WRIGHTS' CANADIAN ROPES LIMITED ..... } APPELLANT;

AND

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

1945
*Oct. 9
1946
*Jan. 24

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income Tax—Income War Tax Act (R.S.C. 1927, c. 97, and amendments) —Deductions in computing income—Sums paid by taxpaying company to another company as commissions for performance of obligations assumed by latter under agreement—Disallowance in large part by Minister of National Revenue of such sums as deductions—Whether Minister acted under, and applicability of, s. 6 (1) (i) or s. 6 (2) of Act—Whether Minister's discretion under s. 6 (2) properly exercised—Complaint that report of local inspector of taxation to Minister was not shown to taxpayer or transmitted to be filed in Exchequer Court—Whether function falling upon Minister was within his power of delegation to Deputy Minister of National Revenue for Taxation.

Appellant, a company incorporated under the Dominion *Companies Act*, 49·86 per cent. of whose shares were held by a certain English company, made an agreement with the English company in 1935, whereby, in consideration of performance of obligations assumed by the latter (not to sell in Western Canada, to transmit to appellant orders received from that territory, to select and test products supplied to appellant, to furnish information and technical knowledge, and to advise), appellant agreed to pay to the English company a commission of 5 per cent. upon all cash received in respect of the net selling price of certain products both manufactured and sold by appellant after the date of the agreement. Pursuant to the agreement, appellant paid to the English company in 1940, 1941 and 1942, commissions of $17,381.94, $29,325.85, and $39,480.91, respectively, for which it claimed deductions in computing its income under the Dominion *Income War Tax Act*. The sums were disallowed as deductions except as to the sum of $7,500 in each year. From such disallowance, as affirmed by the Minister of National Revenue (acting by the Deputy Minister of National Revenue for Taxation), appellant appealed to the Exchequer Court. Its appeal was dismissed ([1945] Ex. C.R. 174); and it appealed to this Court. It contended (*inter alia*) that the commissions were an obligation imposed by a valid contract; that on the evidence they were reasonable and there was no evidence to the contrary; that s. 6 (1) (*i*) of said Act governed and that as the English company did not control appellant, no disallowance was warranted; that s. 6 (2) was not applicable; and that in any case the Minister's discretion was not properly exercised; that a report to the Minister from the local inspector of taxation should have been before the Exchequer Court, to give opportunity to appellant to controvert any statements therein; that the function falling upon the Minister was not within his power of delegation to the Deputy Minister.

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Kellock and Estey JJ.

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Held (Kerwin J. dissenting): The appeal should be allowed and the matter referred back to the Minister to be dealt with by him according to the reasons of the majority of the Court.

Per the Chief Justice: In view of an admission, binding respondent, as to the proportion of shares in appellant held by the English company, appellant must be taken not to be controlled directly or indirectly by the English company, and therefore the disallowance of the deductions was not authorized under s. 6 (1) (*i*) of the Act, the provisions of which were applicable to the case, and the Minister could not act under s. 6 (2) in contravention of what was prescribed under s. 6 (1) (*i*); further, there was evidence, uncontradicted, that the advice and services of the English company were worth the amounts paid; further, s. 6 (2) did not apply to the facts: the sums claimed as deductions were not "expenses" within the meaning of s. 6 (2) (which contemplates expenses in the ordinary course of business); they were the price or consideration of the contract and of the due performance by the English company of its obligations; without them there would have been no contract and appellant would not have been in business. (The opinion was expressed that the assessment should be set aside to all intents and purposes, but, in view of conclusions by Hudson, Kellock and Estey JJ. that the matter should be referred back to the Minister, such disposition was agreed to).

Per Hudson J.: S. 6 (1) (*i*) of the Act did not exclude the exercise of the Minister's discretion under s. 6 (2) under which he proceeded. The sums for which appellant claimed deductions could not be considered as part of its "net profit or gain" under s. 3, and there should be special reasons to support the disallowance. The Minister's ruling did not disclose reasons. The Court should know the reasons, so as to decide whether or not they are based on sound and fundamental principles. The report of the local inspector should have been before the Court under s. 63 (*g*) of the Act; appellant was entitled to see it and reply to it. The matter should be referred back to the Minister for reconsideration.

Per Kellock J.: Having regard to the matters for which the commissions were paid, s. 6 (1) (*i*) did not apply; and the Minister did not purport to act under it but expressly acted under s. 6 (2). His discretion under s. 6 (2) should be exercised on proper legal principles. Appellant had a statutory right to have deducted, in the computation of its net profits or gains, "expenses wholly, exclusively and necessarily laid out or expended" for the purpose of earning those profits or gains. For the Minister to disallow any excess over what was reasonable or normal for appellant's business, he first had to determine what was reasonable or normal. His formal decision threw no light as to the grounds upon which it rested. He could not ignore the agreement between appellant and the English company nor its legal consequences; and there was nothing before the Court upon which it could be said that there was any unreasonableness attaching to the commissions or to the agreement to pay them. What evidence there was, was to the contrary. The ground of the Minister's decision was unexplained and his decision was made to appear as a purely arbitrary one. Whether the local inspector's report disclosed grounds for the Minister's decision the

Court had no means of knowing. Therefore it was the duty of the Court to refer the case back to the Minister. Further, s. 63 (*g*) of the Act made the report of the local inspector evidence, and appellant was entitled to have it produced to him before the assessments were made and to have an opportunity to meet whatever it contained; and his not having been accorded this right was in itself a ground for setting aside the assessments and sending the case back for further consideration.

Per Estey J.: The Minister acted under s. 6 (2) of the Act, as stated in his decision and the correspondence; also s. 6 (1) (*i*) was inappropriate, in view of the matters for which the commissions were paid; moreover, there was no evidence before the Minister upon which he could determine by whom appellant was controlled "directly or indirectly" within the provision in s. 6 (1) (*i*). The Minister's discretion under s. 6 (2) is a judicial discretion, to be exercised on proper legal principles. Apart from the local inspector's report, which was not produced before the Court, there were no facts before the Minister which provided a basis upon which a discretionary determination could be made that the items in question were excessive within the terms of s. 6 (2). The said report, admitted by the Deputy Minister to have contained representations from the taxpayer, was "relative to the assessment" and should have been filed as required by s. 63 (*g*) of the Act. As it was not so filed, and also as further information might well have been requested from and given by appellant, the case should be referred back to the Deputy Minister as provided under s. 65 (2) of the Act.

Per Kerwin J., dissenting: On the evidence it could not be said definitely that appellant was not "controlled directly or indirectly" by the English company within the meaning of s. 6 (1) (*i*) of the Act; in any event, s. 6 (2) (enacted in its present form subsequently to the enactment of s. 6 (1) (*i*)) conferred upon the Minister a power which he might exercise even if appellant had been able to bring itself within s. 6 (1) (*i*), and that power is a purely administrative one. Even if it were held to be of a quasi-judicial nature, appellant was given a fair opportunity to be heard and to make its representations, and there was nothing to indicate that the discretion was not exercised on proper legal principles. Appellant's payments to the English company fell within the term "expense" in s. 6 (2). As the substantial matter in the appeal to the Deputy Minister (acting for the Minister) was the same as what was involved in the exercise of his discretion, the decision in *Local Government Board* v. *Arlidge*, [1915] A.C. 120, not only justifies but requires a decision that he was not obliged to produce any report from the local inspector.

It was held (*per* Kerwin, Hudson, Kellock and Estey JJ.; the Chief Justice not expressly dealing with the matter) that the Minister's duty in this case came within his power of delegation under s. 75 (2) of the Act.

APPEAL from the judgment of the Honourable Mr. Justice Cameron, Deputy Judge of the Exchequer Court of Canada (1), dismissing the present appellant's appeal

(1) [1945] Ex. C.R. 174; [1945] 4 D.L.R. 94; [1945] C.T.C. 177.

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from the affirmance by the Minister of National Revenue (acting by the Deputy Minister of National Revenue for Taxation) of the assessment made against the appellant in respect of income tax and excess profits tax for the years 1940, 1941 and 1942, which assessment disallowed (except as to the sum of $7,500 for each year), as deductions in computing the appellant's taxable income, sums paid ($17,381.94 in 1940; $29,325.85 in 1941; and $39,480.91 in 1942) by the appellant to Wrights' Ropes Limited, of Birmingham, England, as commissions pursuant to the provisions of an agreement dated 12th September, 1935.

The material facts of the case and the questions involved in the appeal are sufficiently stated in the reasons for judgment in this Court now reported.

