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

AND

WAIN-TOWN GAS AND OIL COMPANY LIMITED ..... RESPONDENT.

1952

*Feb. 21, 22
*Jun. 16

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income—Sale of franchise to supply natural gas—Price fixed on percentage of future gross sales of gas—Payments described as royalties—Whether payments are income within s. 3(1) (f) of the Income War Tax Act, R.S.C. 1927, c. 97.

The respondent company assigned to another company its franchise to supply the consumers in a certain municipality with natural gas. The rights conferred by the franchise were granted for a period of ten years from 1938 with the option of renewal, indefinitely, for further periods of like duration. The consideration for the assignment was that the respondent was to be paid monthly "by way of royalty" a percentage of the gross sales of gas. The Minister assessed these monthly payments as taxable income for the years 1944 and 1945 under s. 3(1) (*f*) of the *Income War Tax Act*, R.S.C. 1927, c. 97 and amendments. The assessment was set aside by the Exchequer Court of Canada.

Held (Locke J. dissenting), that the appeal should be allowed and the assessment restored since the payments were income within s. 3(1) (*f*) of the *Income War Tax Act*.

Held: In a business sense in Canada, the word "royalty" covers the payments made here and was so looked upon by the respondent when making its tax returns. Even if they were not received as royalties, they fall within the expression "other like periodical receipts". They depend upon the use of the franchise (which is property). It is not the production of natural gas upon which depend the payments as it is only under the powers conferred by the franchise that natural gas may be supplied and conducted to the consumers thereof. Finally, receipts, so dependent, are income by virtue of s. 3(1) (*f*), even though they are payable on account either of the use or sale of the franchise.

Per Locke J. (dissenting): In its ordinary meaning, the word "royalty" does not describe, or extend to, a payment such as was stipulated for in this case, where the payment is made as part of the purchase price of the outright sale of personal property transferred without reservation. As the words "other like periodical receipts" refer to those of an income or revenue, as distinguished from a capital nature, they do not cover these payments, which were instalments on account of the purchase price of the franchise and of a capital nature such as were dealt with in *Wilder* v. *Minister of National Revenue* [1952] 1 S.C.R. 123.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand and Locke JJ.

1952

MINISTER OF NATIONAL REVENUE v. WAIN-TOWN GAS & OIL CO. LTD.

APPEAL from the judgment of the Exchequer Court of Canada (1), Angers J., reversing the decision of the Minister of National Revenue and holding that the payments stipulated in the agreement were not taxable income.

J. R. Tolmie and F. J. Cross for the appellant. The receipts here in question fall within the words of subparagraph (*f*) and are "annual profits or gains from any other source" within subsection (1) of section 3. They are "rents, royalties, annuities or other like periodical receipts". They depend upon the production or use of any real or personal property. The whole of the receipts are profit or gain by definition whether or not they may be said to represent, in whole or in part, a return of capital.

The receipts are income receipts and were properly included in the computation of the respondent's annual net profit or gain in the two years in question. To say that these receipts are part of the consideration for the transfer of property is not conclusive as to their character as capital or income receipts. They were not instalments of purchase price but income receipts. The respondent's capital, namely, its franchise and exclusive marketing contract, entirely disappeared and in its place it was to receive an income calculated as a percentage of the gross selling price of gas sold under the franchise. Whether they are to be treated as capital or income is to be determined upon a careful analysis of the circumstances in each particular case. The circumstances in this case taken together clearly indicate that the respondent's capital simply disappeared and substituted for it was an income dependent upon the volume of business conducted in the exclusive market. There is no evidence that any part of the sums received by the respondent under the agreement represented a return to it of its capital.

H. W. Riley Q.C. for the respondent. The transaction between the respondent and the Franco was a capital transaction. It was a sale by the respondent of a capital asset, the purchase price being payable in instalments, which were capital receipts in the hands of the respondent.

(1) [1951] Ex. C.R. 1.

The payments are not included in the terms "rents, royalties, annuities or other like periodical receipts" since there is no reversionary interest left in the respondent.

