having been placed in issue on the pleadings, was inadmissible. *The Exchequer Court Act*, s. 46. *Johnson* v. *Minister of National Revenue*, [1948] S.C.R., 486, applied.

Held: also, that the interest paid on the demand note was not "interest on borrowed capital used in the business to earn income" within the meaning of s. 5(1) (*b*).

APPEAL by the Crown from the judgment of the Exchequer Court, Cameron J., (1) whereby an assessment affirmed by the Minister of National Revenue relating to the amount allowable for depletion of timber limits was set aside and referred back to the Minister for adjustment, and a cross-appeal by the taxpayer from that part of the judgment which disallowed its claim for interest allowance.

F. P. Varcoe K.C. and *T. Z. Boles* for the appellant.

Lee A. Kelley K.C. and *W. R. Meredith* for the respondent.

(1) [1948] Ex. C.R. 548.

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Rand J.

The judgment of Kerwin and Rand, JJ. was delivered by:—

RAND J.:—Cameron J. (1) has found the refusal of the Minister to accept the depletion allowance claimed to have been based on two grounds: that there was in fact no change of ownership of the assets; and that they had been set up in the books of the company at an appreciated value. I regret to be unable to agree with this conclusion. What the communication from the Minister, exhibit No. 2, "that the timber limits will be valued for the purposes of the Income War Tax Act" conveys to me is the intention to allow depletion on the basis of market value. To arrive at that, the Department took the nearest free transaction, the purchase by McCool from Miss Booth for $35,000, to be the most dependable fact presented. The pleadings raised the issue, not of value, but cost to the company, and evidence was adduced before Cameron J. which satisfied him that the limits, at the time of purchase, were worth between $150,000 and $200,000. Strictly that was not the fact to be found, although relevant to it; the distinction between value and cost seems to have been lost sight of. If the new matter from independent sources had been available to the Minister, it must have affected somewhat his finding of value: and assuming it to have been found by the Court that the real cost to the company was $150,000, a further fact appeared which has not been taken into account by the Minister. The Crown objected to the evidence of value but under the misconception that the right to depletion and its amount were in the uncontrolled discretion of the Minister; and it was intimated that if such a view was wrong, the matter should be returned to the Minister for further consideration of value. But as the Minister had decided for the allowance and on the basis of value, the only issue should have been that of amount. This simple situation was complicated originally by the failure of the company to bring or at least to offer to bring forward the evidence later presented, and at the trial both by the pleading and by the erroneous view of discretion. In substance, it is a case in which the Minister, in ascertaining a basic fact, has been misled by the insufficient proof offered, a proof which in the circum-

(1) [1948] Ex. C.R. 548.

stances it was on the company to furnish. In addition to the fact that the judgment purports to direct the Minister to award an allowance on the basis of cost to the company as distinguished from value, decided upon by the Minister, if what is now disclosed had been considered, can it be said that the Minister must have found the amount of $150,000 to be the value or that he must then have proceeded on the same basis of allowance? The Minister is entitled to determine the sum to be allowed on the whole of the material factors and are not the new matters adduced by the company, and the striking difference indicated between value and original cost, such factors?

I do not find it necessary to decide that question because another new fact has been introduced. McCool advised the Commissioner that the quantity of timber on the limits was twenty million feet. It now appears that it is at least twenty-five million and may run more. This is obviously relevant to the allowance for the year in question on any basis, but it has never been considered by the Minister.

The case of *Minister of National Revenue* v. *Wrights Canadian Ropes Ld.* (1) was interpreted to justify the order made, but the cases are distinguishable. There the Minister proposed under section 6(2) to exercise a discretion in reducing the amount of an admitted outlay as an expense against revenue. Only on proper and sufficient grounds could that be done, which the Court, on the matter before it, found not to be present. But the issue raised and fought out, and on which the Minister was content to stand or fall, was the sufficiency of the facts before him for the ruling he made: and it was held that he was bound by the finding of the Court.

Here there was no such clear cut issue brought to the Court: the parties were to some degree at cross purposes. And in view of the issue raised, the evidence presented, the finding made, and the error in the total quantity of timber, there were facts disclosed which through the failure of the company were not before the Minister and which I think he is entitled to consider: but in finding a basic fact the Minister must, of course, act judicially on the evidence before him.

(1) [1947] A.C. 109.

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Rand J.

The respondent has cross-appealed on the refusal to allow as an expense the payment of interest on that part of the consideration to McCool given by the company for the assets transferred which consisted of a promise to pay money. It is, I think, misleading to convert a transaction of this sort into what is considered to be its equivalent and then to attribute to it special incidents that belong to the latter. Whether, if the company had raised money by issuing bonds, with which McCool had been paid off, the interest on them could be deducted as an expense I do not stop to consider; that is not what we have before us. There was no borrowing and lending of money and no use of money for which interest would be the compensation. What the vendor did was to sell his property, for the consideration, in addition to the shares, of a price plus interest; that interest is part of the capital cost to the company.

The item is clearly within section 6(*a*) which prohibits deduction of "disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"; as a capital payment, it comes within the ban of section 6(*b*); and treated as interest, it is not within section 5(1) (*b*) which allows interest on "borrowed capital used in the business to earn the income": *Inland Revenue Commissioners* v. *Rowntree, Co. Ltd.* (1).

I would, therefore, allow the appeal, dismiss the cross-appeal, and refer the matter back to the Minister to take such action in relation to an allowance for depletion as the facts disclosed or the further facts that may be disclosed may call for. There should be no costs in either court.

KELLOCK J.:—The facts are sufficiently stated by the learned trial judge and need not be here repeated. In the first appeal the question is as to depletion allowance for the period ending August 31, 1942, in respect of the "Booth" limit.

