Sydney 1966
June 13
Ottawa Sept. 8

BETWEEN:

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

AND

DUNCAN MORRISON ..... RESPONDENT.

Income tax—Income Tax Act, R.S.C. 1952, c 148—Section 6(1)(j)—Amounts dependent upon use of or production from property—Removal of rock from farm—Claim for compensation at so much per ton and general damages settled for lump sum—Whether proceeds taxable.

The respondent, who owned a 200 acre farm bordering on Big Bras d'Or Lake in Nova Scotia, agreed to sell to a contractor at 2½ cents per ton all the rock required from the respondent's farm for the purpose of building a causeway in the lake. Under the contract payments were to be made monthly based on the amount of rock removed. In the construction of the causeway the contractor used rock both from the respondent's farm and from an adjoining property. No account was

kept by anyone of the quantity of rock removed from the respondent's property and none of the payments called for by the contract were made. Instead, in 1959, the first year of the construction, the respondent was paid an advance of $2,500 and in 1960 after the completion of the causeway he accepted a final payment of $14,500 in settlement of his rights under the contract which included his right to payment for rock and to compensation for some minor damages caused to his buildings in the course of removing it.

The Minister assessed income tax in respect of the two amounts on the basis of their being "amounts received in the year (s) (1959 and 1960) that were dependent upon use of or production from property" within the meaning of section 6(1)(*j*) of the *Income Tax Act*. The Tax Appeal Board, however, allowed the respondent's appeal.

On a further appeal by the Minister held dismissing the appeal that while the amounts which the contractor had agreed to pay for rock, if paid, would have been taxable under section 6(1)(*j*) as amounts that were "dependent upon...production from property" the amounts in fact paid were not calculated by reference to the extent of production from the respondent's property but were lump sum amounts paid in satisfaction of claims arising under the contract or otherwise for the price of rock taken and damage to the respondent's buildings and farm. These did not fall within the meaning of section 6(1)(*j*) and as they were not otherwise of an income nature were not subject to income tax.

APPEAL from a decision of the Tax Appeal Board.

M. A. Mogan and *L. Little* for appellant.

J. G. Hackett, Q.C. for respondent.

THURLOW J.:—This is an appeal from a judgment of the Tax Appeal Board[1] which allowed an appeal by the respondent from re-assessments of income tax for the years 1959 and 1960. The issue in the appeal is whether amounts of $2,500 and $14,500 received by the respondent in 1959 and 1960 respectively were taxable as income under section 6(1)(*j*) of the *Income Tax Act*[2] by which it is provided that:

6(1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year

. . .

(*j*) amounts received by the taxpayer in the year that were dependent upon use of or production from property whether or not they were instalments of the sale price of the property, but instalments of the sale price of agricultural land shall not be included by virtue of this paragraph;

In the event that the amounts are required to be included a further issue arises as to the respondent's right to deductions in respect of losses alleged to have been incurred in gaining the amounts in question.

[1] 37 Tax A.B.C. 164.

[2] R.S.C. 1952, c. 148.

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The respondent is a bachelor who has earned his living by fishing, woodcutting, raising cattle, growing vegetables and working on the highways. He lives, as did his father and grandfather before him, on a two hundred acre property at New Harris in Victoria County, Nova Scotia near an arm of the sea known as Big Bras d'Or. The land includes about one hundred and fifty acres of woodland and some pasture and brush land and prior to the events to be related it also included about eight acres of cultivated land. His income tax returns showed income from his activities amounting to $2,460 in 1959 and to $2,195.29 in 1960.