The payments do not depend upon the use or production of the franchise but depend upon the amount of gas sold by Franco, and the respondent is in no way, directly or indirectly, an owner of said gas.

The franchise is not the kind or type of real or personal property specified and enumerated in the section.

The concluding portion of the sub-paragraph has therefore no application.

The judgment of the Chief Justice, Kerwin and Taschereau, JJ. was delivered by:—

KERWIN J.:—We are called upon to decide whether the respondent, Wain-Town Gas and Oil Company, Limited, is liable to assessment for income tax and excess profits tax in the years 1944 and 1945, and the particular question is whether an item of $1,965.02 should be included in the respondent's revenue receipts for 1944 as "net royalties" and an item of $4,181.45 should be included in its revenue receipts for the year 1945 as "royalties and sales". These items were in fact so inserted under those names by the respondent in its tax returns for the respective years but because of certain claimed expenditures a loss was shown. When these expenditures were disallowed by the Department, a profit appeared in each year, upon which the assessments in question were made, and the respondent thereupon appealed to the Minister—not with respect to the disallowed expenditures but with reference to the "net royalties" and "royalties and sales".

These moneys were received by the respondent from Franco Public Service Limited in pursuance of an assignment dated January 6, 1940, from the respondent to Franco of a certain franchise. This franchise had been secured by the respondent from the Town of Vermilion in 1938 for the purpose of supplying and conducting natural gas to consumers in the municipality. It conferred upon the respondent the right to put down, repair, etc., and operate gas lines and related structures and equipment in the town's streets, squares, etc., and other public places, and also the exclusive right to sell natural gas within the town

1952

MINISTER OF NATIONAL REVENUE v. WAIN-TOWN GAS & OIL CO. LTD.

Kerwin J.

limits. These rights were granted for a period of ten years with the option of renewal for a further period of ten years and a similar option at the expiration of each succeeding ten year period. Provision was made whereby the town could under certain conditions and at the end of any ten year period purchase the respondent's rights under the agreement and its property used in connection therewith. The respondent undertook to continue drilling a well, which at the time of the granting of the franchise was in process of drilling, and to drill other wells as required to provide and maintain a suitable supply of gas for the town so long as such operations were economically sound. In the event of the respondent failing to comply with its covenants, or in the event of its failing to secure a suitable supply of natural gas within twelve months of the date the franchise became operative and binding on the parties, the town might, by written notice, require the Company to remedy such default or secure such suitable supply of natural gas, and upon the respondent's failure to remedy such default or secure such a suitable supply of natural gas within six months of the date of service of such notice, the town might by resolution of its council terminate the contract.

The respondent drilled only one well, failed to obtain a supply of natural gas and was without funds to continue further drilling operations. So far as appears, no gas lines or other structures were put down by the respondent. It was under these circumstances that by the assignment of January 6, 1940, the respondent, with the consent of the town, assigned the franchise agreement to Franco. By this assignment, Franco covenanted to carry out the terms of the franchise agreement and to indemnify and save harmless the respondent from all liability for breach, non-performance or misfeasance in respect of any of the provisions thereof as against the town or otherwise. Paragraphs 4 and 5 provide:—

4. In consideration of this assignment Franco doth hereby covenant and agree with Wain-Town to pay to Wain-Town by way of royalty, from the proceeds of all sales of natural gas under the said franchise, the following percentages of the actual gross sales of gas reckoned at consumers' prices, less consumers' discounts:

(*a*) During the first three years, six and a quarter per cent (6¼%);

(*b*) During the next 7 years, eight and one-third per cent (8⅓%);

(c) Thereafter during the currency of this agreement, and of the said franchise twelve and one-half per cent (12½%).

5. It is further agreed that the following provisions shall apply:

(a) All royalties shall be deposited to the credit of Wain-Town in the Vermilion Branch of the Canadian Bank of Commerce or in such other institution as Wain-Town may designate from time to time not later than the 15th of month covering sales for the preceding month.

