1950

*Feb. 13, 14
*April 25

JOGGINS COAL COMPANY LIMITED ..... } APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Revenue—Income Tax—Depletion Allowance re coal mines—Meaning of the words "lease" and "lessee" in leases of mines as used in the Income War Tax Act, R.S.C., 1927, c. 97, s. 5(1) (a) as amended.

Section 5(1) (*a*) of the *Income War Tax Act* provides that:

The Minister in determining the income derived from mining * * * may make such an allowance for the exhaustion of the mines, * * * as he may deem just and fair, and in the cases of leases of mines * * * the lessor and lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and lessee do not agree the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive.

Held: that the word "leases" and the word "lessee" in s. 5(1) (*a*) of the *Income War Tax Act* are not used in the narrow or technical sense. Such "leases" include a grant to the "lessee" of an exclusive right to mine and appropriate the mineral to the use of the grantee.

Held: also, that the refusal by the Minister to consider the appellant as a "lessee" involved an error in law and therefore was not a good ground for refusing to make an allowance for depletion.

D. R. Fraser Co. Ltd. v. *Minister of National Revenue,* [1949] A.C., 24; *McCool* v. *Minister of National Revenue,* [1950] S.C.R., 80, followed.

Judgment of the Exchequer Court of Canada, [1949] Ex. C.R., 361, reversed.

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

APPEAL from the judgment of the Exchequer Court of Canada, Cameron J., (1) dismissing the appeal of the appellant and affirming the assessments made by the respondent under the Income War Tax Act for the years 1939, 1940 and 1941.

C. B. Smith, K.C. for the appellant.

J. T. MacQuarrie, K.C. and *A. J. MacLeod* for the respondent.

The judgment of Rand, Kellock, Estey, Locke and Cartwright, JJ. was delivered by

KELLOCK J.: This is an appeal from the decision of the Exchequer Court, Cameron J. (1) affirming the dismissal by the Minister under the provisions of *The Income War Tax Act* of an appeal by the appellant in respect of its assessment for income for the years 1939, 1940 and 1941.

During the said years the appellant derived its entire income from mining the coal from "the 40 Brine Seam"; the right to mine which was granted *inter alia* by two "mining leases" made by the Province of Nova Scotia in 1903 and renewed on July 2, 1923, on the basis of certain rents and royalties.

The interest of the original lessee in these leases was acquired by one Ralph Parsons by virtue of a sale under execution and he became duly entered in the records of the Provincial Mines Office as the lessee.

On June 4, 1937, the said Parsons entered into an agreement with the Fundy Coal Company Ltd. to sell to the latter all his right, title and interest in the said mining leases and this company, by agreement of June 7, 1937, assigned to the Tantramar Coal Company all its right in the agreement with Parsons and its interest in the mining leases.

Again, on June 1, 1939, the Tantramar Company entered into an agreement with one J. H. Winfield, by which the Tantramar Company, as "vendors", granted to Winfield, as "purchaser", "the sole and exclusive right or option to mine and purchase such coal as the purchaser desires to win from the said 40 Brine Seam under the terms and conditions hereinafter recited". This agreement provided for the payment of certain royalties on a graduated scale

(1) [1949] Ex. C.R. 361.

1950

JOGGINS COAL CO. LTD. v. MINISTER OF NATIONAL REVENUE

Kellock J.

to the vendors as well as the provincial royalties and obligated the purchaser to mine all the marketable coal in the seam which, under sound mining practice, would be practical and expedient to mine from a certain shaft then under construction. Subject to certain indefeasible rights in any shafts sunk, the agreement provided that if the purchaser at any time ceased reasonably active operations on the seam, any coal remaining therein should "revert" to and be the sole property of the vendors. By agreement of September 2, 1939, Winfield, as vendor, assigned and transferred to the appellant, as purchaser, all his rights in the leases and undertook to perform all obligations of the vendor.