It is contended on behalf of the Crown that the Minister properly exercised his discretion under section 5(1) (*a*) of the *Income War Tax Act* on the material before him and

(1) [1948] 1 All E.R. 482.

allowed depletion on the "basis of value as shown by the only real evidence of value before him, namely, the price paid by McCool for the limit"; that the Minister did not accept the transaction between McCool and the company as determining the value; and that the Minister was entitled to proceed on this view. It is said that the learned trial judge erred in concluding that the Minister had based his decision on the ground that there had been no actual change of ownership of the assets under the transaction between McCool and the company, and erred further, in concluding that the Minister had based his decision on the ground that the limit had been set up in the books of the company at an appreciated value. The Crown also complains that the trial judge erred in having regard to evidence which was not before the Minister.

At the time the Minister made his decision under section 59 of the *Income War Tax Act,* by the terms of which he has the obligation, upon receipt of the taxpayer's notice of appeal, to "duly consider the same and affirm or amend the assessment appealed against", he had before him:

(*a*) the option agreement of March 27, 1940;
(*b*) the agreement between McCool and Ryan of August 31, 1940;
(*c*) a balance sheet purporting to be the closing balance sheet as of August 31, 1940, of T. E. McCool;
(*d*) the opening balance sheet of the respondent company as of August 31, 1940;
(*e*) the income tax return in question;
(*f*) an assessor's report showing that the company had issued 600 of its 1,000 authorized shares of which 360 had been issued to McCool personally, and the remaining 240 on his direction to members of his family and that on a value of $24,000 a gift tax of $1,000 had been paid in respect of these 240 shares.

It is important to see what was the issue, first, while the matter was before the Minister, and second, in the Exchequer Court.

In its Notice of Appeal to the Minister, the appellant included in its statement of facts the statement that the

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timber limits were transferred to it "on a valuation of $150,000", and in its reasons for appeal it claimed that it should be allowed—

> Depletion on the basis of a *valuation* of $150,000 and not $35,000, the sum of $150,000 being *the price* paid by it for the said limits when purchased from Mr. McCool and *being less than the actual market value* of the said limits at the date of acquisition by the Appellant.

It also claimed that the Minister erred in his interpretation of the Act and had not used a proper, fair and just discretion "in valuing the said limits for the purpose of depletion at the cost price to Mr. McCool of $35,000 and the said assessment is accordingly made on an improper basis".

The language last quoted has reference to a letter to the appellant from the Inspector of Income Tax which accompanied the Assessment Notice and stated that:

> It has been ruled by the Deputy Minister of National Revenue (Taxation) that the timber limits will be valued for the purpose of the Income War Tax Act and the Excess Profits Tax Act at the cost price to T. E. McCool of $35,000 * * *

In the decision in writing of the Minister upon the appeal from this assessment, the assessment was affirmed "on the ground that a just and fair allowance has been made under the provisions of paragraph (*a*) of subsection 1 of Section 5 of the *Income War Tax Act,* of the amount of $10,445.94 in respect of depletion of a timber limit".

It will be seen that the Minister does not state the ground of his decision. It is not stated that the Minister had concluded, (*a*) that on the evidence before him the value of the limits when acquired by the appellant was $35,000 rather than $150,000, nor (*b*), that the cost to the appellant was not $150,000, nor (*c*), whether it was cost to the taxpayer or market value, if there were a difference, which was the proper figure to be taken and which he had taken in arriving at his decision.

When the matter reached the Exchequer Court counsel for the Minister put the matter thus:

> I think perhaps my learned friend has in mind calling certain expert evidence as to the value of the timber limits, and as to that I would like to say this: the respondent takes the position that under the applicable section of the *Income War Tax Act,* which is 5(1) (*a*), it is entirely a matter of discretion with the Minister whether or not he shall allow depletion on timber limits * * * If the respondent is right in that, then of course the question of value would be of little moment.

That was to say that the amount of any allowance for depletion was a matter exclusively for the Minister and the question of value did not enter. Counsel went on to say further:

> But if your Lordship should decide that the respondent is wrong in that, I would submit that then your Lordship ought to remit the case back to the Minister in order that he might exercise his discretion according to proper principles; and then it would be for the Minister to make inquiries as to the value of the timber limits. The department, rightly or wrongly, was not prepared in advance of this trial to send people out to cruise limits in order that it might meet any evidence of this kind to be given by the appellant * * *
>
> His Lordship: Are you objecting to any evidence which has to do with the actual value of the limit?
>
> Mr. Macdonald: Yes, my Lord. The exhibits already filed show that the appellant claimed that the value was $150,000, and I submit that with them in front of us we perhaps have enough on which to go and do not need to listen to a lot of evidence as to cruising the limit.

If this correctly reflects the basis of the decision of the Minister upon the appeal from the assessment, it establishes, in my opinion, that the Minister made his decision on the theory that any amount which he allowed could not be questioned by the taxpayer. At the trial his counsel took the position that if the Minister were wrong and, having determined to make an allowance for depletion, should have done so on the basis of the value of the limits, the matter must go back to him for that purpose.

In his examination for discovery Mr. Williams was referred to the recommendation of the Timber Committee, which reads as follows:

> That the depletion allowance be such as to permit the owner of timber or the holder of a right to cut timber from Crown or private lands to recover successively and rateably out of income before tax such capital sums as he may have invested in acquiring such ownership or rights, and no more.

On being asked whether or not this recommendation had been adopted by the Department, he replied in the affirmative and said:

> Q. On the basis of the adoption of that recommendation, the department then set the value of the limit at $35,000?
>
> A. Yes.

If this be correct, the Minister must have taken the position that the investment of the appellant was only $35,000. This result could only be arrived at by identifying the appellant company with Mr. McCool personally.

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In *Johnston* v. *Minister of National Revenue*, (1), Rand J. said at 489:

> Notwithstanding that it is spoken of in section 63(2) as an action ready for trial or hearing, the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted. For that purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, but the onus was his to demolish the basic fact on which the taxation rested.

