NORTH BAY MICA COMPANY LIMITED ..... APPELLANT;

AND

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

1958

*Apr. 28, 29
Jun. 26

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Special provisions in case of mine—When mine "came into production"—The Income Tax Act, 1948 (Can.), c. 42, s. 74, as amended by 1951, c. 51, s. 25.

Mines and minerals—What constitutes bringing mine "into production"—Mica—Abandonment of operation—Subsequent reopening of new dyke by different company—Special provisions as to income tax—The Income Tax Act, 1948 (Can.), c. 42, s. 74, as amended by 1951, c. 51, s. 25.

*PRESENT: Kerwin C.J. and Cartwright, Abbott, Martland and Judson JJ.

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P.M. Co. successfully operated a mica mine from October 1942, but by February 1945 it had almost exhausted the supply of raw mica then known to it. After having a thorough inspection made by geologists, the company decided not to proceed with further investigations and in October 1945 it ceased operations. In 1949 a different geologist made a thorough inspection of the property, as a result of which he and an associate obtained a lease of the mining claims from P.M. Co. He caused appellant company to be incorporated in 1950, and it bought the claims from P.M. Co. and continued operations. It proceeded thereafter to find and develop a new dyke or vein of mica of which P.M. Co. had not known. Ore in reasonable commercial quantities was obatined from this dyke from 1950 onwards.

Held (Kerwin C.J. and Judson J. dissenting): The income from the property was properly excluded from the appellant's income for the taxation year 1951, under s. 74 of the *Income Tax Act*, as amended. The property in question had lost the character of a mine between its abandonment by P.M. Co. and the commencement of operations by the appellant; what the appellant acquired was not a "mine" but a derelict and abandoned property which it hoped to develop into a mine. In this view, the mine "came into production", within the meaning of s. 74, in 1950. *Semble*, the "mine" of the appellant was one entirely different from the "mine" of P.M. Co.

Per Kerwin C.J. and Judson J., *dissenting*: The word "mine" in s. 74 should be construed as denoting a physical thing and the mine operated in 1950-51 by the appellant was the same mine as that operated by P.M. Co. before 1946. It came into production of ore in 1942 and was therefore not within s. 74.

APPEAL from a judgment of Ritchie J. of the Exchequer Court of Canada[1], affirming a decision by the Minister of National Revenue. Appeal allowed, Kerwin C.J. and Judson J. dissenting.

D. W. Mundell, Q.C., and *S. D. Thom, Q.C.*, for the appellant.

W. R. Jackett, Q.C., and *T. Z. Boles*, for the respondent.

The judgment of Kerwin C.J. and Judson J. was delivered by

THE CHIEF JUSTICE (*dissenting*):—This is an appeal against a judgment of the Exchequer Court[1] dismissing the appeal of the appellant, North Bay Mica Company Limited, from the decision by the Minister of National Revenue confirming the reassessment of the appellant for the taxation year 1951 under the *Income Tax Act*, 1948 (Can.), c. 52, now R.S.C. 1952, c. 148. The point in issue is whether the appellant was correct in not including in the computation of its income for that year the income

[1] [1955] Ex. C.R. 300, [1955] C.T.C. 260, 55 D.T.C. 1157.

derived by it from the operation of a mica mine formerly owned and operated by Purdy Mica Mines Limited. The section of the Act as applicable to the taxation year 1951 is s. 74, as amended by 1951, c. 51, s. 25 (now replaced by s. 85(5), first enacted by 1952, c. 29, s. 24):

> 74. (1) Where a corporation establishes that a mine was
>
> (*a*) a metalliferous mine, or
>
> (*b*) an industrial mineral mine certified by the Minister of Mines and Technical Surveys to have been operating on mineral deposits (other than bedded deposits such as building stone),
>
> that came into production of ore during the calendar years 1946 to 1954, inclusive, income derived from the operation of the mine during the period of 36 months commencing with the day on which the mine came into production (other than any portion thereof in the year 1946) shall, subject to prescribed conditions, not be included in computing the income of the corporation.
>
> (2) In this section, "production" means production in reasonable commercial quantities.