By the judgment of the Court (Kerwin J dissenting), the appeal was allowed with costs, and the matter was referred back to the Minister to be dealt with by him according to the reasons of the majority of the Court. (The matter of costs in the Exchequer Court, overlooked when the reasons were first given, was later spoken to, and the Judges forming the majority of the Court decided that there be added to their reasons a holding that the appellant was entitled to its costs in the Exchequer Court).

H. R. Bray K.C. for the appellant.

R. Forsyth K.C. and *H. H. Stikeman* for the respondent.

THE CHIEF JUSTICE.—The Appeal Case states the present litigation as follows:—

(1) This is an appeal by the appellant from the judgment of the Honourable Mr. Justice J.C.A. Cameron delivered on the 3rd day of August, 1945, on an appeal by the appellant from the decision of the Honourable the Minister of National Revenue affirming the assessment made against the appellant under the provisions of The Income War Tax Act in respect of its taxable income and in respect of Excess Profits Tax for the years 1940, 1941 and 1942.

(2) Pursuant to the provisions of an Agreement made between the appellant and Wrights' Ropes Limited of Birmingham, England, dated September 12, 1935, the appellant has made certain annual payments to Wrights' Ropes Limited.

* * *

(12) From the said judgment the appellant appeals to the Supreme Court of Canada.

The reasons for appeal as given in the notice of appeal from the assessment, were as follows:

(1) That the commissions paid by the appellant to Wrights' Ropes Limited were an obligation imposed on the appellant by a valid contract.

(2) That the opinion of the Minister herein was not based on a consideration of the facts.

(3) That the opinion of the Minister herein was unreasonable and was not formulated in accordance with the law.

(4) That no opportunity has been given to the appellant to refute any material that may have been laid before the Minister of National Revenue or the Commissioner of Income Tax relative to the said assessment and which may be prejudicial to the interests of the appellant.

The decision of the Minister of National Revenue was that, having duly considered the facts and having exercised his discretion under the provisions of subsection 2 of section 6 of the *Income War Tax Act,* he affirmed the assessment and disallowed the sums already mentioned paid to Wrights' Ropes Limited of Birmingham, as expenses or deductions for the purposes of the said Act. "Therefore, on these and related grounds and by reason of other provisions of the Income War Tax Act and Excess Profits Tax Act," said assessment was affirmed.

Subsequent to the filing of a Notice of Dissatisfaction, the case was carried to the Exchequer Court of Canada, where the judgment was that the appeal failed and should be dismissed with costs.

The appellant is incorporated under the Dominion *Companies Act.*

The sections of the *Income War Tax Act* having to do with the issues raised are as follows:—

Section 6 (1):

In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

* * *

(i) any sums charged by any company or organization outside of Canada to a Canadian company, branch or organization, in respect of management fees or services or for the right to use patents, processes or formulae presently known or yet to be discovered, or in connection with the letting or leasing of anything used in Canada, irrespective of whether a price or charge is agreed upon or otherwise; but only if the company or organization to which such sums are payable, or the company in Canada, is controlled directly or indirectly by any company or group of companies or persons within or without Canada, which are affiliated one with the other by the holding of shares or by agreements or

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otherwise; provided that a portion of any such charges may be allowed as a deduction if the Minister is satisfied that such charges are reasonable for services actually rendered or for the use of anything actually used in Canada.

Section 6 (2):

The Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income.

The Excess Profits Tax Act, 1940, provides as follows:

Section 8:

In computing the amount of profits to be assessed, subsections one and two of section six of the *Income War Tax Act* shall, *mutatis mutandis,* apply as if enacted in this Act * * *

The payments claimed by the appellant as deductible expenses were made pursuant to paragraph (5) of the agreement between the appellant and the Birmingham company and the evidence establishes that the payments were made in fact in accordance with said agreement. Paragraph (5) reads as follows:

In consideration of the due performance by Wrights' of their obligations under this Agreement the Canadian Company will pay to Wrights' a commission at the rate of five per centum upon all cash received in respect of the net selling price of all wire ropes both manufactured and sold by the Canadian Company after the date of this Agreement * * *

There is no dispute that the amounts paid by the appellant to the Birmingham company were an obligation imposed by a valid contract. The learned trial judge was of the opinion that the assessments were made, in so far as the matters in dispute are concerned, under section 6 (2) and not under section 6 (1) (*i*). He said that was clearly established by the letter of August 13, 1943, and by the decision of the Minister, dated September 26, 1944.

The contention of the appellant is that the Minister should have considered the matter under section 6 (1) (*i*) of the Act and should have found:

(1) That the commissions paid by the appellant to the English company were in respect of the matters mentioned in the first part of the subsection and

(2) That the appellant was not controlled by Wrights' Ropes Limited and

(3) That, therefore, as the items claimed as deductions were not paid to a controlling company, they could not be disallowed, but, in fact, should be allowed in full.

The learned trial judge, however, found that the evidence was not at all clear that the appellant was not controlled by the English company.

There is, however, in the record a consent signed on behalf of both parties whereby they agreed that at all times pertinent to the issues in this appeal, Wrights' Ropes Limited held 49·86 per cent. of the shares and not 50 per cent. of the shares of the appellant.

This was an admission binding the respondent; and it seems, therefore, difficult to understand why the judgment of the learned trial judge expresses a doubt as to that fact.

It would follow that section 6 (1) (*i*) does apply to the case under consideration, for the appellant, as a result of the consent so filed by the parties, must be taken not to be controlled directly or indirectly by the English company. It is only when the Canadian company is controlled by the company without Canada that a deduction of the sums charged by the company outside of Canada for "services" shall not be allowed as a deduction.

Nor in my view can it be said that, irrespective of the provisions contained in section 6 (1) (*i*), the Minister may disallow the deduction under section 6 (2).

If the case is covered by section 6 (1) (*i*), with due respect, it can not come under 6 (2); it is already provided for and that is the end of it. I can not see how the Minister can act under section 6 (2) in contravention of what is prescribed under section 6 (1) (*i*).

I can not find any good reason for excluding section 6 (1) (*i*) as the learned trial judge has done and, to my mind, that would be sufficient to allow the appeal, because the sums paid by the appellant to the English company in respect of services were not paid to a company controlling the appellant, and it is of no concern to inquire what services were supplied, how frequently they were supplied or how important they were.

However, the managing director testified that the advice and services were worth the amounts paid and his evidence was not contradicted.

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But further and in any event, I can not see my way to apply section 6 (2) to the present case.

The section says:

> The Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income.

Of course, the discretion must be exercised on proper legal principles. (*Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (1)).

Whatever may be said about the question whether the record discloses that, in the premises, the Minister exercised or not his discretion, I am distinctly of opinion that section 6 (2) does not apply to the facts herein.

What the Minister may disallow is "any expense".

The sums claimed as deduction by the appellant are not expenses within the meaning of the section, they were sums paid by the appellant as a condition *sine qua non* of the agreement between it and the English company. These sums were the price or consideration of the contract and of the due performance by the English company of its obligations under the agreement. No other consideration moving from the Canadian company to the English company was either contained or represented in the agreement. Without them, there would have been no contract at all. It is the essential condition of its very existence. But for the payment so agreed upon and made by the appellant to the English company, there would have been no contract; and but for that contract, the appellant would not have been in business.

The effect of the Minister's decision is really to nullify the consideration clause in the agreement and to leave the latter in a modified or amended form to which, of course, the parties never agreed.

I fail to see where in section 6 (2) the Minister found the power and authority to act as he has done.

The sums paid by the appellant were not expenses in the ordinary course of their business, and those are the expenses which are contemplated by section 6 (2).

Here, the sums which the Minister refused to allow as deductions constitute the very price and the only price

(1) [1940] A.C. 127).

paid by the appellant for the contract which they made with the English company; and I am unable to read section 6 (2) as being intended to cover a case such as this.

Both therefore for the reason that under 6 (1) (*i*) the appellant has been proved and indeed admitted not to be controlled by the English company and, as a consequence, the sums paid by the appellant are properly deductible and can not be disallowed, but also because, in any event, section 6 (2) does not apply to the present case, I am of opinion that the appeal should be allowed with costs and that the assessment should accordingly be set aside to all intents and purposes; but, in view of the conclusions reached by the other Members of the Court who think that the matter should be referred back to the Minister under the provisions of section 65 (2) of the Act, I will agree with them in the disposition of the present case.

KERWIN J. (dissenting).—This is an appeal by Wrights' Canadian Ropes Limited, a company incorporated under the Dominion *Companies Act,* from a judgment of the Exchequer Court dismissing its appeal from the respondent's affirmation of the appellant's assessments for the years 1940, 1941 and 1942, wherein commissions paid by the appellant to an English company called Wrights' Ropes Limited, Birmingham, were disallowed as deductions from income for those years, except as to the sum of $7,500 in each year.

