
1954

Nov. 1

Nov. 4

BETWEEN:

S. D. EPLETT & SONS, LIMITED .....APPELLANT,

AND

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

Revenue—Excess profits tax—The Excess Profits Tax Act, 1940, S. of C. 1940, c. 32, as amended, s. 5—Decision of Board not erroneous by reason of possible error in computation of amount of capital employed —Onus on appellant to establish that Board's decision based on wrong principles and that it did not act judicially.

The appellant made an application to the Minister pursuant to section 5 of The Excess Profits Tax Act, 1940, as amended, for a reference to the Board of Referees to determine its standard profits on the ground that its business was itself abnormally depressed during the standard period. The Board found that it was so depressed but did not recommend that the capital standard should be departed from and also

(1) [1913] P. 130 at 136.

reported that inasmuch as its standard profits exceeded 10 per cent upon the capital it was unable to make any recommendation for an increase of such standard profits. The appellant appealed from assessments based on such standard profits.

Held: That there is no foundation for the objection that the Minister had failed to make a proper reference of the appellant's claim to the Board of Referees in that he failed to ask the Board for advice as to whether or not a departure from the basis of capital employed would be justified and that the Board had erred in recommending to the Minister that the capital employed basis should not be departed from.

2. That even if the Board made an error in computing the amount of the capital employed by the appellant it does not follow that its decision that the appellant's standard profits should not be increased was erroneous or that it was based on wrong principles or that the Board in making it had not acted judicially.

3. That it is pure speculation on the appellant's part that, if the Board had found the capital employed to be the amount which the appellant contended was the correct one, it might then have recommended a departure from the capital employed basis. It is inconceivable that it would have done so.

4. That the appellant could not discharge the onus of establishing that the Board's decision was based on wrong principles and that it did not act judicially in arriving at it by proof of an error in the computation of the amount of capital employed by the appellant that could not possibly have had any effect on it.

APPEALS from assessments under The Excess Profits Tax Act, 1940, as amended.

The appeals were heard together by the President of the Court at Ottawa.

W. G. Burke-Robertson, Q.C. for appellant.

E. G. Gowling Q.C. and *T. Z. Boles* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (November 4, 1954) delivered the following judgment:

Two separate proceedings were launched by the appellant herein. In the first it appealed against its excess profits tax assessments for the years 1943 and 1944 and in the second against its excess profits tax assessments for the years 1945, 1946 and 1947. On the opening of the hearing before me it was ordered that all the appeals be heard together.

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Certain facts are clearly established. On March 11, 1944, the appellant made an application to the Minister pursuant to section 5 of The Excess Profits Tax Act, 1940, Statutes of Canada, 1940, Chapter 32, for a reference to the Board of Referees to determine the standard profits of the standard period for the reason that its business, while not being one of a class which was depressed during the standard period, was itself abnormally depressed during such period for the reason set out in the brief which accompanied the application. The application was made on a form called "S.P. 1 and Questionnaire combined", prescribed and authorized by the Minister. The application and brief were prepared by Mr. N. Child who was employed by the appellant as its accountant from January 1, 1942, to November 15, 1949, and who, at the date of the application and until November 15, 1949, was its treasurer.

On December 16, 1944, Mr. C. F. Elliott, the Deputy Minister of National Revenue for Taxation, referred the appellant's claim to the Board of Referees as follows:

The Secretary,
Board of Referees, Excess Profits Tax Act,
Ottawa.

Dear Sir:—

Pursuant to Section 5 of the Excess Profits Tax Act, 1940, reference to the Board of Referees is hereby made

For advice under Order-in-Council P.C. 6479 as to whether the business of the taxpayer was or was not depressed during the standard period and if depressed, for a determination of the Standard Profits.

The following documents are enclosed herewith:

1943—T.20; S.P. 1 and Questionnaire combined; financial statements. T.2's for 1940, 1941 and 1942.

Any additional data that the Board requires will be furnished on request or explanations given on consultation.

In due course you will please advise us of the conclusions of the Board.

Yours faithfully,
C. F. Elliott,
Deputy Minister (Taxation).

December 16th, 1944.

The Board of Referees held a hearing in respect of the appellant's claim on February 6, 1945, at which Mr. Child represented the appellant.

On February 16, 1945, the Board reported its decision to the Minister as follows:

To:

The Minister of National Revenue,
Ottawa, Ontario.
Re S. D. Eplett & Sons Limited,
New Liskeard, Ontario.