In its statement of claim the appellant set out the facts, including an allegation that the limits had been acquired by it at a cost of $150,000 and alleged that it was that amount which was the proper basis on which depletion should be allowed. The appellant complained that the assessment was improper in that the Minister erred in "using the sum of $35,000 as the basis for allowing depletion and in not properly interpreting section 5, subsection (1), paragraph (*a*), of the said *Act* with respect to depletion on the ground, among others, that the Appellant on the basis of the Minister's discretion would never recover its capital investment through depletion allowance".

In his defence the Minister merely affirmed that he had properly allowed the amount of $10,445.94 in respect of depletion and that by making the said allowance he had exercised, according to the proper legal principles, the discretionary power vested in him under the subsection.

In these circumstances I do not think that whatever might have been the situation otherwise, it can be argued on behalf of the Crown, as Mr. Varcoe does, that "the Minister decided to allow depletion on the basis of value as shown by the only real evidence of value before him, namely, the price paid by McCool for the limit", or that "he did not accept the transaction between McCool and the Company as determining the value". Neither in his formal decision nor in his statement of defence, does it appear that this is what happened and it is perfectly clear that counsel for the respondent at the trial did not so

(1) [1948] S.C.R. 486.

understand the matter. I think, therefore, that it has not been shown in this court on behalf of the appellant that the Minister's decision was arrived at in accordance with proper principles.

In *Fraser* v. *Minister of National Revenue* (1), the Judicial Committee held that the Minister has a double discretion under section 5(1) (*a*) of the *Income War Tax Act*, first, to determine whether the case is one for an allowance, and second, if so, to determine how much shall be allowed. With respect to the opening words of section 5, namely:

> Income * * * shall for the purposes of this Act be subject to the following exemptions and deductions.

their Lordships held that these words merely "require the Minister to make a deduction under head (*a*) if he has decided that the case is one for a deduction". Their Lordships intimated that in exercising his discretion as to whether he should or should not make an allowance, the Minister must proceed on "just, reasonable and admissible grounds". The view of the Minister in the *Fraser* case was, in their Lordships' opinion, "an intelligible view which was both tenable and admissible, and in adopting it the Minister cannot be said to have transgressed the bounds of his discretion so as to justify any interference with his decision".

Their Lordships went on to say:

> The criteria by which the exercise of a statutory discretion must be judged have been defined in many authoritative cases, and it is well settled that if the discretion has been exercised bona fide, uninfluenced by irrelevant considerations and not arbitrarily or illegally, no court is entitled to interfere even if the court, had the discretion been theirs, might have exercised it otherwise.

In the instant case the Minister did determine that the case was one for an allowance. The question in the present appeal is therefore whether, in exercising the second branch of the statutory discretion, the Minister proceeded in accordance with the principles above laid down. As I have already said, I do not think that has been shown.

It is no doubt a prevalent practice for promoters to acquire assets with a view to turning them over to an incorporated company called into being at their instance, at a figure involving a handsome profit which may or may not have any relation to actual value, but in my opinion

(1) [1949] A.C. 24.

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there is no presumption that such is invariably the case. It seems to me that the Minister acted on some such view without any evidence to support it, such evidence as there was, being to the contrary, or else he must have disregarded the separate legal existence of the company.

On the pleadings the respondent claimed that its investment of $150,000 in the limits was the amount upon which depletion allowance should be based. The appellant denied this and did not raise any other issue, at the trial taking the stand, not that cost was improper and value or some other basis correct, but that the amount allowed could not be questioned. Cost was not necessarily the basis which the Minister was bound to apply. On the other hand the stand taken by the Minister could not be supported. I therefore think that the matter must be referred back to the Minister on the basis however, that it has already been determined that an allowance for depletion should be made. This will permit the fact of there being 25,000,000 feet on the limits instead of the amount previously thought to exist, namely, 20,000,000 to be taken into consideration.

I would therefore allow the appeal to the extent mentioned. I think the respondent should have its cost in the court below, but that there should be no costs in this court.

In the second appeal the company claims that the interest paid on the note given to McCool for the balance of the purchase price of the assets acquired by the company should be allowed as an operating expense on the ground that the note represents borrowed capital used in the business to earn the income within the meaning of section 5(1) (*b*) of the statute. This claim was disallowed by the Minister and the company's appeal was dismissed by the learned trial judge, on the ground that in order to qualify under the statute the taxpayer would have to be in the position of a borrower and some other person would have to be a lender, while in fact there was no such relationship as between the company and McCool. I agree with the learned trial judge that the company cannot bring itself within the language used in section 5(1) (*b*). To employ the language of Viscount Finlay in *Commissioners of Inland Revenue* v. *Port of London Authority* (1), in

(1) [1923] A.C. 507 at 514.

order to enable the statute to apply, "there must be a real loan and a real borrowing". Here there is nothing more than unpaid purchase money secured by a promissory note which, in my opinion, is insufficient. It is not sufficient to say that if the company had borrowed the amount of the note and paid McCool it would have been entitled to the deduction. However that may be, that was not done and the statute does not apply. This appeal should also be dismissed.

ESTEY J.:—The respondent in filing its income tax returns for the taxation year ending August 31, 1942, claimed an allowance of $51,874.36 for the exhaustion of a timber limit, and interest on $123,097.34 at the rate of 5 per cent on and after the 1st day of September 1941. The allowance was reduced to $10,445.94 and the interest entirely disallowed by the officials of the Department of National Revenue. Their decision was affirmed by the Minister, but in the Exchequer Court varied with respect to the allowance and affirmed as to the disallowance of the interest. These items constitute the subject-matter of this appeal.

An allowance with respect to a timber limit is provided for in sec. 5(1) (*a*) of the *Income War Tax Act*, R.S.C. 1927, c. 97, and amendments thereto, the material part of which reads:

> 5. (1) "Income" as hereinbefore defined shall for the purpose of this Act be subject to the following exemptions and deductions:—
>
> (*a*) The Minister in determining the income derived from * * * timber limits may make such an allowance for the exhaustion of the * * * timber limits as he may deem just and fair * * *

This section was under review in *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue* (1), where Lord Macmillan states:

> He has a double discretion, first, to determine whether the case is one for an allowance, and second, if so, to determine how much shall be allowed. The Minister "may" not "shall" make an allowance. The language is permissive, not obligatory.