The commissions were paid pursuant to an agreement dated September 12th, 1935, between Wrights' Ropes Limited, Birmingham, (Wrights'), Charles Hirst and Son Ltd. (Hirst's) and the appellant, which agreement was supplemental to an earlier one dated May 19th, 1931. The pertinent terms are, I think, fairly summarized in the appellant's factum and I transcribe them substantially as follows:—

(*a*) The English company should not sell wire rope in Western Canada (west of the Ontario-Manitoba boundary).

(*b*) Any orders from Western Canada received by the English company to be transmitted by it to the appellant.

(*c*) The English company must select and test all wire purchased by the appellant from Hirst's.

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(*d*) The English company is to place at the disposal of the appellant, at request, all its technical knowledge and generally advise the appellant on manufacture and marketing.

(*e*) In payment for such services and for territory, the appellant is to pay the English company a commission of 5 per cent. on all sales made by it of its manufactured product.

Pursuant thereto the following amounts were paid to Wrights' by the appellant: in 1940, $17,381.94; in 1941, $29,325.85; in 1942, $39,480.91; and these were claimed by the appellant as deductions from income in its returns for those years. On August 13th, 1943, the Inspector of Income Tax at Vancouver notified the appellant that the Minister of National Revenue was about to exercise his discretion under subsection 2 of section 6 and subsection 2 of section 75 of the *Income War Tax Act* in connection with these payments and invited the appellant to submit written representations for consideration. The appellant in reply forwarded the agreements of 19th May, 1931, and 12th September, 1935.

On October 9th, 1943, the Inspector further notified the appellant that it was proposed to recommend to the Minister that commissions paid to Wrights' (called by the Inspector "the controlling company") in 1940, 1941 and 1942 be disallowed as deductions except as to the sum of $7,500 in each year. The appellant replied on 21st October, 1943, that it had nothing further to add but on 29th October, 1943, it advised the Inspector that Wrights' did not have the controlling interest in the appellant company but held fifty per cent. of the shares, the other fifty per cent. being held by Hirst's.

The Minister by the Deputy Minister of National Revenue for Taxation exercised his discretion in the manner suggested and on 10th May, 1944, notices of assessment were mailed to the appellant, all payments to Wrights' by way of commissions on sales being disallowed as deductions except for the sum of $7,500 in each year.

The appellant gave notice of appeal on 29th May, 1944, and on 26th September, 1944, the Minister of National Revenue, acting by the Deputy Minister, affirmed the as-

sessments. On 11th October, 1944, the appellant filed his Notice of Dissatisfaction and, by Reply dated 8th January, 1945, the Minister, again through the Deputy Minister, affirmed the assessments as levied. From that affirmation an appeal was taken to the Exchequer Court.

A formal admission in writing was filed in that Court, signed by the solicitors for both parties, that Wrights' held 49·86 per cent. of the shares referred to in the letter of October 29th, 1943, and not 50 per cent. as therein stated. It was proved at the trial that there was no relation between Wrights' and Hirst's "as far as stock interest goes." The appellant desired that these two matters be shown in order to avail itself, if possible, of subsection 1, paragraph (*i*), of section 6 of the *Income War Tax Act*. The Deputy Judge of the Exchequer Court, Cameron J., decided that it did not apply but that the discretion of the Minister, conferred on him by subsection 2 of section 6, had been properly exercised. These two enactments read as follows:—

6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

(*i*) any sums charged by any company or organization outside of Canada to a Canadian company, branch or organization, in respect of management fees or services or for the right to use patents, processes or formulae presently known or yet to be discovered, or in connection with the letting or leasing of anything used in Canada, irrespective of whether a price or charge is agreed upon or otherwise; but only if the company or organization to which such sums are payable, or the company in Canada, is controlled directly or indirectly by any company or group of companies or persons within or without Canada, which are affiliated one with the other by the holding of shares or by agreements or otherwise; provided that a portion of any such charges may be allowed as a deduction if the Minister is satisfied that such charges are reasonable for services actually rendered or for the use of anything actually used in Canada;

2. The Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income.

For the appellant it is argued that subsection 2 is a general provision which is inapplicable because the circumstances bring the case within the special category dealt with in paragraph (*i*) of subsection 1. Related to the facts of this case that paragraph, it is said, means

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this:—In computing profits or gains, a deduction is not to be allowed for management fees or services charged by a company outside of Canada to a Canadian company although by the proviso power is given the Minister to allow as a deduction a portion of any such fees or services; however, by virtue of the middle part of the paragraph, introduced by the words "but only", the prohibition does not apply at all if direct or indirect control of the Canadian company by the receiving company (outside of Canada) is lacking. It is said that the English company does not control the appellant directly or indirectly since it holds only 49·86 per cent. of the total issued capital stock of fifteen hundred shares. It is pointed out that it is admitted that the payments to the English company were made in pursuance of a valid contract and, therefore, it is argued, while subsection 1, paragraph (*i*), of section 6 is in negative terms, these payments should be allowed.

Now, in the first place, the "sums charged" shall not be allowed as a deduction if either the receiving company or the paying company is controlled "by any company or group of companies or persons within or without Canada, which are affiliated one with the other by the holding of shares or by agreements or otherwise." The mere fact that Wrights' does not own a majority of the shares of the appellant and that there was no relation between Wrights' and Hirst's "as far as stock interest goes" is not sufficient to bring the appellant within the negative words of subsection 1, paragraph (*i*). Furthermore, it may be noted that the only other shareholders of the appellant are three residents of Canada and in the agreement of May 19th, 1931, at which time the appellant was known as William Cooke and Co. (Canada) Limited (for brevity called "Cooke's"), it was recited that "Wrights' and their nominees hold one-half of the issued share capital in Cooke's, and Hirst's and their nominees hold the other half of such issued capital." Because of these additional factors, I agree with the Deputy Judge that it cannot be said definitely that the appellant is not "controlled directly or indirectly" by Wrights' within the meaning of the paragraph.

In any event, paragraph (*i*) was already in the Act, having been enacted in 1935, when subsection 2 was passed in 1940. It is true that subsection 2 was enacted in lieu of an earlier subsection 2 but the wording thereof is so different and the powers conferred upon the Minister by the present subsection are so greatly extended that it must be taken as a later expression of the will of Parliament. A comparison of the present wording of subsection 2 given above with the earlier enactment transcribed below, will, I think, make the matter clearer:—

> 2. The Minister may disallow as an expense the whole or any portion of any salary, bonus, commission or director's fee which in his opinion is in excess of what is reasonable for the services performed.

Therefore, by subsection 2 of section 6, Parliament conferred upon the Minister a power which he might exercise even if the appellant had been able to bring itself within paragraph (*i*), and that power is a purely administrative one. Even if it were held to be of a quasi-judicial nature, the appellant was given a fair opportunity to be heard and to make its representations, and there is nothing to indicate that the discretion was not exercised on proper legal principles. The fact that subsection 3 of section 6 concludes "The decision of the Minister on any question arising under this subsection shall be final and conclusive", and that subsection 4 ends with the sentence, "The determination of the Minister hereunder shall be final and conclusive", cannot alter the construction of subsection 2, Subsections 3 and 4 deal with entirely different matters and it will be time enough to deal with the effect of the concluding sentences therein when the occasion arises. The payments made to Wrights' fall within the term "expense" in subsection 2; if this were not so, the appellant would have difficulty in showing that they were disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income.

It was argued that since the sum of $7,500 was allowed in each year, although the three years differed widely in volume of sales as reflected in income, it was evident that the discretion had not been properly exercised, but

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the answer is that the Deputy Minister might very well consider that, whatever the volume, the amount allowed was reasonable or normal for the appellant's business.

It was contended that the Minister was not empowered to delegate his duty under section 59 of considering the appeal from the original assessment. In order to appreciate this argument, it is necessary, first of all, to refer to subsection 2 of section 75:

> 2. The Minister may make any regulations deemed necessary for carrying this Act into effect, and may thereby authorize the Commissioner of Income Tax to exercise such of the powers conferred by this Act upon the Minister, as may, in the opinion of the Minister, be conveniently exercised by the Commissioner of Income Tax.