The Standard Profits Claim of the above-mentioned taxpayer was referred to the Board of Referees upon date of 16th December, 1944, in accordance with the provisions of the Excess Profits Tax Act, 1940, as amended.

The Board of Referees having examined the claim reports as follows:

Under the provisions of section five of the Excess Profits Tax Act, 1940, as amended, the Board of Referees

Finds that the taxpayer was depressed during the Standard Period, but does not recommend that the Capital Standard should be departed from.

Computes the Capital Employed on 1st January, 1939 in the sum of $93,618.10 and inasmuch as the Standard Profits of this company exceed 10% upon the Capital, it is unable to make any recommendation for an increase of such Standard Profits.

Dated at Ottawa this sixteenth day of February, 1945.

Board of Referees,

J. D. Hyndman.	Chairman.
Kris A. Mapp.	Member.
T. N. Kirby.	Member.
C. A. Gray.	Member.

On March 15, 1945, Mr. Elliott wrote to the appellant as follows:

Sir:

Re Excess Profits Tax Act, 1940
Standard Profits Claim.
Decision of the Board of Referees.

Your application, pursuant to Section 5 of the Excess Profits Tax Act, 1940, has been considered by the Board of Referees.

The decision of the Board has been received and a copy thereof is set forth below.

The decision of the Board has been approved and becomes operative accordingly.

Yours truly,

C. F. Elliott,
Deputy Minister (Taxation).

The appellant's claim was made under section 5 of the Act without specific reference to any subsection of it. At the date of the application subsection 1 of section 5 of the Act read as follows:

5. (1) If a taxpayer is convinced that his standard profits were so low that it would not be just to determine his liability to tax under this Act by reference thereto because the business is either of a class which

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during the standard period was depressed or was for some reason peculiar to itself abnormally depressed during the standard period when compared with other businesses of the same class he may, subject as hereinafter provided, compute his standard profits at such greater amount as he thinks just, but not exceeding an amount equal to interest at ten per centum per annum on the amount of capital employed in the business at the commencement of the last year or fiscal period of the taxpayer in the standard period computed in accordance with the First Schedule to this Act:

Provided that if the Minister is not satisfied that the business of the taxpayer was depressed or that the standard profits as computed by the taxpayer are fair and reasonable, he may direct that the standard profits be ascertained by the Board of Referees and the Board shall thereupon, in its sole discretion, ascertain the standard profits at such an amount as the Board thinks just, being, however, an amount equal to the average yearly profits of the taxpayer during the standard period or to interest at the rate of not less than five nor more than ten per centum per annum of the amount of capital employed at the commencement of the last year or fiscal period of the taxpayer in the standard period as computed by the Board in its sole discretion in accordance with the First Schedule to this Act, or the Minister shall assess the taxpayer in accordance with the provisions of this Act other than as provided in this subsection.

Subsection 3 of section 5, which dealt with standard profits in cases where a capital employed basis was inapplicable, provided as follows:

5. (3) If on the application of a taxpayer the Minister is satisfied that the business either was depressed during the standard period or was not in operation prior to the first day of January, one thousand nine hundred and thirty-eight, and the Minister on the advice of the Board of Referees is satisfied that because,

(*a*) the business is of such a nature that capital is not an important factor in the earnings of profits, or

(*b*) the capital has become abnormally impaired or due to other extraordinary circumstances is abnormally low

standard profits ascertained by reference to capital employed would result in the imposition of excessive taxation amounting to unjustifiable hardship or extreme discrimination or would jeopardize the continuation of the business of the taxpayer, the Minister shall direct that the standard profits be ascertained by the Board of Referees and the Board shall in its sole discretion thereupon ascertain the standard profits on such basis as the Board thinks just having regard to the standard profits of taxpayers in similar circumstances engaged in the same or an analogous class of business.

And subsection 4 of section 5 read as follows:

5. (4) Notwithstanding anything contained in this section the decisions of the Board given under subsections one, two and three of this section shall not be operative until approved by the Minister whereupon the said decisions shall be final and conclusive.

Provided that if a decision is not approved by the Minister it shall be submitted to the Treasury Board who shall thereupon determine the standard profits and the decision of the Treasury Board shall be final and conclusive.

It is established that the appellant's standard profits when computed in accordance with the Act came to $15,241.47. It was this amount which the Board had in mind when it held that since the company's standard profits exceeded ten per cent of the amount of the capital employed by it on January 1, 1939, which it computed at $93,618.10, it was unable to make any recommendation for an increase of such standard profits. The result of the Board's decision and its approval by the Minister was that the appellant was left with its actual standard profits as computed under the Act, namely, $15,241.47, without any increase.