And further, at p. 36:

> The criteria by which the exercise of a statutory discretion must be judged have been defined in many authoritative cases, and it is well settled that if the discretion has been exercised bona fide, uninfluenced by irrelevant considerations and not arbitrarily or illegally, no court is entitled to interfere even if the court, had the discretion been theirs, might have exercised it otherwise.

(1) [1949] A.C. 24 at p. 32.

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The Department of National Revenue on February 10, 1942, adopted and published the recommendations of the Timber Depletion Committee of the Income Tax Division. The part of the recommendations material hereto reads as follows:

> That the depletion allowance be such as to permit the owner of timber or the holder of a right to cut timber from Crown or private lands to recover successively and ratably out of income before tax such capital sums as he may have invested in acquiring such ownership or rights, and no more.

Such a recommendation though not binding upon may be followed by the Minister but in either event it must be determined whether in a particular case he has exercised a judicial discretion. *Pioneer Laundry and Dry Cleaners Ld.* v. *Minister of National Revenue* (1).

The decision of the Minister made in the exercise of his discretion should be supported unless it is "manifestly against sound and fundamental principles": per Davis J. in *Pioneer Laundry & Dry Cleaners* v. *Minister of National Revenue* (2), and quoted with approval by Lord Thankerton in *Pioneer Laundry & Dry Cleaners* v. *Minister of National Revenue supra.*

It is apparent that in this case the Minister had decided that an allowance should be made and no question has been raised with respect to that portion of his decision. The ruling of the Deputy Minister clearly made under the terms of the foregoing recommendation and affirmed by the Minister reads in part:

> It has been ruled by the Deputy Minister of National Revenue (Taxation) that the timber limits will be valued for the purpose of the Income War Tax Act and the Excess Profits Tax Act at the cost price to T. E. McCool of $35,000, that the depletion allowable will be the result of dividing $35,000 by the total cruise and multiplying by the cut during the period * * *

In considering the appeal the Minister had before him the following facts: T. E. McCool purchased the timber limit from Gertrude E. Booth for $35,000 under an option agreement dated March 27, 1940, and carried it at that amount on his personal balance sheet as of August 31, 1940. A letter written by Crandall, who was engaged in lumber operations and was familiar with and interested in purchasing the timber limit, to T. E. McCool on September 27, 1940, intimated that his company would

(1) [1940] A.C. 127. (2) [1939] S.C.R. 1 at p. 5.

have paid a substantially higher price to have obtained it. The respondent was incorporated to take over the assets of T. E. McCool and did so under an agreement setting out a list of items not separately valued. The company in consideration of the transfer of the assets agreed (*a*) to assume and pay all debts and liabilities of T. E. McCool in the sum of $37,684.20, (*b*) cash in the sum of $400 to be used in the purchase of four organization shares, (*c*) allot and issue to T. E. McCool or his nominees 596 fully paid up and non-assessable shares of capital stock at a par value of $100, and (*d*) give to the vendor a demand note for the sum of $123,097.34 with interest at 5 per cent from and after the 1st day of September, 1941. It was also stated in the material before the Minister that the timber berth here in question was valued at $150,000, and that the respondent purchased it for "less than the actual market value of the said limits at the date of the acquisition," and that the respondent carried it in its balance sheet at $150,000. It was also disclosed that T. E. McCool was the largest shareholder in the company and the other shareholders were the members of his family.

At the trial in the Exchequer Court the validity of the discretion exercised by the Minister was in issue. No evidence was adduced on behalf of the Crown but the respondent read into the record the examination for discovery of Mr. Williams, Director General of the Corporation Assessments Branch of the Taxation Division, Department of National Revenue, in which Mr. Williams deposed that "an allowance for depletion is made in order to enable the total cost of the limits to be absorbed in the production," that the $35,000 was selected "because the department felt that that was the actual cost to the taxpayer." Further, that "they had seen an option agreement and copies of other agreements between the chief shareholder of the taxpayer and the original owner of the property in which he agreed to pay $35,000 for the limits." Mr. Williams did not know whether the department had any idea of the value of the limits and deposed that he "would consider that the company was McCool's company, that he would have control as to the price to be fixed on any assets that were purchased from himself, and consequently that that was not a transaction as between strangers," and that

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here the department which "usually looks at a transaction in regard to market value, if there is not a ready market * * * at the last transaction that took place for cash, at arm's length or as between strangers."

The foregoing evidence establishes that the Minister was following the recommendation in determining the "just and fair" allowance and therefore that it should be related to the possibility of eventually returning out of income the taxpayer's investment in the timber limit. That though on behalf of the respondent it was plainly stated that $150,000 was paid for this timber limit and that it was worth more, the Minister, without any knowledge of the value of the timber limit decided that "the cost price to T. E. McCool of $35,000" in a transaction between strangers should be accepted as the investment to the taxpayer in this timber limit.

An assumption that a sale between strangers discloses the cost to or the investment of a company formed to purchase the assets of the purchaser (in the sale between strangers), including the asset then purchased in which company the controlling shareholder is that purchaser and the other shareholders members of his family, may in some circumstances be justified. Not, however, in a case such as this where apart from the agreements there is a statement from an independent prospective purchaser to the effect that the timber limit was obtained by T. E. McCool at a bargain; where the agreements evidencing these sales were by the taxpayer placed before the Minister without any request on his behalf, as well as the statement intimating that the $35,000 was a bargain; and where throughout the record there is no suggestion of wrongdoing or fraud on the part of the taxpayer.

While these agreements disclosing such a difference in the purchase price would naturally raise in the mind of the Minister questions upon which in the exercise of his discretion he had to pass, they did not provide the relevant facts upon which that discretion ought to have been exercised. The statute contemplates that these important decisions ought not to be made without at least an endeavour to obtain all the relevant facts. That was no doubt one of the reasons why secs. 41-46 were included. Under these sections the Minister may demand additional

information of the character such as would be suggested in this case, more particularly because there is nothing to suggest that the further information relative to the figures, and particularly the value of the investment as eventually adduced at the trial, would not have been produced and possibly this litigation avoided.