(b) An authorized representative of Wain-Town shall be permitted to inspect the books, records, meters, etc., pertaining to the sale of gas.

(c) In the event of the town exercising its right to purchase the gas utility during or at the end of either the ten (10) year term of the franchise or during or at the end of the first renewal period of ten (10) years then in such event Franco covenants and agrees to pay to Wain-Town twenty-five per cent (25%) of the net proceeds of such sale; such net proceeds to be computed after all debts of Franco have been paid.

In pursuance of paragraph 4, the above mentioned sums of $1,965.02 and $4,181.45 were paid by Franco to the respondent in 1944 and 1945 respectively. The appellant claims that these payments fall within clause (*f*) of subsection 1 of section 3 of the *Income War Tax Act* as amended down to and including the year 1945. Speaking generally, it is undoubted that Parliament intended to tax under the Act income as distinct from capital: *Wilder* v. *Minister of National Revenue* (1), a decision of this Court under section 3(1) (*b*) as it stood before amendment in 1945. However, it is clear that Parliament may also provide that receipts, part or all of which might ordinarily be termed capital, shall be treated as income for the purposes of the Act. Hence it is that after stating what income *means*, Parliament has enacted, by subsection 1, that it shall *include* certain things "and also the annual profit or gain from any other source including

(*f*) rents, royalties, annuities or other like periodical receipts which depend upon the production or use of any real or personal property, notwithstanding that the same are payable on account of the use or sale of any such property;

Clause (*f*) was enacted for the first time by section 1 of chapter 55 of the 1934 statutes as a result of the decision in *Minister of National Revenue* v. *Spooner* (2), affirming (1931) S.C.R. 399.

(1) [1952] 1 S.C.R. 123. (2) [1933] A.C. 684.

1952

MINISTER OF NATIONAL REVENUE v. WAIN-TOWN GAS & OIL CO. LTD.

Kerwin J.

The first point to be determined is whether the moneys received by the respondent are "royalties" within the meaning of this clause. The word does not bear the original meaning ascribed to it as rights belonging to the Crown *jure coronae*. As pointed out in *Attorney General of Ontario* v. *Mercer* (1) in the Judicial Committee and in this Court (2), it has a special sense when used in mining grants or licences signifying that part of the reddendum which is variable and depends upon the quantity of minerals gotten. It is a well-known term in connection with patents and copyrights. In a business sense in Canada, it covers the payments which were to be, and were, paid monthly by way of percentages of the actual gross sales (to quote paragraph 4 of the assignment), "of natural gas under the said franchise". It is settled by authority both here and in England that the appearance of the word "royalties" in the assignment does not necessarily dispose of the matter but, to quote Finlay J. in *British Salmson Aero Engines Ltd.* v. *Commissioners of Inland Revenue* (3), "the fact that people who, after all, know all about it, choose in their agreement to refer to these annual sums * * * as "royalties", is a matter not to be entirely neglected." Furthermore, the word is used in the respondent's tax returns for each of the years 1944 and 1945, to describe the moneys received by it from Franco. I quite agree that this is not decisive but, that circumstance added to the first, are at least evidence of the manner in which, in a business sense, the word is looked upon in this country. A particularly useful judgment is that of the High Court of Australia in *McCauley* v. *The Federal Commissioner of Taxation* (4), where it is pointed out that in an agreement drawn in England the term "royalties" has been used to describe payments for removing furnace slag from land (*Shingler* v. *P. Williams and Sons* (5)) and in an agreement drawn in New Zealand to describe payments for flax cut: *Akers* v. *Commissioner of Taxes* (6).

Finally, even if the payments were not received as royalties, they fall within the expression "other like periodical receipts". They are at least similar to percentages "as on

(1) (1883) 8 A.C. 767.
(2) (1881) 5 Can. S.C.R. 538.
(3) (1937) 22 Tax. C. 29 at 35.
(4) (1944) 69 C.L.R. 235.
(5) (1933) 17 Tax C. 574.
(6) [1926] G.L.R. (N.Z.) 259.

output, paid to the owner of an article, esp. a machine, by one who hires the use of it": Webster's New International Dictionary sub nom "royalties".