In its appeals against its excess profits tax assessments for the years under review based on the said standard profits the appellant made two complaints against the Minister and the Board of Referees. The first was, in effect, that the Minister had failed to make a proper reference of the appellant's claim to the Board in that he failed to ask the Board for advice as to whether or not a departure from the basis of capital employed would be justified and that the Board had erred in recommending to the Minister that the capital employed basis should not be departed from. But in view of the decisions in *M. Company Ltd.* v. *Minister of National Revenue* (1) and *Bowman Brothers Ltd.* v. *Minister of National Revenue* (2) counsel for the appellant did not press this objection. The questions involved are fully dealt with in the cases referred to and I need not say more than that there is no foundation for the objection.

The appellant's sole complaint is that the Board's computation of the amount of capital employed by the appellant on January 1, 1939, at $93,618.10 was erroneous by reason of the fact that it did not deduct certain amounts owing by the appellant for unpaid income tax and unpaid sales tax and that in failing to do so it did not comply with the requirements of the First Schedule to the Act. It was, therefore submitted that the Board had acted on wrong principles and not in a judicial manner. And it was urged that the Board should be reconvened so that it might find the correct amount of capital employed in accordance with the requirements of Schedule 1 and in the light of a correct

(1) [1948] Ex. C.R. 483; [1950] S.C.R. viii.

(2) [1952] Ex. C.R. 476.

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computation determine what the appellant's standard profits should be. The line of argument was that if the Board had followed the requirements of Schedule 1 and arrived at a correct computation of amount of the capital employed it might have made a different decision regarding departure from the capital employed basis in which case if it decided to depart from such basis it would not be bound by the limitations of subsection 1 of section 5 and might give the appellant a larger amount of standard profits.

In my judgment the appellant's submission is without merit in fact or in law. Although it was stated on the "S.P. 1 and Questionnaire combined" form, on which the appellant made its application for a reference to the Board of Referees, that it was required to compute the "capital employed" in the business in accordance with the First Schedule of the Act and was told that it must attach supporting statements showing its computations of "capital employed" it did not do so. There was no information in the appellant's application or supporting brief from which the amount of the capital employed by it could be ascertained and the appellant never at any time gave the Board any information on the subject. Mr. Child stated that when he appeared before the Board one of the members of the Board made reference to the fact that the Board were limited in their powers to an award somewhere between five and ten per cent of the capital employed and that he then asked them what the amount of the capital employed was but never received an answer. But he made no computation of the amount himself, although no person was in a better position to do so than he was, and he made no submission to the Board on the subject. Moreover, on his cross-examination he admitted that although he could have had access to the appellant's income tax file if he had requested it he did not ask for such access at any time prior to the Board's decision. Nor did he attempt to get any information from the Board or any of its officers regarding its figures of the amount of capital employed. Mr. Child also admitted that he was familiar with an explanatory brochure on The Excess Profits Tax Act "issued by the Income Tax Division, Department of National Revenue,

for the guidance of persons concerned with the application of the Excess Profits Tax Act," in which the taxpayer was told, at page 16:

> The initial calculation of his standard on such a basis is to be made by him when he files his Return, with the limitation of a maximum of 10 per cent on capital employed at the commencement of the 1939 year or fiscal period of the taxpayer. The Minister is given the right to refer any case to the Board of Referees where he considers the taxpayer's estimated standard profits to be too high.
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> The taxpayer, in so computing his standard profits and applying to have them recognized should complete and file with his Return the form S.P. 1 (page 40) in triplicate. The taxpayer's computation of capital must be in conformity with the definition of capital set out in the First Schedule to the Act (page 33).
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> The taxpayer in computing his standard profits should indicate the reason and justification for the rate which he has used in computing the standard profits. If his case is referred to the Board of Referees the taxpayer will be required to justify the rate which he has used as well as his basis for computing capital employed.

Yet, notwithstanding these instructions, the appellant made its application for a reference to the Board without giving any information on the important subject of the amount of the capital employed by it. Under the circumstances, it should not be open to it to blame the Board for any error of computation when it was itself mainly to blame. The person best able to compute the amount of capital employed in accordance with the requirements of Schedule 1 was the appellant himself. It knew its assets and liabilities and ought to have disclosed them when it made its application for a reference to the Board. If it had done so there would have been no dispute about the amount of the capital employed. Under the circumstances, the Court should not find in the appellant's favour unless the law makes such a finding clearly mandatory.