It would therefore appear that the Minister in determining the said sum of $35,000 acted upon insufficient facts and therefore did not exercise a judicial discretion as that term is defined in the authorities. Lord Greene in *Minister of National Revenue* v. *Wrights' Canadian Ropes Ltd.* (1), stated at p. 123:

> The court is, in their Lordships' opinion, always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the court insufficient in law to support it, the determination cannot stand. In such a case the determination can only have been an arbitrary one.

See also *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue, supra,* and *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue, supra.*

I am therefore in agreement with the conclusion arrived at by the learned trial Judge that the Minister in exercising his discretion has acted upon a wrong principle.

The learned trial Judge having concluded that the Minister had exercised his judicial discretion upon a wrong principle, it would appear that the case should have been referred back to the Minister as the only party authorized under the statute to determine the "just and fair" allowance. The statute is explicit:

> 5. (1) * * *
> (*a*) The Minister * * * may make such an allowance * * * as he may deem just and fair * * *

The general language of sec. 66, conferring the exclusive jurisdiction upon the Exchequer Court, is circumscribed and limited by such phrases as "subject to the provisions of this Act * * *" and "determine all questions that may arise in connection with any assessment * * *". Apart from specific language to the contrary, it would appear that it still remains the duty of the Minister to determine under sec. 5(1) (*a*) the allowance that he may deem just and fair and a reference back to the Minister should have been directed for that purpose.

(1) [1947] A.C. 109.

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In the *Pioneer Laundry* Case, *supra,* the Minister acted upon irrelevant facts in determining under sec. 5(1) (*a*) a depreciation allowance of $255.08 as against the amount claimed by the taxpayer of $17,775.55. The Privy Council directed "that the assessment should be set aside and the matter referred back to the Minister."

The learned trial Judge followed the direction made by the Privy Council in *Wrights' Canadian Ropes* case, *supra.* That case, with respect, appears to be distinguishable. There the issue under sec. 6(2) was in respect to the disallowance of the major portions of three items of expense and was decided by the Privy Council upon a construction of certain documents. Lord Greene stated, at p. 124: "So far, therefore, as these documents are concerned their Lordships cannot find any material which could have justified any disallowance." That concluded the matter and therefore the Privy Council directed the case be remitted to the Minister "for an adjustment of the figures consequential on the allowance of the respondents' appeal." It is also significant that the *Pioneer Laundry* Case upon another point is referred to in the *Wrights' Canadian Ropes* judgment, but no suggestion that the order there directed was not appropriate to the circumstances of that case.

There would appear to be no difference in principle between a case in which the Minister proceeds upon irrelevant facts and where he proceeds upon insufficient facts and therefore under the authority of the *Pioneer Laundry* case the matter should be referred back to the Minister in order that he may determine a "just and fair" allowance within the meaning of sec. 5(1) (*a*).

The respondent in its appeal asks that interest on the demand promissory note of $123,097.34 be allowed under sec. 5(1) (*b*), the essential part of which reads as follows:

> 5. (1) "Income" as hereinbefore defined shall for the purpose of this Act be subject to the following exemptions and deductions:—
>
> * * *
>
> (*b*) Such reasonable rate of interest on borrowed capital used in the business to earn the income as the Minister in his discretion may allow * * *

Terms such as "borrowed capital", "borrowed money" in tax legislation have been interpreted to mean capital or money borrowed with a relationship of lender and borrower between the parties. *Inland Revenue Commissioners* v.

Port London Authority (1); *Inland Revenue Commissioners* v. *Rowntree & Co. Ltd.* (2); *Dupuis Frères Ltd.* v. *Minister of Customs and Excise* (3). It is necessary in determining whether that relationship exists to ascertain the true nature and character of the transaction. In this case the promissory note arises out of an exchange in which, as already detailed, the purchase price was paid by assuming outstanding obligations, a small payment of cash, allotment of captial stock and the execution and delivering of this promissory note. Under such circumstances it cannot be held that the relationship of lender and borrower in respect to this note exists between the respondent company and the payee of the note.

The appeal of the Minister of National Revenue should be allowed and the case remitted to the Minister to determine a just and fair allowance for depreciation. The appeal of T. E. McCool Limited should be dismissed. T. E. McCool Limited should have its costs in the Exchequer Court and no costs to either party in this Court.

LOCKE J.:—(dissenting in part): In the exercise of the powers vested in the Minister by subsec. (*a*) of sec. 5 of the *Income War Tax Act*, as amended by sec. 10 of cap. 34 of the Statutes of 1940, the respondent company was allowed an amount of $10,445.94 for depletion of timber limits acquired by it under the circumstances hereinafter stated. That subsection in so far as relevant provided that:—

> "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*a*) the Minister in determining the income derived from mining and oil and gas wells and timber limits may make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair.

The respondent appealed from the assessment claiming to be entitled to a larger amount by way of depletion and the assessment was affirmed by the Minister but, on appeal to the Exchequer Court, Cameron J. set aside the assessment and referred the matter back to the Minister for adjustment on the footing that the value of the timber was not less than $150,000 and that depletion should be based upon this figure rather than upon $35,000, the value as found by the Minister.

(1) [1923] A.C. 507.
(2) [1948] 1 All E.R. 482.
(3) [1927] Ex. C.R. 207.

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Under the subsection the Minister has a discretion first, to determine whether any allowance is to be made for the exhaustion or depletion of timber limits and, if he determines that such an allowance should be made, then secondly, as to the amount of the allowance. By a letter accompanying the notice of assessment which was for the taxation period between October 21, 1941, and August 31, 1942, the assessor informed the respondent, *inter alia*, that:

> It has been ruled by the Deputy Minister of National Revenue (Taxation) that the timber limits will be valued for the purpose of the Income War Tax Act and the Excess Profits Tax Act at the cost price to T. E. McCool of $35,000, that the depletion allowable will be the result of dividing $35,000 by the total cruise and multiplying by the cut during the period.

