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Nov. 27, 29
1952
Feb. 14

BETWEEN:

JASON MINES LIMITED (now NEW JASON MINES LIMITED) — APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... — RESPONDENT.

Revenue—Excess profits tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 48(1), 66, 89. The Excess Profits Tax Act, 1940, S.C. 1940, c. 32, ss. 2(f), 3—Income Tax Act, S.C. 1948, c. 32, s. 92—Meaning of "taxable income"—Quaere whether order for repayment of tax can be made.

The appellant appealed from its assessments for excess profits tax for the years 1940, 1941 and 1942. In each of these years its income was derived from the operation of a metalliferous mine and was exempt from corporation tax under s. 89 of the Income War Tax Act and it contended that it was not subject to tax under The Excess Profits Tax Act, 1940. Appeals allowed.

Held: That the term "taxable income" as used in section 2(*f*) of The Excess Profits Tax Act, 1940, means income that is liable to income tax and that since the appellant's income for the years under review was exempt from income tax it had no taxable income as determined under the Income War Tax Act and, therefore, no profits within the meaning of section 2(*f*) of The Excess Profits Tax Act, 1940, that could be brought into charge for excess profits tax under section 3 of that Act.

2. That it is questionable whether an order can be made in these proceedings for repayment to the appellant of the amount of tax paid by it.

APPEAL under The Excess Profits Tax Act, 1940.

The appeal was heard before the Honourable Mr. Justice Thorson, President of the Court, at Toronto.

T. Sheard K.C. and *A. B. Whitelaw* for appellant.

G. B. Bagwell K.C. and *J. S. Forsyth* for respondent.

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

THE PRESIDENT now (February 14, 1952) delivered the following judgment:

The appellant herein, which was incorporated on November 9, 1938, as Jason Mines Limited by Letters Patent under the Ontario Companies Act and had its name changed on July 8, 1948, to New Jason Mines Limited by Supplementary Letters Patent, appeals from the assessments levied against it for excess profits tax for the years 1940, 1941 and 1942.

The appellant's main ground of appeal is that in each of the said years its income was exempt from income tax under section 89 of the Income War Tax Act, R.S.C. 1927, chap. 97, and that, consequently, it was not subject to any tax under The Excess Profits Tax Act, 1940, Statutes of Canada, 1940, chap. 32. An alternative ground of appeal is that the Minister acted on a wrong principle in disallowing its claims for depreciation allowance. Almost all the evidence at the hearing was directed to this issue but if the appellant succeeds in its main contention its alternative one need not be considered.

The main contention turns on the construction of section 89 of the Income War Tax Act, section 3 of The Excess Profits Tax Act, 1940, and the definition of "profits" in section 2(*f*) of the latter Act. Section 89 of the Income War Tax Act, as enacted in 1936 and amended in 1939, provided as follows:

89. (1) Subject to the provisions of this section, the income of a company derived from the operation of any metalliferous mine which comes into production after the first day of May, 1936, and prior to the first day of January, 1943, shall be exempt from the corporation tax hereunder for its first three fiscal periods established by the Minister hereunder following the commencement of such production.

(2) The Minister, having regard to the production of ore in reasonable commercial quantities, shall determine which mines, whether new or old, qualify under subsection one hereof.

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(3) The Minister shall issue a certificate stating the date upon which any mine is deemed to have come into production and establish such fiscal periods of twelve months each, during which the income derived from any such mine shall be exempt hereunder.

(4) The Minister may make any regulations deemed necessary for carrying this section into effect.

It is admitted that the appellant's income in each of the years under review was derived from the operation of a metalliferous mine, namely, its gold mine, that such mine came into production during the specified period, that the Minister issued the necessary certificate and that the appellant's income was exempt from the corporation tax under the Income War Tax Act. The fact that the appellant had no income in any of the said years that was liable to income tax is not disputed. Indeed, that fact appears on the very face of the notices of assessment issued by the Minister. I now come to the relevant sections of The Excess Profits Tax Act, 1940. Section 3, the charging section of the Act, read as follows:

3. In addition to any other tax or duty payable under any other Act, there shall be assessed, levied and paid upon the annual profits or upon the annual excess profits, as the case may be, of every person residing or ordinarily resident in Canada, or who is carrying on business in Canada, a tax as provided for in the First Part of the Second Schedule to this Act, or a tax as provided for in the Second Part of the said Schedule, whichever tax is the greater.

The amendment of this section in 1942 does not affect the question under discussion. It is plain that what was brought into charge for tax under the Act was "annual profits" or "annual excess profits" and the term "profits" in the case of a corporation was defined by section 2(*f*) the relevant portion of which read as follows:

2. (1) In this Act and in any regulations made under this Act, unless the context otherwise requires, the expression—

(*f*) "profits" in the case of a corporation or joint stock company for any taxation period means the amount of net taxable income of the said corporation or joint stock company as determined under the provisions of the *Income War Tax Act* in respect of the same taxation period;

On these enactments counsel for the appellant contended simply that since the appellant's income was exempt from corporation tax under section 89 of the Income War Tax Act it had no taxable income as determined under the provisions of the Income War Tax Act and, consequently, no "profits" within the meaning of section 2(*f*) of The Excess Profits Tax Act, 1940, that could be brought into charge for excess profits tax under section 3 of the latter Act.