But the law does not do so. In the first place, it is not fully established that in computing the amount of capital employed by the appellant at January 1, 1939, at $93,618.10 the Board failed to comply with the requirements of Schedule 1 of the Act. The appellant's main complaint is that in computing the amount of capital employed the Board omitted to deduct a liability of $22,339.40 which should have been deducted, made up of $17,426.02 for unpaid sales tax and $4,913.38 for unpaid income tax. It was contended that the amount of capital employed by the appellant on January 1, 1939, was $84,078.70, instead of

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$93,618.10, as found by the Board, and in support of its contention counsel for the appellant filed a balance sheet prepared by Mr. W. S. Ryan, an Ottawa chartered accountant. This was prepared after the decision of the Board. There was also evidence that the Department of National Revenue had computed the amount of capital employed at $106,418.10 and that this computation was before the Board. The details of how this amount was made up appear in Exhibit 4, a document of four pages containing information prepared for the use of the board. The difference between the amount of the Department's computation and that found by the Board is accounted for by an item of $12,800 which the appellant had set up as a bonus in favour of its shareholders. The Department included this item in its computation of capital employed but the Board considered it a liability and deducted it from the amount of the Department's computation. According to Mr. Ryan's statement his computation of the amount of capital employed at $84,078.70 is lower than the Department's computation of $106,418.10 by $22,339.40, the exact amount of the appellant's alleged liability for unpaid sales tax and unpaid income tax. If Mr. Ryan's computation is correct, and I make no finding regarding it, it would follow that the Board's computation is not correct. But I am not prepared to make any such finding, for the evidence of Mr. J. F. Harmer indicates that the statements of capital employed prepared by the Department were based on information and records furnished by the appellant. I do not see how they could have been prepared otherwise.

But the issue in these appeals is not whether the finding of the Board that the capital employed by the appellant on January 1, 1939, was $93,618.10 was correct or not. What the Board had to ascertain was the amount of the appellant's standard profits. It was required to ascertain these at such an amount as it thought just but there was a limitation on the amount which it could find. It had to be equal to the average yearly profits of the appellant during the standard period or equal to interest at the rate of not less than five nor more than ten per centum per annum of the amount of the capital employed by it on January 1, 1939. This was to be computed by the Board in its sole discretion

in accordance with the First Schedule to the Act. The appellant's standard profits, computed according to the Act, amounted as already stated, to $15,241.47, so that so long as the capital employed did not exceed $152,414.70, the Board could not increase the standard profits beyond $15,241.47, unless it decided to depart from the capital employed basis. Consequently, even if the Board made an error in computing the amount of the capital employed at $93,618.10 and should have found that it was $84,078.70, as Mr. Ryan computed it, it does not follow that the Board's decision that the appellant's standard profits of $15,241.47 should not be increased was erroneous or that it was based on wrong principles or that the Board in making it had not acted judicially.

What the appellant is really seeking is another chance to have its claim considered by the Board of Referees in the hope that it might depart from the basis of capital employed and the limitations imposed by subsection 1 of section 5 of the Act and under subsection 3 on some basis other than that of capital employed grant the appellant a larger amount of standard profits than $15,241.47. It was with that hope in mind that it was urged on behalf of the appellant that if the Board had found the amount of capital employed at $84,078.70, instead of $93,618.10, it might have recommended a departure from the basis of capital employed and that the appellant was entitled to the benefit of this possibility.

I do not agree. As I see it, the fact of possible error in finding the amount of capital employed to be approximately $9,000 more than it was does not make the Board's decision that the appellant's standard profits should not be increased erroneous. It is pure speculation on the appellant's part that if the Board had found the capital employed to be $84,078.70, instead of $93,618.10, it might then have recommended a departure from the capital employed basis. In my judgment, it is inconceivable that it would have done so. Then the Board, having decided that it did not recommend that the capital standard should be departed from, had no alternative other than to decide that it was unable to make

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any recommendation for an increase of the appellant's profits and it could not have made any difference in its decision if it had found the capital employed to be $84,078.70, instead of $93,618.10.

The onus was on the taxpayer to establish that the Board's decision that it could not recommend an increase of the appellant's standard profits was based on wrong principles and that the Board did not act judicially in arriving at it. The appellant has not discharged this onus. It could not do so by proof of an error in the computation of the amount of capital employed by the appellant that could not possibly have had any effect on the decision.

Since the appellant has failed in its attacks on the Board's decision its appeals against the assessments for the years in question must all be dismissed. The respondent is entitled to costs.

Judgment accordingly.