Having decided that an allowance for depletion should be made, the question to be determined is whether the Minister's discretion as to what was a just and fair allowance has been properly exercised. The facts properly to be considered in deciding this question are, in my opinion, few in number.

Thomas E. McCool had been engaged for a long period of years in the logging and lumber business and by an option agreement dated March 27, 1940, acquired the right to purchase the limits in question from Gertrude R. Booth within a stipulated time for the sum of $35,000. That option was exercised by McCool within the time limited and a payment of $10,000 made on account of the option price. Having acquired the limits, they were shown on the balance sheet of McCool's business dated as of August 31, 1940, valued at the sum of $35,000. He had apparently decided to incorporate a company to take over his business and to take shares in the proposed company for a portion of the purchase price and give part of these shares to various members of his family. For some reason which is not clear to me, he decided to enter into an agreement with Lawrence S. Ryan, a chartered accountant and who had apparently acted as his auditor, whereby he agreed to sell his assets to Ryan who was designated as trustee on behalf of a company to be formed under the name of T. E. McCool Ltd., consisting of the limits in question, certain other lands and timber limits, a hotel property, certain chattels and accounts receivable and shares of stock and the amount of his cash on hand, to

the proposed company in consideration of its assuming his business liabilities in an amount stated, issuing to him or his nominees 600 fully paid up shares of the par value of $100 each, and giving a demand note in the sum of $123,097.34. This agreement was also dated August 31, 1940, and it is to be noted that no part of the stipulated consideration was allocated to any of the assets agreed to be sold. The respondent company was not incorporated until some fourteen months thereafter when, by letters patent issued under the provisions of the *Dominion Companies Act* dated October 20, 1941, it came into being. Its organization meetings were held in the following month when a further agreement dated November 28, 1941, was made between McCool, Ryan and the new company whereby McCool, with Ryan's expressed consent, agreed to sell the assets referred to and an additional piece of land to the company for the consideration mentioned. Three hundred and sixty of the shares were directed to be issued to Thomas E. McCool and on his direction the remaining 240 shares were issued to his nominees, most of whom appear to have been members of his family, and the promissory note was delivered. Neither this agreement nor the minutes of the meetings of the company authorizing its execution allocate any portion of the agreed purchase price to the timber limits in question.

While the company did not commence to carry on business until October 21, 1941, Mr. Ryan prepared what he called a balance sheet of the company as of August 31, 1940, and this was produced and filed as an exhibit at the trial, accompanied by a letter addressed by him to the shareholders dated November 10, 1941, stating that in accordance with the instructions received he had prepared the balance sheet. The minutes of the company's various meetings held at the time of the acquisition of the assets contain no reference to this letter or to the balance sheet and while Ryan gave evidence at the trial he said nothing to indicate that they had been considered or formally dealt with by either the shareholders or the directors. By a further letter addressed to the shareholders dated December 15, 1942, Ryan advised the shareholders that he had prepared a balance sheet as of August 31, 1942, and this document was filed with the Inspector of Income Tax with the

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company's return dated December 16, 1942, for the taxation period in question. In the balance sheet of August 31, 1940, the Booth limits were shown among the fixed assets of the company as an amount of $150,000: in the balance sheet as of August 31, 1942, they were shown at the sum of $150,812 and to the latter statement filed with the taxation return there was attached a statement as to the depletion claimed which read:—

> I estimate on the basis of a cruise made of this limit there would be twenty million feet of standing timber consisting of white, red and jack pine, spruce, balsam, poplar, birch, basswood, cedar at the time of purchase. The cost per one thousand feet-board measure would be $7.50 to give a total cost of $150,000—20,000,000 feet at $7.50 per thousand.

and below this there appeared the words "Certified correct —T. E. McCool Limited per T. E. McCool, President."

Since the appeal is in respect of the amount allowed in the exercise of a discretion, it is necessary to ascertain the nature of the material which was before the Minister when the amount of the allowance to be made for depletion was determined. This consisted of the option agreement, the balance sheet of T. E. McCool as of August 31, 1940, the so-called trust agreement between McCool and Ryan, the so-called opening balance sheet of T. E. McCool Ltd. as of August 31, 1940, the balance sheet for the period ending August 31, 1942, with the attached schedules and McCool's certificate as to the value upon which the company claimed depletion, and a report of the assessor showing that the shares had been issued and that McCool had paid a gift tax on the 240 shares he had given to the members of his family and others on the footing that they were of the value of $100 each. In so far as the Booth limits were concerned, the only information touching their value was accordingly the admitted fact that they had been bought in the year 1940 for $35,000 and that the purchaser T. E. McCool had shown them as of this value in his balance sheet for the period ending August 31, 1940, and his statement appended to the tax return of the company dated December 16, 1942, that he estimated that there were 20,000,000 feet b.m. on the limit and that the "cost" of 1,000 feet would be $7.50 on the basis apparently that $150,000 had been the cost to the company of the purchase of the timber limits at which amount they were

valued in the balance sheet of August 31, 1942. The Minister thus had before him evidence as to the purchase price agreed to be paid for the transaction between two parties who were at arm's length and the fact that Mr. McCool, an experienced lumberman, showed the properties in the balance sheet of his own business as being of the same value as the stipulated purchase price, and on the other hand the fact that in the balance sheet prepared after the incorporation of the company this same asset had been shown at a value of $150,000 and to a slightly increased amount as of August 31, 1942. It was undoubtedly, in my opinion, the intention of the Minister to provide for a depletion allowance on the basis of the value of the limits and not upon their cost to the company and I see nothing in this record justifying the intervention of the court when, upon the evidence before him, he found that that value was the lesser of these two figures.