It is convenient at this point to refer to the nature of the rights granted by the original "leases" themselves. The surface rights in the lands in respect of which the leases here in question were issued had previously been granted to private owners and under the provisions of the Statute, R.S.N.S. (1923) c. 22, the lessee was prohibited from entering upon or using the lands for mining purposes without acquiring a right to do so by agreement with the owner of the surface rights or by proceedings taken under other provisions of the statute.

By section 184 "lease" is defined, so far as minerals other than gold or silver are concerned, as "a lease of the right to mine minerals", and by section 185 "every application for a lease shall state the mineral for which the right to mine is sought and shall describe the tract of ground sought to be covered by such * * * lease". By the statutory form of lease the Crown "grants and demises unto the lessee all the rights of the Crown to the * * * (coal?) * * * in that certain tract of ground situated at and described as follows. It also provides that:

> the lessee shall have during the term of this lease or any renewal thereof the exclusive right of mining for and taking for his own use all * * * contained in the said tract of ground and appropriating the same to his own use.

It is also expressly provided that nothing in the lease shall authorize entry by the lessee upon the surface of the land or interference in any way with it.

The matter here in issue involves the right of the appellant to an allowance or deduction from its taxable income

for "depletion" under the provisions of section 5(1) (*a*) of the *Income War Tax Act*. With relation to the taxation year 1939 the Act read as follows:

5. "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 * * * shall make such an allowance for the exhaustion of the mines * * * as he may deem just and fair, and in the case of leases of mines * * * the lessor and the lessee, shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and the lessee do not agree the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive.

This appeal was argued on the footing, and it must now be taken to be the fact, that the Minister in the exercise of his discretion with respect to the making of an allowance for exhaustion or depletion of the particular mine here in question, fixed the allowance at ten cents per ton of coal actually mined. However, while the appellant mined some 29,000 tons of coal in the year 1939, the Minister refused it any part of this allowance. His ground for so doing is made clear in certain letters written to the appellant pending its appeal to the Minister, by the Director General of the Legal Branch of his department.

In a letter of December 4, 1947, the following appears:

This case presents special difficulties, in that it raises the question as to *which of two taxpayers* is entitled to the depletion allowance under paragraph (*a*) of section 5 of the Income War Tax Act.

On the facts in this case we would consider that the lessor is the Crown in the right of the Province of Nova Scotia and as the province is not a taxpayer, there is no question of making an allowance to the lessor. The question, however, remains as to the proper *party* to be considered as the lessee.

The agreement dated 1st June, 1939 under which J. H. Winfield, and subsequently this company, (the appellant) obtained the right to operate the mine, is not made in the form of a lease or sub-lease, but appears to be merely for the *sale of the coal in the mine*. The purchaser obtains "the sole and exclusive right or option to mine and purchase such coal as the purchaser may desire to win from the said 40 Brine Seam". Under clause 8 of this agreement, the coal reverts to the vendor if the purchaser ceases to mine the property.

In our opinion, this agreement is not a sub-lease or assignment of a lease, but *merely a sale* of the coal and the necessary licence to mine the coal. The vendor apparently remains the lessee from the Crown and would therefore be the lessee within the meaning of the relevant provisions of the Income War Tax Act.

* * *

1950

JOGGINS COAL CO. LTD. v. MINISTER OF NATIONAL REVENUE

Kellock J.

If the Tantramar Company had assigned all its interest to the Joggins Coal Company Limited, then we would agree that the Joggins Company became the lessee in place of the Tantramar Company, but as stated before, we do not think the agreement in 1939 has this effect.

(The Italics are mine.)

A further letter of January 14, 1948, reiterates the refusal of the Department "to accept the proposition that this company" (the appellant) "is the lessee of the Crown within the meaning of section 5 (*a*)". Referring to the agreement of June 1, 1939, the letter states:

Presumably, the Tantramar Coal Company Limited takes the stand that it was not a lease, but merely a sale of the coal and a licence to operate the property.