These receipts depend upon the use of the franchise. In *Natural Gas and Fuel Co. of Hamilton* v. *Dominion Natural Gas Co.* (1), Lord Macmillan, speaking for the Judicial Committee, points out that the by-law of the Town of Barton and the relative agreement there in question conferred what was correctly designated as a "franchise", and that in Canadian local government law the term is not used with the technical signification which it possessed in other connections. Here, as there, it is employed so as to include such rights and privileges as were conferred by the original agreement between the respondent and the town. That such a body of rights is real or personal property does not admit of doubt, and the moneys received by the respondent from Franco were dependent upon the use of that franchise. It is not the production of natural gas upon which depend the payments by Franco to the respondent as it is only under the powers conferred by the franchise that natural gas may be supplied and conducted to the consumers thereof. By virtue of the concluding part of clause (*f*), the receipts, so dependent, are income even though they are payable on account either of the use or sale of the franchise.

It is not without importance to note the changes that were made in 1945 in clause (*b*) of subsection 1 of section 3 of the *Act* dealing with contractual annuities as a result of the Report of the Royal Commission on Taxation of Annuities and Family Corporations. Clause (*f*) remains intact and perhaps it may be difficult to find a basis for any suggested change to cover a case like the present when one bears in mind that no total sum was fixed for the sale of the franchise by the respondent to Franco and that provision was made by paragraph 5 of the assignment for the contingency of the town exercising its right to purchase during or at the end of the first or second ten year terms—whereupon Franco was to pay the respondent twenty-five percentum of the net profits of such sale. It has not been overlooked that even if the town should so exercise its right to purchase, the respondent had disposed of part of its

(1) [1934] A.C. 435.

1952

MINISTER OF NATIONAL REVENUE v. WAIN-TOWN GAS & OIL CO. LTD.

Kerwin J.

property (the franchise) for the intervening period just as Miss Nethersole had disposed of a portion of her copyright in *Nethersole* v. *Withers* (1). However, in that case the claim of the Inspector of Taxes was that, under Case VI of Schedule D of the English Act, a certain amount received by Miss Nethersole was "annual profits or gains not falling under any of the foregoing cases and not charged by virtue of any other schedule." It was held by the Court of Appeal and the House of Lords that the payment was not an annual profit or gain.

The determination of this appeal depends upon the proper construction of clause (*f*) of subsection 1 of section 3 of the *Income War Tax Act* and I have been unable to secure any assistance from the *Nethersole* case or any of the other English cases cited by counsel on either side. They must be read with care and always bearing in mind the different statutory enactments with which they were concerned.

The appeal should be allowed with costs here and in the Court below and the assessments of the Minister restored.

RAND J.:—By the terms of an agreement dated September 19, 1938 between the Gas Company respondent and the town of Vermilion, the latter granted to the company an exclusive franchise to supply the town and its inhabitants with natural gas, together with all necessary powers to lay pipe lines under the streets and other public ways or places and otherwise to perform the public service undertaken. The franchise was to continue for ten years with a right of renewal, indefinitely, for further terms of like duration. The Gas Company agreed to do certain work of drilling wells for the gas, and in the event of default the town was authorized to take action looking to the termination of the contract.

The company was not successful in its drilling, and having exhausted its funds entered into an agreement dated January 6, 1940 with Franco Public Service Limited, by which, with the consent of the town, it transferred to the

(1) (1948) 28 Tax C. 501.

Service Company the franchise with all rights and powers annexed to it. The Service Company covenanted to pay to the Gas Company:—

> By way of royalty, from the proceeds of all sales of natural gas under the said franchise, the following percentages of the actual gross sales of gas reckoned at consumers' prices, less consumers' discounts:
>
> (*a*)) During the first three years, six and a quarter per cent (6¼%);
>
> (*b*) During the next 7 years, eight and one-third per cent (8⅓%);
>
> (*c*) Thereafter during the currency of this agreement, and of the said franchise twelve and one-half per cent (12½%).