In the notice of appeal from the assessment the respondent company in the statement of facts recited the agreement made by it with T. E. McCool for the purchase of the limits on November 28, 1941, and contended that the Booth timber limits were transferred to the company "on a valuation of $150,000" and claimed depletion on the basis of this valuation "being the price paid by it for the said limits when purchased from Mr. McCool and being less than the actual market value of the said limits" at the date the company acquired them. Upon the Minister rendering his decision rejecting the appeal, the notice of dissatisfaction retiterated the statement of facts contained in the notice of appeal and claimed that the discretionary power of the Minister "has not been properly exercised, is not in conformity with the provisions of the Act, has not been exercised in a reasonable manner and the facts upon which such discretion was exercised were not properly before the Minister, nor were they examined by him." It is, in my opinion, of importance that when by consent pleadings were delivered the taxpayer alleged that at the time of the transfer of the assets the Booth timber limits were transferred to the company "at a cost of $150,000." and that it was not alleged that the limits were of that value so that the question of value was not placed in issue.

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The complaint as to the exercise of the Minister's discretion was that he had erred in:—

> not exercising any discretion, or in not exercising his discretion on material sufficient in law to support his decision, and that such decision was made in a purely arbitrary manner, and that the decision of the Minister and his reply contained no grounds or reasons for his decision, nor are the facts outlined therein upon which the Minister arrived at his decision.

The statement of defence filed by the Minister after denying these allegations contended that the Minister had exercised his discretionary power in accordance with proper legal principles.

Much of the evidence admitted at the trial was, in my opinion, irrelevant: its admission appears to me to have been based on a misconception as to the issues that were to be tried. In *The Minister of National Revenue* v. *Wrights' Canadian Ropes* (1), Lord Greene, M.R., dealing with an appeal from the exercise of the Minister's discretion under sec. 6(2), pointed out that since an appeal is given by the statute this involved the consequence that the Court was entitled to examine the determination of the Minister but that the limits within which the Court is entitled to interfere are strictly circumscribed. It is for the taxpayer to show that there is ground for interference and, unless it is shown that the Minister has acted in contravention of some principle of law, the Court cannot interfere. After quoting the language of Lord Thankerton in *Pioneer Laundry and Dry Cleaners* v. *Minister of National Revenue* (2), adopting the language of Davis J. in that case in this Court (3), that the Court would not interfere with the Minister's decision unless "it was manifestly against sound fundamental principles", Lord Greene said in part:—

> The court is, in their Lordships' opinion, always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the Court insufficient in law to support it, the determination cannot stand. In such a case the determination can only have been an arbitrary one. If, on the other hand, there is on the facts shown to have been before the Minister sufficient material to support his determination the Court is not at liberty to overrule it merely because it would itself on those facts have come to a different conclusion.

(1) [1947] A.C. 109.
(2) [1940] A.C. 127, 136.
(3) [1939] S.C.R. 5.

In *Fraser* v. *Minister of National Revenue* (1), a case in which the exercise by the Minister of his discretion under the same subsection as is here under consideration, Lord MacMillan, in delivering the judgment of the Judicial Committee, said in part:—

> The criteria by which the exercise of a statutory discretion must be judged has been decided in many authoritative cases, and it is well settled that if the discretion has been exercised bona fide, uninfluenced by irelevant considerations and not arbitrarily or illegally, no court is entitled to interfere even if the court, had the discretion been theirs, might have exercised it otherwise.

This was the question to be determined at the trial in the Exchequer Court. The taxpayer, however, tendered evidence to indicate that at the time of the acquisition of the timber limits by the company they were of a fair value of $150,000. It is not suggested that the value as of August 31, 1940, when McCool entered into the agreement with Ryan, differed from that of November 28, 1941. None of this evidence had been before the Minister and in effect the contention of the appellant company was that his finding should be set aside upon evidence that was not before him. The evidence as to the value was, however, in my opinion clearly inadmissible on a second ground. The court having ordered the delivery of pleadings sec. 36 of the *Exchequer Court Act,* R.S.C. 1927, cap. 40 applied and the practice and procedure in the action was to be that of similar actions in the High Court of Justice in England on the 1st day of October 1887, unless otherwise provided by the Act and general rules made in pursuance of the Act. I find nothing in either the statute or in any rules of court which alters the practice of the High Court of Justice that the issues to be determined at the trial are those disclosed by the pleadings. In *Johnston* v. *The Minister of National Revenue* (2), at 489, Rand J. in delivering the judgment of the majority of the Court said that in such an appeal the taxpayer must allege the grounds upon which he relies in support of his claim that the decision of the Minister is erroneous. Here, in spite of the fact that the question of the value of the limits was not raised in the pleadings, the evidence was received and the learned trial judge, being of the opinion that since it

(1) [1949] A.C. 24 at p. 36. (2) [1948] S.C.R. 486.

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was contended in the notice of appeal that the limits were of the value of $150,000 that question was in issue, said:

> The question of value is clearly relevant to the issue and it is not barred by the provisions of sec. 65(1) of the *Income War Tax Act*, as the appellant clearly raised that issue in its Notice of Appeal.

With great respect, I think there is nothing in sec. 65 which affects the provisions of sec. 36 of the *Exchequer Court Act*. That section is merely intended to permit the appellant to raise in his pleadings whatever issues he may wish, without being restricted by the grounds raised in the notice of appeal or notice of dissatisfaction. If the learned trial judge by the passage quoted intended to indicate that the issues to be tried in the Exchequer Court where pleadings are delivered are those raised by the notice of appeal and the notice of dissatisfaction as well as by the pleadings, I am unable to agree. That the timber limits had been acquired by the respondent company at a cost of $150,000 was, however, clearly raised by the pleadings and the learned trial judge found that this had been proven. The only evidence on this point is that of T. E. McCool and Ryan since, as has been above pointed out, nothing in the agreements or the company's records throws any light on the matter. Mr. Ryan, however, who had prepared both the financial statement of T. E. McCool as of August 31, 1940, and the so-called opening statement of the company bearing the same date, said that the limit was actually valued at $150,000 at the time that McCool agreed to sell it to the company in 1940, and the other assets acquired were of a value in round figures of $70,000. Mr. McCool said that it was valued at this amount "when it was transferred to the company", this being some fourteen months after the date referred to by Ryan. While the cost of the limits to the taxpayer had been put in issue by the pleadings, it is not suggested that when the Minister exercised his discretion he had been informed that the cost to the taxpayer was the larger amount and, even if the evidence had been relevant, I do not think the fact was established by the evidence of Ryan and McCool. It is to be borne in mind that Ryan who professed to act as trustee for a non-existent *cestui qui trust* when entering into the agreement with McCool on August 31, 1940, was simply the latter's nominee. He was not acting as trustee for the persons