The letter continues:

This Department is in the position of having to decide *which* of two taxpayers is entitled to the allowance for depletion in the absence of an agreement between them. To give your client the benefit of the doubt would require depriving another taxpayer of the allowance. Under these circumstances, we consider that the question should be determined by the Exchequer Court.

* * *

Your appeal can only be sustained on the grounds that the Joggins Company has replaced the Tantramar Company as lessee from the Crown and as stated before, we do not consider this to be the effect of the Agreement of June, 1939.

In accordance with the view thus expressed, the appellant was excluded from all benefit under the section. It received no allowance for depletion in 1939, although its entire income was "derived from mining".

The statement of defence maintains this position. It alleges:

(*a*) That the Appellant has no proprietary or other exhaustible interests in the mine from which it derives its income;

(*b*) That the Appellant is not a Lessee of the said mine within the contemplation of paragraph (*a*) of subsection 1 of Section 5 of the *Income War Tax Act;*

In my opinion the respondent's stand is based on a complete misapprehension of the status of the appellant under the statute. The word "lessee" is not there used in the narrow or technical sense attributed to it by the Minister. Leases of mines commonly take the form of granting nothing more than the exclusive right to mine the coal and to appropriate it to the use of the grantee. Lord Cairns in *Gowan* v. *Christie* (1), at 263 said:

(1) (1873) 2 Sc. 273.

> For although we speak of a mineral lease, or a lease of mines, the contract is not, in reality, a lease at all in the sense in which we speak of an agricultural lease * * * What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil.

As has already been pointed out in the above references to the Nova Scotia legislation nothing more than this was granted by the original leases and nothing more could be or was acquired by the Tantramar Company and by it transferred to the appellant. The reason given for refusing to consider the appellant as a "lessee" because the assignment to it from Tantramar was "merely a sale of the coal and the necessary licence to mine" involved therefore a misapprehension of the position in law of the appellant and was accordingly not a good ground of disqualification of the appellant under the statute. The fact that Tantramar retained an interest entitling it to royalties instead of its interest having been bought out once and for all by a capital payment does not differentiate the nature of the rights acquired by appellant from the Tantramar Company from those acquired by the latter from the Fundy Company. The persons concerned under the section were the Tantramar Company and the appellant, as lessor and lessee, respectively, for the purpose of apportioning between them the allowance for depletion of the mine from which both derived their entire income.

It may further be observed, in considering the sense in which the word "lessee" is used in the statute, that the Judicial Committee in *Fraser's* case (1), considered that the holder of a licence to cut timber was within the section. The contention to the contrary on the part of the Minister was abandoned in the Privy Council. The same view of the statute was the basis of the decision in *McCool* v. *Minister of National Revenue* (2).

Coming now to the 1939 assessment, which is first to be considered the Statute in its then form, provided that taxable income derived from mining "shall" be subject to certain specified deductions and that in determining such income the Minister "shall" make such allowance for exhaustion as he deems just and fair, with the provision for apportionment already referred to.

(1) [1949] A.C. 24. (2) [1950] S.C.R. 80.

1950

JOGGINS COAL CO. LTD. v. MINISTER OF NATIONAL REVENUE

Kellock J.

Therefore, in determining the appellant's taxable income for 1939, the Minister had laid upon him an "administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles," to employ the language of the Judicial Committee in the *Pioneer Laundry* case (1), at 259. If he did not consider the appellant a "lessee" the provision for "apportionment" had no application to the appellant whose legal right to some depletion allowance under the earlier part of the section remained, and "no proper legal principle" has been invoked under which it could be withheld. It is only when the Minister is apportioning depletion allowance between lessor and lessee that the Minister's decision is conclusive. Nothing of the kind arises here. The Minister considered Tantramar as the lessee and the province the lessor, and as the Province was not a taxpayer, he gave the full allowance for depletion allotted to the mine to Tantramar. The fundamental error was accordingly an error in law in failing to appreciate the true position of the appellant and in depriving it of its statutory right to an allowance for depletion.