The royalties were to be deposited to the credit of the Gas Company in one of the banks in the town "not later than the 15th of month covering sales for the preceding month". In the event, within the first two periods of the franchise, of the town exercising its right to purchase under the original contract, the Service Company was to pay to the Gas Company 25 per cent of the proceeds after all the debts of the Service Company had been paid.

The narrow question is whether these monthly payments are income for the purposes of the *Income War Tax Act*, and the clause of the latter under which the Crown supports its contention that they are is sec. 3(1) (*f*) which reads:—

> (*f*) rents, royalties, annuities or other like periodical receipts which depend upon the production or use of any real or personal property, notwithstanding that the same are payable on account of the use or sale of any such property;

The word "royalty" in the agreement is not, of course, controlling, but it does bear upon the propriety of the use of the word, in the minds of business men, to describe the type of payment involved. The statutory language, dealing with the results of accounting processes determining economic gain in business, must, in large degree, use the vocabulary employed in them; and the meaning of the word as it appears in the statute must have regard to its general acceptation in the course of property and business transactions.

Now a rent is, primarily, something reserved, in some form or other, and in a conceptual sense, from property or property interest transferred from one person to another. The word "royalties" is best known, perhaps, as a term to express an interest in the nature generally of future payments upon a grant or lease of mines, such as gold, coal,

1952

MINISTER OF NATIONAL REVENUE v. WAIN-TOWN GAS & OIL CO. LTD.

Rand J.

petroleum or gas rights; and it makes no real difference in substance or as to the nature of the payments whether they arise through a "reservation", strictly so-called, or a covenant.

The language of para. (*f*) seems to be directly related to that signification of the term, and I should take it to be beyond serious doubt that prima facie the payments here come within the expression "royalties * * * or other like periodical receipts". The query then is whether they "depend upon the production or use" of any property. Purists in language might object to the word "use" in relation to carrying on a franchise; the franchise is perhaps more properly said to be "exercised" than "used". But the words "production or use" are intended to cover a great many particulars of a general class of dealings with property, and to "use" a franchise would not at all be beyond the range of common parlance. I should say, then, that the word "use" is appropriate to the exercise of such a franchise; and that a franchise is personal property was not challenged.

Are the payments, then, constituting as they do part of the consideration for the sale of the franchise, to be excluded from tax as being capital in their nature? In *Wilder* v. *The Minister* (1), a decision of this Court, it was held that an annuity of $1,000 a month for the life of the annuitant, which was part of the price for the transfer of a business from an individual to a company, was of a capital nature and not within the definition of "income" in sec. 3(1) (*b*); but under para. (*f*) of the section that ground seems to be expressly met by the language "notwithstanding that the same are payable on account of the use or sale of any such property". Now, the property is the franchise; the royalty is payable on account of the sale of it; and the payment depends upon its exercise. The paragraph seems to me to be satisfied completely by the terms of the transaction, and I must hold the respondent to come within it.

I would therefore allow the appeal and direct judgment for the amount claimed with costs in both Courts.

(1) [1952] 1 S.C.R. 123.

LOCKE J. (dissenting):—By an agreement dated September 19, 1938, the Town of Vermilion granted to the respondent, inter alia, the right to enter upon the streets of the town and install gas pipe lines and related structures and equipment for the supply of natural gas to inhabitants on terms defined by that instrument. Rights of the nature granted to the respondent are referred to as a "special franchise" in section 291 of the *Town and Village Act*, c. 150, R.S.A. 1942, and by section 292 the council was empowered to grant such rights with the approval of the Board of Public Utility Commissioners for any period not in excess of twenty years.