In accordance therewith the Minister, on August 8th, 1940, signed the following authorization to the Commissioner of Income Tax:—

> To whom it may concern:
>
> Be it hereby known that under and by virtue of the provisions of the Income War Tax Act, and particularly section 75 thereof, and the provisions of the Excess Profits Tax Act, 1940, and particularly section 14 thereof, that I do hereby authorize the Commissioner of Income Tax to exercise the powers conferred by the said Acts upon me, as fully and effectively as I could do myself, as I am of the opinion that such powers may be the more conveniently exercised by the said Commissioner of Income Tax.
>
> Dated at Ottawa this 8th day of August, A.D. 1940.
>
> (sgd) COLIN GIBSON,
>
> Minister of National Revenue.

By section 1 of chapter 24 of the Statutes of 1943-44, authority was given the Governor in Council to appoint a Deputy Minister of National Revenue for Taxation and it was provided that wherever in any statute, regulation, authorization or order there appears the expression "Commissioner of Income Tax", the said statute, regulation, authorization or order shall be read and construed as if the expression "Deputy Minister of National Revenue for Taxation" were substituted therefor. It is not disputed that Mr. C. Fraser Elliott was the Commissioner of Income Tax and is now the Deputy Minister of National Revenue for Taxation, nor is it denied, if subsection 2 of section 6 applies so as to permit the Minister to exercise the discretion referred to therein, that such discretion could be exercised by the Deputy Minister in making the original assessment.

Having received notice of that original assessment, the appellant company objected to the amount thereof and duly served a notice of appeal upon the Minister. It is at this stage that section 59 may be conveniently looked at:—

> 59. Upon receipt of the said notice of appeal, the Minister shall duly consider the same and shall affirm or amend the assessment appealed against and shall notify the appellant of his decision by registered post.

Now, the discretion having in fact been exercised under subsection 2 of section 6 by the Deputy Minister and the notice of assessment having been given by him on behalf of the Minister, the argument is that section 59, in enacting that "the Minister shall duly consider" the appeal, imposed a duty upon him which could not be delegated under the permission given by subsection 2 of section 75 to the Minister to authorize the person who is now the Deputy Minister to exercise "powers" conferred by the Act upon the Minister. Counsel for the appellant drew a distinction between powers and what he described as a duty under section 59. While it is true that a duty in the sense of an obligation is imposed upon the Minister by that section, it is none the less true that the powers thereby invested in him to hear the appeal must be included within the powers that he is authorized to delegate by subsection 2 of section 75.

The final contention on behalf of the appellant is that in deciding the appeal the Deputy Minister improperly received evidence not known or made available to the appellant and that no opportunity was given it to controvert the facts or statements, the subject matter of that evidence. It is made abundantly clear in the examination for discovery of Mr. Elliott, which was put in at the trial, that in hearing the appeal under section 59 he had before him nothing but what he had already considered in exercising the discretion under subsection 2 of section 6, excepting, of course, matters to which the appellant drew his attention. The material included one or more reports from the Vancouver inspector. In connection with the appeal certain remarks in *The King*

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v. *Noxzema Chemical Company of Canada, Ltd.* (1) may be reiterated and emphasized. While that case was concerned with the *Special War Revenue Act,* reference was made to the decision of the Judicial Committee in *Pioneer Laundry* v. *Minister of National Revenue* (2), where the *Income War Tax Act* was in question although in connection with a decision of the Minister as to depreciation under section 5 (*a*) as it then stood. It was pointed out at page 185 of the *Noxzema* case (1) that while there was no appeal provided for in terms from such a decision, there was an appeal from the determination as to the amount of taxes to be paid. Similarly, in the present case, while there is no appeal from the exercise of discretion under subsection 2 of section 6, there is an appeal from the assessment to the Deputy Minister and ultimately to the Courts. On my construction of the relevant provisions, the substantial matter in the appeal to the Deputy Minister was the same as what was involved in the exercise of the discretion, and the decision of the House of Lords in *Local Government Board* v. *Arlidge* (3) not only justifies but requires a decision that the Deputy Minister is not obliged to produce any report from the Inspector.

This is the conclusion at which the local judge arrived in the present case, although he stated that it was not without some doubt, in view of the following extract from the speech of Lord Loreburn in *Board of Education* v. *Rice* (4):—

> They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

As the local judge pointed out, the decision in the *Rice* case (5) was referred to with approval by Davis J. in the *Noxzema* case (1).

The decisions in the *Rice* (5) and *Arlidge* (3) cases must be read together. The former illustrates the principle that any power conferred upon a Government Department by statute must be exercised in strict conformity

(1) [1942] S.C.R. 178.
(2) [1940] A.C. 127.
(3) [1915] A.C. 120.
(4) [1911] A.C. 179, at 182.
(5) [1911] A.C. 179.

with the terms of the statute, and that any action by such department, which is not so exercised, should be treated by a court of law as invalid. Lord Loreburn's speech, including the extract copied above, was referred to in the *Arlidge* case (1) but all the peers had no difficulty in holding that although the appeal to the local Government Board under the *Housing, Town Planning, etc., Act,* 1909, required the Board to act judicially, there was no obligation upon it to produce a report made to it by one of its inspectors. This is particularly applicable in the present case when, as I have already indicated, the appeal to the Deputy Minister really involved the same matter as had come before him when exercising the discretion conferred by subsection 2 of section 6. This disposes of the last contention advanced on behalf of the appellant.

The discretion was exercised not only in connection with income tax but also excess profits tax, as section 8 of *The Excess Profits Tax Act, 1940,* provides:—

> 8. In computing the amount of profits to be assessed, subsections one and two of section six of the *Income War Tax Act* shall, *mutatis mutandis,* apply as if enacted in this Act and no deduction shall be allowed in respect of the following:
>
> (*a*) the tax payable under this Act in respect of any taxation period;
>
> (*b*) any expense which the Minister in his discretion may determine to be in excess of what is reasonable and normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the amount of profits.

By virtue of section 14 of that Act, subsection 2 of section 75 of the *Income War Tax Act* applies, *mutatis mutandis,* to matters arising under the provisions of the former. What has been said with reference to the income tax assessment applies equally to the excess profits tax assessment.

The appeal should be dismissed with costs.

HUDSON J.—The question for decision in this appeal is whether or not certain sums of money paid out of earnings by the appellant company could properly be

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disallowed by the Minister under section 6 (2) of the *Income War Tax Act* and section 8 of *The Excess Profits Tax Act, 1940*. The sections read as follows:

Sec. 6 (2):

The Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income.

Sec. 8:

In computing the amount of profits to be assessed, subsections one and two of section six of the *Income War Tax Act* shall, *mutatis mutandis*, apply as if enacted in this Act and no deduction shall be allowed in respect of the following:

* * *

(*b*) any expense which the Minister in his discretion may determine to be in excess of what is reasonable and normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the amount of profits.

The facts in evidence are set forth in the judgment of the Court below.

It appears that the payments in question were all made in fulfilment of legal obligations arising under the terms of agreements made by the appellant with two other companies some years prior to the taxation years in question. The evidence does not indicate any inadequacy in consideration for the payments made, nor is there any suggestion of fraud.

The Minister professed to act under the provisions of the above sections 6 (2) and 8, but gives no reasons for his decision.

The Court is warranted in interfering with the exercise of the Minister's discretion if such discretion has not been exercised in accordance with "sound and fundamental principles": see *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (1); *The King* v. *Noxzema Chemical Co. of Canada Ltd.* (2).

On the facts before us it would appear that the taxes in question were imposed in respect of moneys received by the appellant but which it was in effect legally bound to pay to third parties. Such payments could not be con-

(1) [1939] S.C.R. 1, [1940] A.C. 127.

(2) [1942] S.C.R. 178.

sidered as part of the "net profit or gain" of the appellant under section 3 of the *Income War Tax Act,* and there should be special reasons to support such a departure from this general rule as appears here.

The ruling of the Minister does not disclose any reasons. No doubt he had what appeared to him perfectly sound reasons for his decision, but none are before us. It is not for the Court to weigh the reasons but we are entitled to know what they are, so that we may decide whether or not they are based on sound and fundamental principles.

The Minister also had before him a report from the local Inspector of Taxation but that report's contents is not in evidence. It may have had an important bearing on his decision. It should have been before the Court. Section 63 (*g*) of the Act provides:

> Proceedings in Exchequer Court.
>
> 63. Within two months from the date of the mailing of the said reply, the Minister shall cause to be transmitted to the registrar of the Exchequer Court of Canada, to be filed in the said Court, typewritten copies of the following documents:
>
> * * *
>
> (*g*) All other documents and papers relative to the assessment under appeal.

It was strongly contended on behalf of the appellant that this document should have been before the Court on the appeal, so that evidence could be given on its behalf in rebuttal to any statements and such answers to arguments advanced which it thought advisable.