In my opinion therefore, the respondent cannot rely upon the concluding words of the section. He did not act under them as he considered the appellant did not come within them. So far as the 1939 assessment is concerned therefore, the appeal should be allowed and the matter referred back to the Minister for disposition under the section.

In 1940 the statute was amended by the substitution of the word "may" for "shall" where that word first appears in paragraph (*a*), so that thereafter it read:

> 5(1) "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 * * * may make such an allowance * * *

In respect of the assessments for 1940 and 1941, the Minister proceeded upon the same view of the Statute as already described, but because of the fact that the royalties received by the Tantramar Company were less than the full amount of depletion allowance allotted to the mine in these years, appellant was allotted the surplus as a deduction. It is this fact alone which gives plausibility to the contention made on behalf of the respondent that the

(1) [1939] 4 All E.R. 254.

decision of the Minister in connection with the allowances for these years is conclusive and not the subject of appeal. These allowances however, were not made in exercise of the power given to the Minister under the section to apportion *as between lessor and lessee* but only because the Tantramar Company did not have enough income to absorb them. The letter of January 14, 1948, previously referred to, is express on the point. It says:

> Your company is being allowed depletion to the extent that it has not been claimed by the Tantramar company.

It is therefore plain to my mind that with respect to the later years, as well as with respect to 1939, the decision of the Minister was based on the same erroneous view in law of the position of the appellant. As the latter did not act in accordance with the Statute he may not invoke it to preclude the appeal provided for by sections 58 and 60.

The alternative allegation in the statement of defence should be mentioned. It alleges that if the appellant were a lessee within the meaning of the section "which the respondent does not admit but denies", the Minister has properly apportioned the depletion allowance between the appellant and Tantramar. This cannot, in my opinion, avail the respondent. As already pointed out, he did not make any apportionment at all in the exercise of his statutory power. The alternative plea in the respondent's defence has therefore no relevancy as it has no foundation in fact in anything which the Minister did or purported to do under the statute.

In *Fraser's* case (*supra*) their Lordships had to consider the statute as it stood after the 1940 amendment. It was there held that the Minister has a two-fold discretion under the section, first, to determine whether the case is one for an allowance for depletion, and, second, if so, to determine how much should be allowed. In the present case the Minister has exercised the first head of his discretion, as already mentioned, by determining that ten cents per ton was to be allowed for depletion in respect of the mine.

As to the second head, their Lordships held that the Minister must proceed on "just, reasonable and admissible grounds". In defining this discretion their Lordships said at page 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

1950

JOGGINS COAL CO. LTD. v. MINISTER OF NATIONAL REVENUE

Kellock J.

settled that if the discretion has been exercised bona fide, uninfluenced by irrevelant 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 case at bar the Minister acted with respect to the years 1940 and 1941 as with respect to 1939 on the irrelevant consideration that the appellant had no standing as a lessee under the section. Had he not been mistaken in his view as to the legal position of the appellant and the Tantramar Company and had apportioned the depletion allowance as between them *as lessor and lessee,* it might have been that Mr. MacQuarrie's argument that no appeal lay from the Minister's decision would have been well taken. That point need not be decided in the present case as in my view it does not arise on the facts. He did not do that. I think therefore, that as in the case of the 1939 assessment, the appeal with respect to the assessments for the later years must also be allowed and the matter referred back to be dealt with in accordance with these reasons.

When the matter was reviewed by the Minister, all the relevant facts for the statutory apportionment were in the material before him. It was shown, contrary to the contention of the respondent, which was given effect to by the learned trial judge, that there had been a capital consideration paid by the appellant to Winfield in the issue of 747 paid up shares of the appellant company for the assignment to the appellant of the interests here in question and other property, and in the balance sheet of the appellant a value of $70,700 was placed on its "coal leaseholds". The appellant also invested other amounts in the development of the mine in respect of some of which no allowance, such as depreciation, appears to have been made. Amounts invested would ordinarily be one of the relevant matters for consideration in making the allowance for depletion, but would not necessarily be the only consideration.

Appeal allowed.

Solicitor for the appellant: *C. B. Smith.*

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