We are not concerned with a metalliferous mine, but with an industrial mine which, it is agreed, was certified by the Minister of Mines and Technical Surveys to have been operating on mineral deposits (other than bedded deposits such as building stone). The dispute is whether the income of the appellant from the operation of this mine was derived from a mine that came into production of ore in reasonable quantities during the calendar years 1946 to 1950.

The learned trial judge dealt with the history of certain provisions of the *Income War Tax Act,* R.S.C. 1927, c. 97, and the *Income Tax Act,* and while counsel for the appellant disavowed any suggestion that he was relying in any way upon such history, it does not detract from the conclusion reached in the Exchequer Court. Counsel did refer to a letter of August 9, 1951, written on behalf of the Director General, Corporation Assessments Branch, to the appellant's solicitor, but I agree with Mr. Jackett that if what is therein stated is meant to apply to s. 74 it cannot affect what the Court deems to be the proper construction of that provision.

From October 1942, Purdy Mica Mines Limited had successfully operated a mica mine on certain mining claims owned by it in the township of Mattawan, in the Province of Ontario. After obtaining reports from certain geologists, the Purdy company decided that it would not proceed with

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any further investigations into the possibilities of securing additional mica. In October 1945 it ceased operations and from that time to 1949 there was no activity of any kind by it on the property.

James J. Kenmey, having become interested in the claims, made a thorough investigation, as a result of which a lease was first granted to his associate, Paul A. McDermott, and subsequently assigned to Kenmey and two others who carried on business in partnership under the name of North Bay Mica Company. This partnership proceeded to operate on the leased claims in 1949. The appellant was incorporated under the Ontario *Companies Act* by letters patent of January 27, 1950, and continued the operations. By arrangement the claims were sold to the appellant by the Purdy company which received certain payments in cash and a 10 per cent. stock interest in the appellant company.

The word "mine" in s. 74 should be construed as denoting a physical thing. It was argued, however, that the Purdy company had abandoned the mine and that, although the work done by the appellant company is on the same mining claims, what Kenmey and his associates commenced and the appellant continued was a different mine and, therefore, cannot be said to have come into production as early as 1946. The evidence as to what occurred generally is uncontradicted and is set out by the trial judge. The following references are, however, of particular importance. In cross-examination Mr. Kenmey admitted that with respect to pit no. 3 (the important one in the operations of the Purdy company) he found stringers leading off into the wall rock and that the Purdy company had exposed another dyke but had done nothing about it. He continued:

> Well the stringers which led off into the wall rock, in my impression, was, in fact, another dyke that they had done nothing about. Those stringers were, in fact another—indications of another dyke—I will put it that way.

The truth of the matter appears to be as expressed by the witness George B. Langford, when he testified that the Purdy company

> mined the ore which they could see from day to day and did not spend the time or money estimated to develop ore for the mining operations of the future. They did not, until they came to the end of their ore and then they undertook some rather extensive drilling operations to try and find some more pegmatite.

That drilling did not find any ore but Mr. Kenmey's work did.

The mine operated in 1950-51 by the appellant is the same mine as that operated by the Purdy company down to 1945. The mine came into production of ore in October 1942 and therefore it cannot be said that it came into production as late as 1946, the first year mentioned in s. 74.

The appeal should be dismissed with costs.

The judgment of Cartwright and Martland JJ. was delivered by

CARTWRIGHT J.:—The relevant facts out of which this appeal arises are undisputed and are stated in the reasons of the Chief Justice. I wish, however, to emphasize two matters: (i) that in 1945 Purdy Mica Mines Limited had given up all thought of carrying on any further mining operations on the claims later acquired by the appellant and had removed its buildings and machinery; and, (ii) that, while the lens of mica discovered and worked by the appellant was in close proximity to one of those worked by Purdy Mica Mines Limited, the last-mentioned company had failed to discover it and was unaware of its existence.