In 1957 Provincial Government engineers, with his permission, made test drillings on his property for the purpose of ascertaining whether the rock under the surface was suitable for use in the construction of a causeway and bridge crossing of the Big Bras d'Or to be built near his property. The rock was found to be suitable and in the following year the respondent was approached by a representative of Municipal Spraying and Contracting Company Limited (hereinafter referred to as Municipal) with a proposal for the purchase of rock from his property for the purposes of its contract for the construction of the causeway. In an agreement in writing between the respondent and Municipal dated November 27, 1958, it is stated that the respondent, in consideration of one dollar and of the covenants and agreements thereinafter set forth:

> hereby sells to the purchaser all the rock required by the purchaser from the Vendor's land hereinafter described, for the purpose of the purchaser's contract for the construction of causeway in the Big Bras d'Or Lake, in the vicinity of Seal Island in the said lake.

After describing the respondent's property, the eastern side of which adjoined Sutherland property a portion of which had been or was later acquired by Municipal, the agreement went on to say:

> The Purchaser, its agents, servants and workmen, at all times within the period of two years from the date hereof shall have full and free liberty of entry through, over and upon the said land, for the purpose of digging, taking, removing, and carrying away the said rock, and with full right and liberty to bring, place, keep and maintain trucks, animals, carts and other vehicles, plant and equipment in and upon the said land, and to erect buildings necessary for the Purchaser's operations on the said land; and with full right and liberty to construct a road or roads from the said Sutherland land across the Vendor's said land, and if required, to construct a road or roads from the present highway to, through and over the said Vendor's land, for the operations of the purchaser.

The price to be paid by the Purchaser to the Vendor for the said rock, and including the rights and privileges herein set forth, shall be Two and one-half cents (2½c) per ton of 2,000 pounds, in accordance with Government scale, to be paid monthly within fifteen days after the end of each month; which the Purchaser hereby covenants and agrees to pay to the Vendor.

The Purchaser agrees that it will remove all the rock required by the Purchaser, within two (2) years from the date hereof, and will also remove within the said period all the plant and equipment of the Purchaser, from the said land.

The Purchaser shall take measures to protect, as far as possible, the Vendor's buildings on the said land from damage from the Purchaser's operations, and the Purchaser will repair any damage to such buildings so caused.

The construction of the causeway was begun in 1959 and was completed some eighteen months later in 1960. In the process a large quantity of rock was removed from the respondent's property and from the adjoining Sutherland property, was weighed at a scale set up on government property nearby and was dumped into the water to form the causeway but no record of the portion thereof taken from the respondent's property was kept either by Municipal or by the respondent and none of the monthly payments required by the contract was made. Instead an advance of $2,500 was paid to the respondent in 1959, which is the amount in question in respect of the re-assessment for that year, and in 1960 when the work had been completed instead of calculating the quantity taken and paying for the same on the basis provided by the agreement the purchaser offered and the respondent accepted a further lump sum of $14,500 which is the amount in question in respect of the re-assessment for 1960.

Just what this sum of $14,500 was intended to cover is not clearly stated but I would infer that it, along with the $2,500 advanced earlier, was in settlement of whatever claims the respondent had against Municipal whether real or fancied and whether for rock or for damage to his house or both or for loss occasioned by the removal of the rock. There had been some damage, occasioned by the blasting, to the roof, wall and chimneys of the respondent's dwelling, for which Municipal was responsible under the agreement, and the excavation of the rock had also resulted in the loss of the road to his pasture and woodland, which would be expensive to replace because of the steep and rough terrain,

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the loss of four acres of his cultivated land and the loss of three springs from which he had formerly drawn water for his cattle and for domestic use. The loss of the springs through removal of the rock seems not to have been anticipated and in an effort to remedy this either Municipal or the government (it does not clearly appear which) drilled a well for the respondent. The well, however, later went dry. The respondent himself then installed a pipe from his house to another spring some distance away and Municipal assisted him in this to the extent of $200 towards the cost of the pipe. By piping to this spring the respondent obtained a sufficient, though scanty, supply of water for domestic use but as a result of the drying up of the springs formerly used his cattle raising came to an end. His woodcutting stopped as well because of the loss of the road and because he took no steps to acquire a new one. In addition apart from the loss of the best of the cultivated land he says that his dwelling is no longer protected from the prevailing winds because of the removal of the side of the hill and that the cliff near his house, resulting from the excavation, presents a hazard to children.