It was argued on behalf of the Minister that there was no duty on the part of the Minister to produce a document such as this, which was in its nature confidential.

There are many good reasons for not compelling the production of such report. These reasons are set forth in the various opinions of the judges in England in the case of *Local Government Board* v. *Arlidge* (1), but these, I think, are not applicable to the case here and, in any event, as the report should be before the Court under the provision of section 63 (*g*) of our Act, the appellant would have a right to see it and make such reply as it deems advisable.

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It was also contended by the appellant that the provisions of section 6 (1) (*i*) and section 6 (2), in so far as they were applicable to the case at bar, were mutually exclusive. The Minister proceeded under section 6 (2) and I am satisfied that in the present case section 6 (1) (*i*) does not in any way exclude the exercise of discretion under the former section.

The appellant also contended that the Minister had no power to delegate his authority to decide this matter, but that, I think, is disposed of by section 75 (2) of the Act.

The matter should be referred back to the Minister for reconsideration under the provisions of section 65 (2) of the Act. The appellant should have the costs of this appeal.

KELLOCK J.—This is an appeal from the judgment of the Exchequer Court, Cameron J., dated 3rd of August, 1945, dismissing an appeal by the appellant from the decision of the Minister of National Revenue which in turn affirmed an assessment made against the appellant for income and excess profits taxes for the years 1940, 1941 and 1942. In those years commissions of $17,381.94, $29,325.85 and $39,480.91, respectively, were paid by the appellant to an English company, Wrights' Ropes Limited, upon the terms of an agreement in writing between them. In lieu of these amounts, a uniform sum of $7,500 was allowed in respect of each year as an expense in determining the taxable income or profits of the appellant and the excess over that amount was disallowed. Before the assessments were made, all apparently being made at the same time, the local Inspector of Income Tax at Vancouver wrote the appellant on the 13th of August, 1943, saying that "by virtue of the powers vested in the Minister under subsection 2 of section 6 and subsection 2 of section 75 of the Income War Tax Act, discretion is about to be exercised" in connection with the "commission on sale of wire rope manufactured, paid to Wrights' Ropes Limited." The appellant was invited to submit written representations for consideration. Following this, the appellant sent to the local Inspector copies of two agreements dated respectively May 19, 1931, and

September 12, 1935, under the latter of which the commissions had been paid. On the 9th of October, 1943, the local Inspector advised the appellant that he proposed to recommend to the Minister the action ultimately adopted and invited further representations, either verbal or written, to be made before the 15th of October. To this letter the appellant replied that it had nothing further to add, but by letter of the 29th of October the appellant referred to the letter of October 9th in which the Inspector had referred to the commissions as having been paid to the "controlling" company. In answer the appellant stated that this was not a correct statement, as the English company did not have a controlling interest in the appellant but held 50 per cent. of the shares, the other 50 per cent. being held by another English company, also party to the agreements, namely, Charles Hirst & Sons Limited. It now appears that the real situation with regard to the ownership of shares in the appellant company is that Wrights' Ropes Limited held 49·86 per cent. and not 50 per cent.

It is not necessary to refer with particularity to the course of proceedings followed subsequent to the assessments. The contentions of the appellant are in substance, (1) that sec. 6 (1) (*i*) governs and that, as the English company, Wrights' Ropes Limited, hereinafter referred to as Wrights', does not control the appellant, the clause does not warrant any disallowance; (2) that subsection 2 of sec. 6 is not applicable as the two provisions are mutually exclusive; (3) whether the Minister acted under subsection (1) (*i*) or subsection 2, he was performing a quasi-judicial function and the discretion was not properly exercised; (4) that the Minister acted upon evidence not known or made available to the appellant and which the appellant had no opportunity of controverting; and (5) that section 75 (2) authorizes the Minister to delegate "powers," whereas the function falling upon the Minister under section 6 (2) was a "duty" and therefore not within the power of delegation.

Dealing with the first contention, my opinion is that subsection (1) (*i*) of section 6 does not apply. Under the agreement of 12th of September, 1935, which displaced the earlier agreement except as to rights already accrued under that agreement, the appellant became obligated

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to pay to Wrights' a commission of 5 per cent. upon its cash receipts from the sale of wire ropes in consideration "of the due performance by Wrights' of their obligations" under the agreement. Wrights' was a manufacturer of wire ropes and prior to the date of the first agreement was engaged in selling them in Western Canada. By the first agreement, Wrights' transferred this business to the appellant and agreed to stay out of the territory and to refer all enquiries and orders to the appellant. Under the later agreement, which was entered into after the business had been transferred to the appellant, Wrights' agreed (*a*) not to supply for sale or sell any wire ropes in Western Canada, (*b*) to refer all enquiries or orders from Western Canada to the appellant, (*c*) with respect to any enquiry for goods which the appellant should be unable or unwilling to fill and which could be manufactured by Wrights', the appellant was to act as agent for Wrights' in connection with such business and Wrights' was to pay the latter a commission, (*d*) Wrights' was to pay the appellant a commission in respect of sales which might be made by a former agent of Wrights' out of stocks still remaining in the hands of that agent, (*e*) Wrights' were to act as technical advisors of the appellant, (*f*) to supply the appellant with information, and (*g*) to supervise the supply by the Hirst Company to the appellant of goods ordered by the appellant from Hirst's. These terms appear to be identical with those contained in the first agreement.

Accordingly, the sums payable by the appellant to Wrights' were not merely paid "in respect of management fees or services" and it is not shown and no doubt could not be shown how much of the sums were so paid. There is nothing in either agreement as to rights to use patented processes or formulae or in connection with the letting or leasing of anything from the one company to the other, so that it could not be argued that the last part of the subsection could have any application. Accordingly, in my opinion, for the reasons given, the subsection has no application at all and it is not necessary to consider the question of control of the appellant company. It is apparent from the correspondence already referred to and from the formal decision of the Minister

on the appeal to him from the assessments, that the Minister was of the same view and did not purport to act under the provisions of subsection (1) (*i*) but expressly under subsection 2.

It will be convenient at this point to consider the appellant's fourth contention. It was shown in evidence that in reaching his decision, the Minister, or rather the Deputy Minister acting for him, had before him a report of the local Inspector which was not made known to the appellant. Counsel for the respondent objected in the course of the proceedings in the Exchequer Court to its production and it was not produced. The decision of the Minister states that he has duly considered the facts as set forth in the Notice of Appeal "and matters thereto related." The document also states that "notice of such decision is hereby given pursuant to Section 59 of the Act and is based on the facts presently before the Minister."

Before us the respondent contended that the decision of the House of Lords in *Local Government Board* v. *Arlidge* (1) supported the stand taken and that the appellant was not entitled to see the report.

In my opinion, the answer to this contention is to be found in the *Income War Tax Act* itself. The Act by sec. 60 provides for an appeal to the Exchequer Court of Canada and sec. 63 imposes upon the Minister the obligation of causing to be transmitted to the registrar of the Court for filing in that Court a number of documents including "all other documents and papers relative to the assessment under appeal" (clause *g*). I know of no statutory provision derogating from the imperative terms of this section. The *Arlidge* case (1) involved quite different statutory provisions and, when the reasons for judgment in that case are examined, their relevancy to the legislation under consideration in the case at bar, in my opinion, disappears. In *Arlidge's* case (1), it was decided, among other things, that a report made by an Inspector of the Local Government Board to that Board upon a public inquiry held by him into the matter there in question, namely, the refusal of a local authority to determine a previous order made by it for the closing of a dwelling house of the respondent's, need not be produced to the respondent in connection with

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his appeal to the Board from that refusal. Before the legislation there in question, such an appeal had been to quarter sessions but a change was made by the Act of 1909 which provided that the appeal should go to the Board. The Act also provided that in the case of an appeal, the procedure as to everything, including costs, was to be such as the Board might by its rules determine, provided that the rules should provide that the Board should not dismiss any appeal without having first held a public local inquiry.

Prior to this legislation, the Board was already in existence as a Department of State, and the evidence established that the holding of local inquiries by the Board was directed under many other statutes and that it had always been the practice of the Board to treat the reports of their Inspectors on such inquiries as confidential documents for their own use. The House of Lords held that Parliament in enacting the 1909 legislation must have intended that the existing procedure of the Board should continue to be followed. Lord Haldane at p. 132 said:

> Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organization with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, *in the absence of any declaration to the contrary,* to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently.

Lord Moulton at p. 150 said:

> Parliament has wisely laid down certan rules to be observed in the performance of its functions in these matters, and those rules must be observed because they are imposed by statute, and for no other reason, and whether they give much or little opportunity for what I may call quasi-litigious procedure depends solely on what Parliament has thought right. These rules are beyond the criticism of the Courts, and it is not their business to add to or to take away from them, or even to discuss whether in the opinion of the individual members of the Court they are adequate or not.