In my judgment, there is no sound answer to this contention. Counsel for the respondent submitted that sections 40 to 87 inclusive of the Income War Tax Act excepting section 76A thereof were, *mutatis mutandis,* made applicable to matters arising under The Excess Profits Tax Act, 1940, by section 14 of the latter Act but that section 89 of the Income War Tax Act was not, and argued that although the appellant's income was exempt from corporation tax under section 89 of the Income War Tax Act there was nothing in that section to warrant any exemption from excess profits tax. That is not the point. It is not a question whether an exemption from excess profits tax can be read into section 89. What is to be determined is the meaning of the words "net taxable income" as used in section 2(*f*) of The Excess Profits Tax Act, 1940. Counsel for the respondent urged that the fact that Section 89 of the Income War Tax Act exempted the appellant's income from corporation tax did not mean that it did not have any "net taxable income", that notwithstanding the exemption it did have a "net taxable income" that was available for any tax other than the corporation tax and, that being the only tax from which it was exempt, it followed that it was not exempt from excess profits tax. I cannot agree with this contention. There would be substance in it if the "net income" of the appellant was made the measure of the profits to be brought into charge for excess profits tax but that is not the case. The measure is the "net taxable

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income" as determined under the Income War Tax Act. I do not see how it could be said that the appellant had any taxable income as determined under the Income War Tax Act when all its income was exempt from tax under it. How could it have any taxable income under the Act if it had no income that was liable to tax under it? The question answers itself. Support for the view that the term "taxable income" means income that is liable to income tax can be found in a statement of Lord Macnaghten, delivering the judgment of the Judicial Committee of the Privy Council in *N.S.W. Taxation Commissioners* v. *Adams* (1) that the words "taxable income", as they were used in the Income Tax Act that was being construed, meant "income liable to income tax". And in *Black* v. *The Minister of National Revenue* (2) Maclean J. held that income that was exempt from taxation under the Income War Tax Act was not taxable income. The same is true here. Since the appellant's income in the years under review was exempt from corporation tax under Section 89 of the Income War Tax Act and there was no other income tax under the Act to which it was liable it had no net taxable income as determined under the said Act. Consequently, it had no profits within the meaning of section 2(*f*) of The Excess Profits Tax Act, 1940, and there could not be any annual profits or excess annual profits that could be brought into charge for excess profits tax under section 3 of that Act. I find, therefore, that the appellant was not subject to any excess profits tax for any of the years 1940, 1941 or 1942 and that the assessments from which it appeals are invalid.

In view of this decision it is not necessary to consider the questions relating to depreciation raised by the appellant in its alternative ground of appeal and I express no opinion on them.

(1) (1912) A.C. 384 at 391.

(2) (1932) Ex. C.R. 8 at 13.

There is one other matter to be mentioned. In its statement of claim the appellant alleged that in accordance with section 48 subsection 1 of the Income War Tax Act the Minister required payment of the amount of tax liability which was disputed by it, namely, the sum of $14,975, that arrangements were made by it with the Minister to retire this amount in instalment payments and that the whole amount was fully paid by March 31, 1951, and it claimed that the said sum of $14,975 should be repaid to it with interest. The appellant's allegations were admitted by the Minister in his statement of defence. While it seems proper that this sum should be repaid to the appellant, since the assessments have been held invalid, it is questionable whether an order for such repayment can be made in these proceedings. The jurisdiction of this Court in appeals from assessments is set out in section 66 of the Income War Tax Act as follows:

> 66. Subject to the provisions of this Act, the Exchequer Court shall have exclusive jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act and in delivering judgment may make any order as to payment of any tax, interest or penalty or as to costs as to the said Court may seem right and proper.

While this section empowers the Court to make an order as to payment of any tax I doubt whether it authorizes an order for repayment of a tax. That there was ground for such doubt and need for removal of it appears from section 92 of The Income Tax Act, Statutes of Canada, 1948, chap. 52, which provided as follows:

> 92. The court may, in delivering judgment disposing of an appeal, order payment or repayment of tax, interest, penalties or costs by the taxpayer or the Minister.

Under this section there would, I think, be power to order the repayment by the Minister of a tax paid by a taxpayer but it does not apply in the present case which must be determined within the limits of the jurisdiction fixed by

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section 66 of the Income War Tax Act. Under the circumstances, even although I think that the sum ought to be repaid, I do not see how the Court can make any order in these proceedings for its repayment.

There will, therefore, simply be judgment that the appeals from the assessments for the years 1940, 1941 and 1942 are allowed with costs.

Judgment accordingly.