The Minister's case for including the amounts of $2,500 and $14,500 in computing the respondent's income is based entirely on section 6(1)(*j*) of the Act. Two alternative grounds for supporting the assessment, that is to say, (1) that the amounts constituted income from a business and (2) that the amounts were received as rent for the use of land, were raised in the notice of appeal but these were abandoned in the course of the argument. The correct approach to the present problem, therefore, as I see it, is that the amounts in question may be subjected to tax if, but only if, they fall clearly within the provisions of section 6(1)(*j*). If they do fall clearly within the scope of that provision they are of course taxable as income whether they are of an income nature or not. The provision itself makes it clear that such may be the result in some cases. But apart from the effect of section 6(1)(*j*) and excepting the case of a sale in the course of a business there appears to me to be nothing about receipts from the sale of rock forming part of a taxpayer's property that would serve to characterize them as being of an income, as opposed to a capital, nature.

Section 6(1)(*j*) and its predecessor, section 3(1)(*f*) of the *Income War Tax Act*[1], have been considered in a number of cases including *Ross v. M.N.R.*,[2] *M.N.R. v. Waintown Gas and Oil Co. Ltd.*[3], and *M.N.R. v. Lamon.*[4] Section 3(1)(*f*) of the *Income War Tax Act* was enacted after (and as a result of)[5] the decision in *M.N.R. v. Spooner*[6] in which it was held that oil royalties forming part of the consideration for the sale of property were not income even though they were realizable only from oil produced by the purchaser from the property. The subsection provided that income subject to tax should include:

> Rents, royalties, annuities and other like periodical receipts which depend upon the production or use of any real or personal property, notwithstanding that the same are payable on account of the use or sale of any such property.

Section 6(1)(*j*) of the present statute is broader in some respects and possibly narrower in others. It applies to amounts of money and is not confined to such amounts when representing rents, royalties or annuities or periodical receipts of a like nature to rents, royalties or annuities. The only qualifications required of such an amount appear to be that it be one that (1) has been "received" by the taxpayer in the year and (2) was "dependent upon use of or production from property". While the words "rents, royalties, annuities or other like payments of a periodical nature", which by themselves suggest variability according to the extent of time or use or production, are not present in the section the qualification imposed by the words "dependent upon use of or production from property" in my opinion has the effect of limiting the "amounts" referred to to amounts which vary with and are in that sense "dependent" in some way upon the extent of use of or production from property whether according to time or quantity or some other method of measurement.

Turning to the contract between the respondent and Municipal it seems doubtful to me that the payments contemplated by it, if made, would, as argued on behalf of the

[1] R.S.C. 1927, c. 97 as enacted by S. of C. 1934, c. 55, s. 1.

[2] [1950] Ex.C.R. 411. [3] [1952] 2 S.C.R. 377.

[4] [1963] Ex. C.R. 277.

[5] *Vide M.N.R. v. Waintown Gas and Oil Co. Ltd.* [1952] 2 S.C.R. 377 per Kerwin J., at page 381 and per Locke J., at page 389.

[6] [1933] A.C. 684 affirming [1931] S.C.R. 399.

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Minister, have fallen within the definition of section 6(1)(*j*) as amounts that were dependent upon "use of" the respondent's property, and particularly so if, as submitted, such payments were to be viewed as amounts received that were dependent upon "use of" the land by the respondent himself. I find no support for such a conclusion in either *Russell v. Scott*[1] or *Smethurst v. Davy*[2], which were cited on behalf of the Minister, both of which were decided on particular statutory provisions and are therefore in my opinion of no assistance in resolving the application of section 6(1)(*j*)[3]. On the other hand if the payments had been made I should have had no difficulty in reaching the conclusion that the payments were amounts that were "dependent" upon the number of tons of rock removed from and thus, in my opinion, "upon production from" the respondent's property within the meaning of section 6(1)(*j*)[4].