Lord Parmoor at p. 143 said:

> It was well known in 1909 that the Local Government Board did not in ordinary cases publish the reports of inspectors before whom local enquiries were held. Unless an opposite intention is declared, or can be inferred, a statutory form of procedure should be construed so as to conform with prevailing practice.

However, he also said at p. 144:

If the report of the inspector could be regarded as *in the nature of evidence* tendered either by the local authority or the owner of the premises, there would be a strong reason for publicity. In my opinion it is nothing of the kind, and is simply a step in the statutory procedure for enabling an administrative body, such as the Local Government Board, to hear effectively an appeal against the order of the local authority.

In the case at bar, the Statute by section 63 (*g*) has, in my view, made the report of the local Inspector here in question, evidence. *Arlidge's* case (1), therefore, is an authority in favour of the appellant rather than in favour of the respondent.

In *Board of Education* v. *Rice* (2), Lord Loreburn at p. 182 said:

Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy *for correcting or contradicting any relevant statement* prejudical to their view.

In *The King* v. *Noxzema Chemical Company of Canada Ltd.* (3), Davis J. said at p. 180:

If, on the other hand, the function of the Minister under the section may be said to be of a quasi-judicial nature, even then all that was necessary was that the taxpayer be given a fair opportunity to be heard in the controversy; and to *correct or to contradict any relevant statement prejudicial to its interests.*

It is admitted by the respondent that the Minister, or his Deputy, was acting in the case of the appellant in a quasi-judicial character. In my opinion, therefore, the appellant was entitled to have produced to him before the assessments were made, the report in question and to have an opportunity to meet whatever it con-

(1) [1915] A.C. 120.
(2) [1911] A.C. 179.
(3) [1942] S.C.R. 178.

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tained. It could not be contended it was not a document "relative" to the assessment under appeal. Not having been accorded this right, I think the appeal must be allowed and the assessments set aside on this ground alone and the case be sent back for further consideration to the court below were nothing more involved in the appeal.

Coming to the appellant's third contention, this involves the question of the proper construction of subsection 2 of sec. 6. It reads as follows:

> The Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income.

Section 8 (*b*) of *The Excess Profits Tax Act, 1940,* is virtually in the same terms. As already mentioned, it is not disputed, but rather expressly admitted, by the respondent that the duty cast upon the Minister under this provision is of a quasi-judicial nature. In his factum counsel for the respondent says:

> In deciding the appeal, the Court must determine that the assessment was made in accordance with the law. To do this, it must be ascertained that the assessment was issued in compliance with all the statutory provisions of the two Acts and that *no general rules of law outside the statutes* have been contravened. The only statutory requirements in question are those above quoted [i.e. Sec. 6 (2) and Sec. 8 (*b*)], and the only *extra statutory rules* which must be considered are those governing the exercise of the discretion of the Minister of National Revenue conferred upon him by Sec. 6 (2) of the Income War Tax Act and Sec. 8 (*b*) of the Excess Profits Tax Act, 1940. It is submitted that if the statutory requirements and the rules of law regarding the exercise of ministerial discretion have been properly observed throughout, there can be no alternative but to hold that, since the discretion was properly exercised, it cannot be interfered with and that the assesssment was properly levied.

The factum further states as follows:

> That this is one of the cardinal rules of the proper exercise of discretion is indicated by Lord Thankerton, L.C., in the judgment of the Privy Council in *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (1), where he says "That involved, in my opinion, an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles".

The respondent contends that the discretion was exercised by the Minister in accordance with the requirements so stated and was not "arbitrary, vague or fanciful, but

(1) [1940] A.C. 127, at 136.

legal and regular". The language quoted is to be found in the judgment of Lord Halsbury in *Sharp* v. *Wakefield* (1), to which I shall later refer.

In the *Pioneer Laundry* case (2) a claim for depreciation in connection with certain machinery of the taxpayer had been disallowed on the ground that the machinery had been the subject of an allowance for depreciation of approximately 100 per cent. while in the hands of a former owner. In the view of the Department on the facts there present, although the former owner and the then owner were separate legal entities, there had been no actual change in ownership of the machinery, and therefore nothing could be allowed. In his judgment in this Court, which was approved by the Privy Council, Davis J. at p. 4 referred to the opening words of the definition of "income" in sec. 3, viz., the annual "net" profit or gain and to sections 5 (*a*) and 6 (*b*) of the *Income War Tax Act* as they then stood. Section 5 provided that:

> Income as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*a*) Such reasonable amount as the Minister in his discretion may allow for depreciation, * * *

Section 6 (*b*), then as now, provided that in computing the amount of the profits or gains to be assessed, a deduction should not be allowed in respect of any depreciation, depletion or obsolescence except as otherwise provided by the Act. Davis J. held that under these provisions the taxpayer was entitled, in the language of the statute, to an exemption or deduction in "such reasonable amount as the Minister in his discretion may allow for depreciation", which involved, in his opinion, "an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles." He referred to sec. 60 which gives a right of appeal, and stated that the exercise of the Minister's discretion would not be interfered with unless it was "manifestly against sound and fundamental principles." At p. 6 he said:

> If the Court is of the opinion that in a given case the Minister or his Commissioner has, however unintentionally, failed to apply what the Court regards as fundamental principles, the Court ought not to hesitate to interfere;

(1) [1891] A.C. 173, at 179.
(2) [1939] S.C.R. 1; [1940] A.C. 127.

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and at p. 8:

> The *Income War Tax Act* gives a right of appeal from the Minister's decisions and while there is no statutory limitation upon the appellate jurisdiction, normally the Court would not interfere with the exercise of a discretion by the Minister except on grounds of law.

He held that in that case, the Minister had exercised his discretion upon wrong principles of law.

In the Privy Council (1), Lord Thankerton at p. 136 said:

> The taxpayer has a statutory right to an allowance in respect of depreciation during the accounting year on which the assessment in dispute is based. The Minister has a duty to fix a reasonable amount in respect of that allowance and, so far from the decision of the Minister being purely administrative and final, a right of appeal is conferred on a dissatisfied taxpayer; but it is equally clear that the Court would not interfere with the decision unless—as Davis J. states—"it was manifestly against sound and fundamental principles."

Under the legislation in question in the *Pioneer* case, therefore, it was held that, (1) the taxpayer was given a right to an allowance in respect of depreciation, and (2) a duty was imposed upon the Minister to fix a reasonable amount therefor, (3) such duty was not purely administrative, but required the Minister to give effect to the evidence before him in accordance with relevant legal principles.

In the case at bar the appellant, by sec. 6 (*a*), is given a statutory right to have deducted in the computation of its "net" profits or gains, "expenses wholly, exclusively and necessarily laid out or expended" for the purpose of earning those profits or gains. In order that the Minister might disallow any excess over what was reasonable or normal for the appellant's business, he first had to determine what was reasonable or normal. The legislation here applicable, therefore, is in principle the same as that in question in the case just cited. In my opinion, therefore, the respondent was well advised in taking the view of the law set out in his factum to which I have referred.

In *Sharp* v. *Wakefield* (2), Lord Halsbury said:

> "Discretion" means, when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's* case (3); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular.

(1) [1940] A.C. 127.
(2) [1891] A.C. 173, at 179.
(3) (1598) 5 Rep. 100, a.

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One of the facts before the Minister in exercising the duty cast upon him by the Statute was the agreement under which the commissions were paid. It was not open to the Minister to ignore the agreement nor its legal consequences. Accordingly, upon what evidence or upon what ground could he refuse to give effect to it, assuming its *bona fides?* The Statute does not say that the Minister may disallow the excess over what is reasonable or normal for the "class" of business carried on by the taxpayer. When the Statute means that, it says so; sec. 23B. It is not shown that the appellant had ever paid any other commissions than those to Wrights' Ropes Limited and there is, therefore, no standard by which the commissions here in question can be shown to have been abnormal with respect to its business. Accordingly, the disallowance can only have been based on unreasonableness. The formal decision of the Minister throws no light as to the grounds upon which it was rested. The document reads:

> The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notice of Appeal, and matters thereto related and, having exercised his discretion under the provisions of Subsection 2 of Section 6 of the Income War Tax Act, hereby affirms the said assessment wherein $9,881.94 of the commission of $17,381.94 in the year 1940, $21,825.85 of the commission of $29,325.85 in 1941 and $31,980.91 of the commission of $39,480.91 in 1942 paid to Wrights' Ropes Limited of Birmingham were disallowed as expenses or deductions for the purposes of the said Act. Therefore on these and related grounds and by reason of other provisions of the Income War Tax Act and Excess Profits Tax Act said Assessments are affirmed.
>
> NOTICE of such decision is hereby given pursuant to Section 59 of the Act and is based on the facts presently before the Minister.