By the agreement the town granted the exclusive right to supply natural gas to its inhabitants to the respondent for a period of ten years from the date of the agreement, and by a further clause it was provided that at the expiration of that term the company might have the option of renewing:—

> the said exclusive franchise and its contract for a further period of ten years and a similar option at the expiration of each succeeding ten-year period for which the said contract and franchise may be renewed.

provided that such renewals should be subject to such alterations as might be agreed upon between the parties, and that if either party refused to renew or if the parties failed to agree as to the conditions of such renewal:—

> then the Company may refer the matters in dispute to the Board of Public Utilities Commissioners for settlement and the order of such Board shall be final and binding on both parties hereto.

A further term provided that if the company failed to refer any such matter to the Board within thirty days after a written request by the town to do so, the town council might purchase the company's rights under the contract and in all apparatus and property used for the purposes thereof on such terms as might be agreed upon or, failing agreement, as might be fixed by the Board of Public Utility Commissioners.

By an order dated January 24, 1941, the Board of Public Utility Commissioners, a body constituted under the *Public Utilities Act* (c. 28, R.S.A. 1942), which referred to the agreement of September 19, 1938, as granting exclusive privileges for a period of ten years to the respondent, approved the agreement.

1952

MINISTER OF NATIONAL REVENUE v. WAIN-TOWN GAS & OIL CO. LTD.

Locke J.

By an agreement in writing dated January 6, 1940, to which the Town of Vermilion was a party, the Wain-Town Company assigned the agreement of September 19, 1938, to Franco Public Service Limited, the latter company assuming the obligations of the respondent to the town contained in that agreement and the town joining for the purpose of evidencing its consent to the transaction. The consideration for the assignment was stated in the following language:—

> In consideration of this assignment Franco doth hereby covenant and agree with Wain-Town to pay to Wain-Town by way of royalty, from the proceeds of all sales of natural gas under the said franchise, the following percentages of the actual gross sales of gas reckoned at consumers' prices, less consumers' discounts:
>
> (*a*) During the first three years six and a quarter per cent (6¼%)
>
> (*b*) During the next 7 years, eight and one third per cent (8⅓%)
>
> (*c*) Thereafter during the currency of this agreement, and of the said franchise twelve and one-half per cent (12½%).)

A further term provided that in the event of the town exercising its right to purchase the gas utility during or at the end of either the ten year term of the franchise or during or at the end of the first renewal period of ten years the Franco Company would pay to Wain-Town twenty-five per cent of the net proceeds of such sale.

The matter to be determined is as to whether amounts received by the respondent from the Franco Company during the taxation years 1944 and 1945 of the nature referred to as royalties in the agreement of January 6, 1940 were taxable income of the respondent during these years. In a carefully considered judgment, by which the decision of the Minister of National Revenue affirming assessments made upon the respondent was set aside, Mr. Justice Angers (1) has found that these receipts were not taxable. The question turns upon the interpretation to be placed upon paragraph (*f*) of subsection 1 of section 3 of the *Income War Tax Act*, c. 97, R.S.C. 1927, and the amendments to that *Act* applicable to these taxation periods. The definition of taxable income, in so far as it affects this matter, as contained in subsection 1 of section 3 of the *Act*, reads:

> For the purposes of this Act "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees

(1) [1951] Ex. C.R. 1.

or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture, or business, as the case may be, whether derived from sources within Canada or elsewhere.

and is stated to include, inter alia:—

(*f*) rents, royalties, annuities or other like periodical receipts which depend upon the production or use of any real or personal property, notwithstanding that the same are payable on account of the use or sale of any such property.

The evidence discloses that the Wain-Town Company did not discover natural gas on its own properties or construct pipe lines or install the apparatus required for the supply of gas to the town and what was conveyed to the Franco Company was simply the rights of the company under the agreement which granted the franchise. Apparently the Franco Company proceeded with the necessary installations and supplies the Town of Vermilion with natural gas acquired by it from the wells of certain companies with which it is associated. For the Crown it is said that within the language of paragraph (*f*) the payments made to the respondent company are either royalties or other like periodical receipts which depend upon the production or use of personal property, that is, the franchise granted by the town to Wain-Town. For the respondent it is contended that the payments are simply instalments of the purchase price of the sale of a capital asset, that is, of the incorporeal hereditament described in the statute as a special franchise.