The question before us turns upon the construction of s. 74 of the *Income Tax Act,* which is set out in the reasons of the Chief Justice.

For the appellant it is contended that the word "mine" as used in cl. (*b*) of s. 74(1) means not "a portion of the earth containing mineral deposits" but rather "a mining concern taken as a whole, comprising mineral deposits, workings, equipment and machinery, capable of producing ore". Support for this contention is sought in the circumstances that if "mine" has the first of the two suggested meanings, then, (i) the phrase "certified . . . to have been operating on mineral deposits" is inapt as it presupposes an entity capable of carrying on operations; and (ii) the draftsman should have substituted for the clause "that came into production" the clause "that was brought into production". From this the appellant goes on to argue that the "mine" of the appellant is one entirely different from the "mine" of Purdy Mica Mines Limited.

I incline to the view that this contention is sound; but, be that as it may, the facts appear to me to bring the claim of the appellant within the plain words of the section. The

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appellant is a corporation. It has established that the mine from the operation of which it derived its income for the year 1951 was an industrial mine certified by the Minister of Mines and Technical Surveys to have been operating on mineral deposits (other than bedded deposits such as building stone) that came into production of ore in reasonable commercial quantities during the year 1950.

The argument of the respondent is, in effect, that this would be so but for the fact that some years prior to 1946 the same mine, then operated by Purdy Mica Mines Limited, came into production of ore in reasonable commercial quantities. That this would be a sufficient answer if the same property, to use a neutral word, had been continuously operated as an industrial mine and had merely changed hands I do not doubt; but it appears to me that in the interval between the cessation of operations by Purdy Mica Mines Limited and the commencement of those of the appellant the property had lost the character of a mine. What the appellant acquired was not a mine but a derelict and abandoned property which it hoped to develop into a mine.

The submission of the respondent is that if an industrial mine has at any time been operated on a particular piece of property and been brought into production of ore in commercial quantities, then, notwithstanding the fact that its operation has been completely and finally abandoned, no industrial mine subsequently operated on the same piece of property, no matter how long thereafter, can come within the intendment of s. 74.

It appears to me that the construction for which the respondent contends necessitates adding to the section some such words as those I have italicized so as to make it read: "that came into production of ore *for the first time* during the calendar years 1946 to 1954 inclusive" or "that *first* came into production . . .".

If on consideration of the words of the section in their ordinary sense, their true meaning appeared doubtful, as I think it does not, it would be proper to inquire what was the object which Parliament had in view as appearing from the circumstances with reference to which the words were used. The object was clearly to encourage the development of productive industrial mines of the sort described in the

section. This object would not be rendered less desirable by the circumstance that at some earlier time, ore had been produced from the same piece of property.

The respondent relied on the following, often quoted, passage in the judgment of Ritchie C.J. in *Wylie et al. v. The City of Montreal*[1]:

> I am quite willing to admit that the intention to exempt must be expressed in clear unambiguous language; that taxation is the rule and exemption the exception, and therefore to be strictly construed . . .

In my opinion, resort can properly be had to the principle stated in this passage only if the Court is unable to determine the meaning of the words it is called upon to interpret after calling in aid all relevant rules of construction.

I would allow the appeal, set aside the judgment below and the amended assessment and restore the original assessment of September 21, 1951, under which no tax was levied. The appellant is entitled to its costs in the Exchequer Court and in this Court.

ABBOTT J.:—I would allow the appeal and dispose of the matter as proposed by my brother Cartwright.

Appeal allowed with costs, KERWIN C.J. *and* JUDSON J. *dissenting.*

Solicitors for the appellant: Manning, Mortimer, Mundell & Bruce, Toronto.

Solicitor for the respondent: A. A. McGrory, Ottawa.