One receives no help in this regard from a perusal of the respondent's factum nor the argument of counsel. It is merely contended that the discretion was properly exercised in accordance with the relevant authorities but the actual principle applied is not stated nor in any way indicated. There is nothing shown upon which anyone can say that there is any unreasonableness attaching to the commissions or to the agreement to pay them. Want of *bona fides* is not suggested. Nor is it suggested that the issued shares of the appellant were at the time of the first agreement all in the hands of Wrights' and the Hirst Company or their nominees and that these companies caused the appel-

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lant to make an improvident bargain for their own purposes. Moreover, any such suggestion is negatived by the evidence. In cross-examination of a witness for the appellant, the witness said that the technical information supplied the appellant by Wrights' was, in the opinion of the witness, by itself commensurate in value with the commissions paid. No other evidence was adduced on the point. This same witness was also asked: "This $7,500, is that the amount allowed to you by the Munitions and Supply in connection with your contracts?" The answer was: "I will have to refer to my file on that question." Counsel for the respondent must have been instructed with regard to the subject-matter of this question, but it was not followed up or developed in any way and there is no other evidence with regard to it. The Court is left to wonder whether something of this nature entered into the making of the assessments. They cannot be supported, however, on a mere suggestion of this kind. The ground of decision, therefore, is unexplained and the decision itself is made to appear as a purely arbitrary one.

If the present were a case of disallowance of expenses for advertising or for travelling or of similar items within the control of the taxpayer, the grounds of disallowance might more readily suggest themselves. The present case is not of that sort and there is nothing which displaces the agreement and the legal consequences which flow from it. Therefore, where there is nothing before the Court which enables it to see any ground or principle upon which the decision appealed from can be supported, but on the contrary where the evidence substantiates the deduction claimed and therefore the decision appears as a purely arbitrary one, which the Statute does not permit, the appellant, in my opinion, has met the onus resting upon it of showing that the exercise of discretion involved has been "manifestly against sound and fundamental principles" or based upon "wrong principles of law." I do not think the appellant is in the position where his appeal must fail because, not knowing the ground of decision, he is unable to point to its error. I further think it cannot be said that the Statute contemplates that an appeal under its provisions is to be rendered abortive by the mere silence of the decision itself as to the grounds upon which it proceeds. Sec-

tion 60 (2) to my mind indicates the contrary, as it calls upon an appellant to submit with his notice of dissatisfaction a statement containing the "further" reasons which he intends to urge before the Exchequer Court in support of his appeal; "further" in the sense of "additional" reasons to those urged before the Minister. No appellant is in a position to give reasons for an appeal against an unfavourable decision without knowing the ground of such decision. I think the Statute recognizes this and when by sec. 59 the Minister is required to notify the appellant of his "decision", by registered post, reasons are intended to be given. When they are not given, I think, in such a case as the present at least, the result is not that the Court must assume something quite contrary to the evidence submitted to it.

It may be that the report of the local inspector discloses ground for the decision arrived at, but at the moment there are no means of knowing this. I think, therefore, consistently with the authorities to which I have referred, it is the duty of the Court to refer the case back to the Minister under the provisions of sec. 65 (2).

I have not referred to the provisions of *The Excess Profits Tax Act, 1940,* other than sec. 8 (*b*). By sec. 14, sections 40 to 87 of the *Income War Tax Act* are made applicable to excess profits tax. By sec. 2 (*f*) of the former Act "profits" in the case of a corporation are defined as the amount of net taxable income as determined under the provisions of the latter Act.

As to the contention that section 75 (2) of the *Income War Tax Act* does not authorize the delegation to the Deputy Minister of the duty imposed upon the Minister by sec. 6 (2), I cannot agree. A power may well include a duty. See Murray's New English Dictionary, p. 1213. In the context of sec. 75 (2) I think it is so included.

I would allow the appeal and remit the case back as already stated.

ESTEY J.—This is an appeal from a judgment in the Exchequer Court confirming a decision of the Deputy Minister of National Revenue whereby he disallowed the greater part of three items claimed as deductible expenses.

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The appellant filed its income tax returns for the years 1940, 1941 and 1942, and included for the respective years as deductible expenses:

Commission on sales of wire rope manufactured.	$17,381.94
Commission on sales of wire rope manufactured.	29,325.85
Commission on sales of wire rope manufacturers	39,480.91

The Deputy Minister of National Revenue, delegated by the Minister, as provided by section 75 (2), disallowed all these items except $7,500 in each year. This he did by virtue of the authority vested in him under section 6 (2) of the Act. This section reads as follows:

6 (2).

The Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income.

The section is restricted in its application to items of expense, and in the exercise of his discretion the Minister, or Deputy Minister, as in this case, is required to determine whether the amount claimed as a deductible expense is "in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income". It is not an amount which is reasonable or normal in respect of business generally, but in respect of the business of that particular taxpayer.

The discretion to be here exercised is a judicial discretion similar to that under the then section 5 (*b*) which Davis J. described as "an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles." (*Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (1)). This statement was adopted by Lord Thankerton in the judgment of the Privy Council in *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (2).

Once such a discretion is properly exercised there is no appeal, but the Courts have consistently exercised the right to determine in a given case whether the discretion has in fact been exercised within proper limits and upon

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

proper grounds, or in other words, to determine if the discretion has been exercised as contemplated by the terms of the statute.

Lord Esher, in *The Queen* v. *The Vestry of St. Pancras* (1):

> If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.

Lord Thankerton in *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (2):

> But it is equally clear that the Court would not interfere with the decision unless—as Davis J. states—"it was manifestly against sound and fundamental principles."

In the latter case, in the exercise of a discretion irrelevant facts were accepted and acted upon; as a result the assessment was set aside.

Cockburn, C.J., in *The Queen* v. *Adamson* (3):

> If I could see my way to the conclusion that the magistrates had considered this evidence and given a decision upon it, I should certainly say that the Court could not act upon the matter further, or send the case back to the magistrates; but the Solicitor General has called our attention to evidence of such a description that I cannot resist the conclusion that the magistrates must have acted upon a consideration of something extraneous and extra-judicial which ought not to have affected their decision, and which, it seems to me, was the same as declining jurisdiction.

The appellant had its head office in the City of Vancouver. On the 13th of August, 1943, Mr. Norman Lee, Inspector of Income Tax at Vancouver, advised the appellant that:

> By virtue of the powers vested in the Minister under Subsection 2 of Section 6 and Subsection 2 of Section 75 of the Income War Tax Act, discretion is about to be exercised in the following matters, which appear to be in excess of what is reasonable for the business * * *

Under date of September 8th, 1943, the appellant replied, enclosing copies of the agreements dated May 19th, 1931, and September 12th, 1935, under the terms of which these payments had been made in each of the respective years to Wrights' Ropes Limited, but did not otherwise attempt to justify the amounts. Under date of October 9th, 1943, Mr. Norman Lee advised the appellant that it was proposed to recommend to the Minister that all

(1) (1890) 24 Q.B.D. 371 at 375.
(2) [1940] A.C. 127, at 136.
(3) (1875) 1 Q.B.D. 201, at 205.

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the foregoing items except $7,500 for each year be disallowed. He again invited the appellant to submit representations either orally or in writing by the 15th October. On the 21st of October the appellant replied that they had nothing to add to their favour of September 8th.

The manager of the appellant company summarized the relevant provisions of these two agreements as follows:

> Wrights' Ropes, Birmingham, have agreed not to market any of their products in the district west of a line being the boundary between the provinces of Manitoba and Ontario * * * they place at our disposal their accumulated technical experience, extending over the past 170 years, in the design and manufacture of wire rope, the design, manufacture and installation of wire rope machinery, and such other information as is necessary and desirable in the successful conduct of the business.

The agreements provide:

> In consideration of the due performance by Wrights' of their obligations under this Agreement the Canadian Company will pay to Wrights' a commission at the rate of five per centum upon all cash received in respect of the net selling price of all wire ropes both manufactured and sold by the Canadian Company after the date of this Agreement.

In this paragraph Wrights' is Wrights' Ropes Limited of Birmingham, England, and the Canadian Company is the appellant.