Paragraph (*f*) of subsection 1 of section 3 was introduced into the *Income War Tax Act* by section 1 of c. 55 of the Statutes of 1934. It appears to be common ground that this amendment was made in consequence of the decisions of this Court and of the Judicial Committee in *Minister of National Revenue* v. *Spooner* (1). In that case a landowner had sold a percel of land in Alberta to a company engaged in drilling for oil for the consideration of a sum in cash, certain fully paid shares of the company and the delivery of ten per cent of the petroleum, natural gas and oil which might be produced from the said lands, which

(1) [1931] S.C.R. 339; [1933] A.C. 684.

1952

MINISTER OF NATIONAL REVENUE v. WAIN-TOWN GAS & OIL CO. LTD.

Locke J.

was referred to in the agreement of sale as a royalty reserved to the vendor. Affirming the decision in this Court, it was held that the so-called royalties were not taxable income.

Paragraph (*f*) of subsection 1 does not reproduce the terms of any of the various Income Tax Acts in England or of the rules passed under the authority of any such Act and little help in its interpretation is to be found in any of the English decisions. In the present matter the franchise was sold outright, without any reservation, and thus the sale was of a different nature from that considered in *Spooner's* case. While the agreement of January 6, 1940 referred to the percentages of the actual gross sales of gas as royalties, this, while a matter to be considered, is not decisive nor relieves us of the necessity of determining what was the real nature of the transactions. The expression "royalties" in the paragraph, in the absence of a statutory definition, is to be assigned its ordinary and natural meaning. The word appears in section 109 of the *British North America Act,* where lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the time of Union were reserved to them. It is not, however, in the sense of a royal prerogative or right that the word is used in the *Income Tax Act,* but rather in the sense that the word is commonly used in business transactions to describe sums paid for the right to use a patent or copyright, or to exercise some like incorporeal right, or some payment to be made from the production from property the ownership of which remains vested in the grantor. In my opinion, the word in its ordinary meaning does not describe, or extend to, a payment such as was stipulated for in the agreement between the parties in this matter, where the payment is made as part of the purchase price of the outright sale of personal property transferred without reservation to the Franco Company.

By the terms of the agreement, the payments to which the Wain-Town Company should become entitled were to be paid monthly to its credit in the Vermilion Branch of the Canadian Bank of Commerce covering sales of gas in the preceding month and are clearly not of the nature of annuities. The remaining question is, therefore, whether

they are "other like periodical receipts", within the meaning of paragraph (*f*). The *Income War Tax Act*, as the name implies and as the language of the defining section discloses, is intended to impose a tax on income. In *Withers* v. *Nethersole* (1), Lord Simon, delivering the judgment of the House of Lords, said in part (p. 402):—

> Much emphasis was laid by the Crown on r. 19(2) of the General Rules which begins: "Where any royalty or other sum is paid in respect of a user of a patent . . ." but the Solicitor General did not dispute the Master of the Rolls' proposition (which is plainly correct) that "other sum" in the phrase quoted means other sum which is of a revenue nature and does not include a capital sum.

In my opinion, the same rule of construction should be applied to the language above quoted and so the "other like periodical receipts" referred to are those of an income or revenue, as distinguished from a capital nature. I think the payments stipulated for by the agreement in question were instalments on account of the purchase price of the franchise of a capital nature, such as were the annuities stipulated for as part of the sale price of property considered by this Court in *Wilder* v. *Minister of National Revenue* (2). Since I consider that these payments do not fall within any of the four classifications mentioned in subparagraph (*f*), it is unnecessary to consider whether they are otherwise payments of the nature referred to in the concluding portion of the paragraph.

I would dismiss this appeal with costs.

Appeal allowed with costs.

Solicitor for the appellant: *F. J. Cross.*

Solicitors for the respondent: *MacLeod, Riley, McDermid, Bessemer & Dixon.*

---

(1) [1948] 1 All E.R. 400. (2) [1952] 1 S.C.R. 123.