who it was intended should become shareholders of the proposed company and it is clear from the terms of the instrument that he did not intend to bargain for the limit on his own behalf. Assuming, as I do, that there was a discussion between McCool and Ryan as to the value of the respective assets referred to in the agreement of August 31, 1940, that cannot establish the agreed purchase price as between the company and McCool under the agreement made fourteen months later. As to McCool's evidence, he did not explain by whom the timber limits were so valued at the time they were purchased by the company and I think the fact was not proven.

It is further said in the reasons for judgment at the trial that:—

> In this case, as in the *Pioneer Laundry* Case, the Deputy Minister has based his decision on two grounds: (*a*) that there was no actual change of ownership of the assets, and (*b*) the assets (the Booth Limits) were "set up in the books of the appellant Company at appreciated values."

and that in fixing the depletion allowance the Minister had proceeded on a wrong principle since he had based the allowance on the cost of the limits to a predecessor in title. The letter accompanying the notice of assessment does not, in my view, support this view. That letter informed the taxpayer that the Deputy Minister had ruled that the limits would be valued for the purpose of the Act at the cost price to McCool of $35,000. That was the Minister's opinion as to the value of the property and nothing more. The argument for the respondent company is really that the Minister fell into the same error as had been made in the *Pioneer Laundry* case, having declined to recognize that T. E. McCool Ltd. was a separate entity and considering it as merely the *alter ego* of McCool. The only evidence which might support such a contention is that to be found in the examination for discovery of an officer of the Taxation Division of the Department of National Revenue which was put in evidence at the trial. The witness, who had not been in the employ of the Government at the time the discretion of the Minister was exercised, was of the opinion that the decision had been made by Mr. C. F. Elliott, K.C., the Deputy Minister of National Revenue for Taxation, and was permitted to express certain opinions

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as to what he thought might have influenced Mr. Elliott in making his determination. Many of the answers which this witness was permitted to make were simply speculations on his part and were inadmissible and while they were given without objection this cannot affect the weight to be given to them. Thus the witness was permitted to say that the figure of $35,000 "was fixed by the Department" because "the Department felt that that was the actual cost to the taxpayer," the form of the answer being prompted by the form of the question. Again the witness said that "the Department usually looks at a transaction in regard to the market value if there is not a ready market —such as there is on the stock exchange, for example, or over the counter trading—as the last transaction that took place for cash, at arm's length or as between strangers." If the evidence was of any value it merely indicated that the witness thought that Mr. Elliott had considered that the price paid by McCool was evidence that he might properly consider in determining the fair value of the timber limits. The witness was further asked the following questions and made the following answers:—

Q. This statement of T. E. McCool Limited dated August 31, 1940, that you mentioned, have you any knowledge as to whether or not the division of the shares as set out in that statement had some effect on the making of the decision?—A. I would think it would.

Q. On what basis would you think it would?—A. I would consider that the company was Mr. McCool's company, that he would have control as to the price to be fixed on any assets that were purchased from himself, and consequently that that was not a transaction as between strangers.

Q. Is there any section in the Act that you have knowledge of under which that ruling would come?—A. Well, in this particular case, one that is dealing with depletion, I think it is 5(1) (*a*), where it is purely a matter of permission (sic) as to the amount of the allowance to be made.

Q. Speaking of this distribution of shares, you have stated that the fact that Mr. McCool controlled the company might have had some bearing on the decision?—A. I think it would.

These answers were on the face of them merely expressions of the witness' opinion and speculations as to what may have had "some bearing on the decision" and inadmissible as evidence. I find no support in this evidence for the view that the Deputy Minister in coming to his decision fell into the error made in the *Pioneer Laundry* case or based his decision on the ground that the assets were set

up in the books of the appellant company at appreciated values or to qualify in any way the statement made by the assessor in the letter of February 9, 1945, which accompanied the notice of assessment. Having decided in the exercise of his discretion that an allowance for depletion should be made, it was further within his discretion to determine that the value of the limits, and not their cost to the company, should be the basis of the allowance. There was evidence before him, in my opinion, upon which he might properly find that the fair value of the limits was $35,000 and I do not find any evidence that he was influenced by irrelevant considerations or otherwise acted in an arbitrary or illegal manner justifying the intervention of the Court. In the light of the evidence as to value which was admitted at the trial under the above mentioned circumstances, the amount fixed by the Minister may well have been much less than the true value but this does not, in my opinion, enable us to refer the matter back to him for further consideration. To do so involves setting the assessment aside and I am unable to see upon what ground this can be done. If the Minister should consider that under all the circumstances some relief should be given to this taxpayer, no doubt this can be done.

The appeal as to the depletion allowance should be allowed and the judgment in the Exchequer Court set aside, with costs in both Courts.

As to the claim of the respondent company to the allowance for interest on the promissory note, I agree with the learned trial judge and would dismiss the cross-appeal with costs.

Appeal allowed without costs in either Court, assessment set aside and matter referred back to the Minister to take such further action as all the facts disclosed, or to be disclosed, call for. Cross-appeal dismissed with costs.

Solicitor for the appellant: *T. Z. Boles.*

Solicitors for the respondent: *Ewart, Scott, Kelley and Howard.*

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