The Deputy Minister, when exercising his discretion with respect to these three items, had only the income tax returns with the three items appearing as above set out, the copy of the agreements above mentioned, and the report from his Inspector of Taxation at Vancouver, Mr. Norman Lee. With this information he reduced each of the said three items to $7,500 by exercising the authority vested in him by section 6 (2) of the Act.

The Inspector's Report was not produced. Without a knowledge of its contents it is impossible to determine its validity as a basis for the exercise of the discretion here provided for. Apart from this report, which will be more particularly discussed hereafter, there would appear to be no facts contained either in the income tax returns or in the agreements which would provide a basis for the determination of what would be a reasonable or normal expense in the business carried on by the taxpayer, or that this expense was incurred in respect of any transaction or operation which would unduly or arti-

ficially reduce the income. Yet it is the determination of these questions which the statute specificially places upon the Minister. It is the relation of this item of expense to the business of the taxpayer, or the transaction or operation mentioned, that he is called upon to exercise his discretion. It is true that the income tax returns contain many figures with reference to the business of the appellant, and show with respect to the items on which the five per cent. was computed a very substantial increase during the three years. This latter the appellant pressed as an indication that the discretion had not here been exercised judicially. That would not of necessity follow. The greater difficulty is that the facts here disclosed in the returns filed and the agreements do not provide a basis upon which a discretionary determination can be made that the items are excessive within the terms of section 6 (2).

The Court, sitting in appeal, is not concerned with the amount as fixed but with the basis upon which the decision fixing that amount is determined. Upon principle it would seem that to act upon insufficient facts or information should in the result be the same as acting upon improper facts as in *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (1). The information contained in the income tax returns and the provisions of the agreements did not, in my opinion, place before the Minister or the Deputy Minister facts or information which enabled him to exercise the discretion contemplated by this section.

Then with respect to the report from Mr. Norman Lee, the Inspector of Income Tax at Vancouver, it is admitted that this included representations made to him by the appellant and that these were before the Deputy Minister when he exercised his discretion under section 6 (2). As to the contents of this report the Deputy Minister deposed as follows:

Mr. BRAY: I am not asking for production now of the representations to which you refer as having been made to you, but I think they should be here at the trial the day after to-morrow.

(1) [1940] A.C. 127.

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Mr. FORSYTH: Yes, the representation that you made to us.

Mr. BRAY: I know what they are, but I am asking that they be here.

By Mr. Forsyth:

26. Q. They were considered by you?—A. I think so.

By Mr. Bray:

27. Q. I notice you answered Mr. Forsyth's query with "I think so". Do you know, Mr. Elliott?—A. As I said before, all these facts are reported from the Vancouver offices; and to answer the question whether this or that document was considered I would have to thumb through the whole file. I do know that all the facts pertaining to this were transmitted from Vancouver to Ottawa, among which were representations from the taxpayer as expressed through the medium of Mr. Lee.

Mr. Bray's admission, as counsel for the appellant, is that he knows what the representations are and no doubt Mr. Lee reported the representations fairly and accurately as he understood them, but there is much to be said for Mr. Bray's contention that he should see them. It is well known that, however careful and conscientious one may be in recording statements, errors will creep in. Furthermore, one reading a report may place quite a different interpretation thereon from that which its author intended. It might well be, therefore, that after reading the report counsel for the appellant would have desired to make some explanation, supplement the facts or make submissions with respect thereto. It appears that without that report, which may have been important, it cannot be said that the appellant had the opportunity "to correct or to contradict any relevant statement prejudicial to its interests". Davis J. in *The King* v. *Noxzema Chemical Co. of Canada Ltd.* (1):

> If, on the other hand, the function of the Minister under the section may be said to be of a quasi-judicial nature, even then all that was necessary was that the taxpayer be given a fair opportunity to be heard in the controversy; and to correct or to contradict any relevant statement prejudicial to its interests.

Lord Loreburn in *Board of Education* v. *Rice* (2):

> They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. * * * But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari.

(1) [1942] S.C.R. 178, at 180. (2) [1911] A.C. 179, at 182.

The respondent takes the position that this communication between the officials of the Department is privileged and that there is no obligation to produce it. In this regard reliance is had upon the established rule that such documents are in general privileged. They are so privileged under the rules and practice of Parliament, but in this particular instance Parliament has directed by section 63 (*g*) that this document when "relative to the assessment under appeal" shall be filed in the Exchequer Court. This report was before the Deputy Minister and it contained representations made by the appellant. What these were and whether material or proper to be taken into account cannot now be determined, but, as intimated above, apart from the document it would appear that no basis existed for the exercise of the discretion called for in section 6 (2). In any event, when the Deputy Minister admits that the report contained representations from the taxpayer and that it was considered, it then becomes "relative to the assessment" and should have been filed as required by section 63 (*g*).

The contention of the appellant that the Deputy Minister acted under section 6 (1) (*i*) and not under 6 (2) is not well founded. The correspondence and the decision of the Minister specifically stated that the disallowance was made under section 6 (2). There are possibly items under the terms of the agreements which might be included under some of the headings in section 6 (1) (*i*), but not all of them. One in particular, a payment in consideration of Wrights' Ropes Ltd. of Birmingham not marketing their products in Western Canada, is not included, and, as there is no information upon which the amounts may be allocated to the respective headings in the agreements, it is quite obvious why the Deputy Minister did not deal with this matter under section 6 (1) (*i*).

Moreover, under 6 (1) (*i*) the deduction shall not be allowed if "the company in Canada is controlled directly or indirectly by any company * * *" There was no evidence before the Minister upon which he could determine by whom this company is controlled "directly or indirectly". The question was not raised by the Minister, but because of a description in Mr. Norman Lee's letter of October 9th "Commissions paid to controlling Company", the Com-

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pany replied advising that Wrights' Ropes Ltd. held only 50 per cent. of the shares, and that Charles Hirst & Sons, Ltd., also an English company, held the other 50 per cent. Apart from this there was no information with respect to the question of control. It appears to me that had the Minister intended to act under section 6 (1) (*i*) he would have obtained further information. There was further evidence given at the trial before the learned judge of the Exchequer Court and upon that evidence I agree with the learned judge that it is impossible to determine the question of control.

It there appeared that the shares were held as follows:

	Shares
Wrights' Ropes Limited	748
Charles Hirst & Sons, Ltd	749
H. R. Bray	1
G. F. Gyles	1
J. G. Chutter	1

No evidence was given as to the basis upon which the three shares are held in Canada, and such evidence upon this allocation of shares is very important with reference to the matter of control. The consent filed at the trial does not in any way clear up this point. It merely states that Wrights' Ropes Limited hold 49·86 per cent. of the shares. Viscount Simon, L.C.:

> * * * I think the conception of "controlling interest" may well cover the relationship of one company towards another, the requisite majority of whose shares are, as regards their voting power, subject, whether directly or indirectly, to the will and ordering of the first-mentioned company * * * I find it impossible to adopt the view that a person who, by having the requisite voting power in a company subject to his will and ordering, can make the ultimate decision as to where and how the business of the company shall be carried on, and who thus has, in fact, control of the company's affairs, is a person of whom it can be said that he has not in this connection got a controlling interest in the company. [*British American Tobacco Co. Ltd.* v. *Inland Revenue Commissioners*] (1).

Upon the evidence it does not appear to me a case which could properly have been dealt with under section 6 (1) (*i*).

If I am correct in my analysis of this case, the report made by the Inspector of Income Tax at Vancouver, which included representations made by the appellant, may or

(1) [1943] 1 All E.R. 13, at 15.

may not have been the dominating factor in the exercise of the Deputy Minister's discretion. Inasmuch as apart from it the discretion could not be exercised as contemplated by the statute, its production as required by section 63 (*g*) becomes the more important in order to determine whether the discretion has been exercised as required by the statute.

I do not overlook that both under date of August 13th and October 9th the respondent invited the appellant to make representations, and on the latter date specifically indicated his probable decision, nor that the appellant replied under date of October 21st, "We have nothing further to add * * *" Such a general invitation asked for either facts or submissions or both. While such a request at that time is not provided for by the statute, it is not only unobjectionable but commendable; the appellant might well have complied therewith. What the statute does contemplate is that if additional information is required it will be requested under sections 41 and 43. Under the circumstances of this case further information relative to these items might well be requested. In view of this and the fact that the report was not filed under section 63 (*g*), I have concluded that the case should be referred back to the Deputy Minister as provided under section 65 (2).

I think the appeal should be allowed with costs.

Appeal allowed with costs and the matter referred back to the Minister to be dealt with by him according to the reasons of the majority of the Court.

Solicitor for the appellant: *H. R. Bray.*

Solicitor for the respondent: *H. H. Stikeman.*