The amounts contemplated by the contract were, however, never received. Instead what was received in 1959 consisted of an advance of $2,500, which was not related to the quantity of rock taken, and what was received in 1960

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[1] [1948] A.C. 159.

[2] [1957] 37 T.C. 593.

[3] *Russell v. Scott* was a case of sales of sand and the question decided was whether a concern or business of selling the sand fell within the meaning of a particular statutory provision or within another more general provision. The House of Lords held the concern of selling the sand to be an ordinary use of land but apart from the distinguishing fact that the activity of the taxpayer from which the proceeds arose was a concern or business it is also clear that the expressions used with respect to the removal of sand being an ordinary use of land were spoken in relation to concerns in dealing in sand and gravel and not to concerns in dealing in rock as to which there could probably have been no problem since concerns in stone quarrying were specially dealt with in yet another statutory provision. The case is thus not authority that permitting the excavation of rock is a use of land. *Smethurst v. Davy*, as I read it, does not carry the matter any further since in it what was decided was simply that on the authority of *Russell v. Scott* the digging of sand or gravel was a "use of land" and that payments received by a person who gave to another a right to remove gravel from his property fell within a statutory provision which required that "profits or gains arising from payments for any easement over or right to use land" be taken into account in computing the income of the occupier of the land.

[4] *Vide* Cameron J., in *M.N.R. v. Lamon*, [1963] Ex. C.R. 277 at 281-2:

> "In accordance with the terms of the contracts, the amounts to be received by the respondent were dependent upon the number of cubic yards of gravel removed from the premises".

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was a final payment of $14,500 making a total sum of $17,000, which was received by way of an accord and satisfaction of the respondent's rights to be paid both the sums payable for rock under the contract and the damage occasioned to his house. The sums so received were thus, as I view the case, not amounts that were "dependent upon use of or production from" the respondent's property but were amounts paid in settlement of unascertained claims which the respondent had against Municipal for rock removed and for damages to his house.

Even if, contrary to the view I take of the evidence, the amounts of $2,500 and $14,500 are regarded as having been paid and received entirely in respect of the rock taken it is in my opinion clear that they were not dependent upon the quantity taken, since this never was ascertained and as I have already indicated dependence upon the extent or quantity of production or use and the application thereto of some rate or standard appears to me to be an essential qualification of amounts which fall to be taxed under section 6(1)(*j*). Moreover, while it might be possible to infer that from the point of view of the contractor the large, though unknown, quantity of rock obtained from the respondent's property was the prime consideration in reaching the figure of $17,000, from the point of view of the respondent I would infer that at that stage the chief elements in respect of which a satisfactory settlement was required were the losses of the accommodations which the property formerly afforded and in particular the losses of the springs, of the road to the pasture and woodland and of half of the cultivated land rather than the unknown quantity of rock in respect of which he was entitled to payment at the rate of 2½ cents per ton but had no way of knowing what that would amount to or whether it would be more or less than the losses which the removal of the rock entailed.

It might of course be said correctly of the amounts that they were received partly, if not entirely, "in lieu of payment of, or in satisfaction of" amounts that were dependent upon production from the respondent's property but while the expression "in lieu of payment of, or in satisfaction of" appears in other clauses of section 6(1), e.g., in 6(1)(*a*) and (*b*), neither that nor any similar expression is

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found in section 6(1)(j) and to read the clause as if such wording were present would in my opinion be unwarranted.[1]

In my opinion therefore the amounts here in question did not fall clearly within the provisions of section 6(1)(*j*) and as no other basis for taxing them has been advanced they cannot properly be included in the computation of the respondent's income.

In view of this conclusion it is unnecessary to consider the question whether the respondent was entitled to deductions in respect of losses which he sustained by reason of the reduction in the usefulness of his property resulting from the excavation of the rock.

The appeal will be dismissed with costs.

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[1] *Vide Partington v. Attorney-General* (1869) L.R. 4 H.L. 100 where Lord Cairns said at page 122:

> "I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because as I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."