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Jan. 22

Jan. 25

BETWEEN:

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

AND

EASTERN TEXTILE PRODUCTS, LTD. RESPONDENT.

Revenue—Income tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 5(p)—The Income Tax Act, S. of C. 1948, c. 52, ss. 3, 4, 26(1)(d), 53, 127(1)(e)——Taxpayer may carry on more than one business—Deductibility of business losses in other years limited to cases of profit from business in which loss sustained.

Prior to 1951 the respondent was in the business of manufacturing and selling textile products at Saint John. At some time prior to October 31, 1950, which was the end of its 1950 fiscal and taxation year, it sold its manufacturing plant and stopped manufacturing but continued to sell the products which the purchaser of the plant manufactured for it. In October or November of 1950 it entered into a joint venture with Ottawa Car and Aircraft Limited for the purchase of certain aircraft engines, related aircraft parts and certain motors. These articles were sold in 1951 by Bancroft Industries Limited as commission agent for the parties to the joint venture and the respondent made a substantial profit from the sale. In 1951 it purchased a stock of canvas shoes from War Assets Corporation and sold them at a profit. The Minister included the profits referred to in the respondent's assessment for its 1951 taxation year. It appealed to the Income Tax Appeal Board

against the assessment on the ground that it was entitled under section 26(1)(*d*) of *The Income Tax Act*, 1948, to deduct from its 1951 profits its losses in 1947, 1948, 1949 and 1950 and the Board allowed its appeal. The Minister appealed from its decision.

Held: That the right given to a taxpayer by section 26(1)(*d*) to deduct from his income for a taxation year business losses sustained by him in other years is a departure from the general scheme of the Act and as such must be confined within the expressed limits of the section.

2. That in an appeal from an income tax assessment the Court is not concerned with the correctness of the reasons given by the Minister either for the assessment or for his confirmation of it after the taxpayer's objection to it. The appeal is not from the Minister's reasons but against the assessment, which carries a presumption of validity that enures to it unless the taxpayer who attacks it shows that it was erroneous either in fact or in law. *Dezura v. Minister of National Revenue* [1948] Ex. C.R. 10 at 15 and *Johnston v. Minister of National Revenue* [1948] S.C.R. 486 at 489 followed.

3. That section 26(1)(*d*) of *The Income Tax Act*, 1948, instead of being less restrictive of a taxpayer's right to deduct business losses than section 5(*p*) of the *Income War Tax Act* had been, was more restrictive.

4. That section 3 and section 26(1)(*d*) of the Act contemplate that a taxpayer may carry on more than one business.

5. That it is contrary to the policy declared in section 26(1)(*d*) that a taxpayer should have the right to deduct from his income for any taxation year a business loss sustained in another year in a case where his income is not from the business in which the loss was sustained.

6. That since the respondent ceased its manufacturing business prior to 1951 and that was the business in which its losses in 1947, 1948, 1949 and 1950 were sustained and it did not make any profit from such business in 1951, its case came within the limitation of section 26(1)(*d*) and it was not entitled to deduct any of the business losses claimed by it.

7. That the appeal must be allowed and the Minister's assessment restored.

APPEAL from decision of the Income Tax Appeal Board.

The appeal was heard before the President of the Court at Montreal.

Lyon W. Jacobs, Q.C., and *J. D. C. Boland* for appellant.

Lazarus Phillips, Q.C., and *Philip L. Vineberg* for respondent.

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

THE PRESIDENT now (January 25, 1957) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board, *sub nom. No. 280 v. Minister of National*

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Revenue[1], dated August 30, 1955, allowing the respondent's appeal from its income tax assessment for 1951.

The respondent's fiscal year ended on October 31 and so did its taxation year, so that when I refer in these reasons for judgment to a year I mean the year ending on October 31 in such year.

The issue in the appeal is whether the appellant in computing its taxable income for 1951 was entitled to deduct from its income for such year the business losses sustained by it in 1947, 1948, 1949 and 1950.

The determination of the appeal involves consideration of section 26(*d*) of *The Income Tax Act*, Statutes of Canada, 1948, Chapter 52, as amended in 1949, which reads as follows:

> 26. For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted from the income for the year such of the following amounts as are applicable:
>
> (*d*) business losses sustained in the 5 taxation years immediately preceding and the taxation year immediately following the taxation year, but
>
> (i) an amount in respect of a loss is only deductible to the extent that it exceeds the aggregate of amounts previously deductible in respect of that loss under this Act,
>
> (ii) no amount is deductible in respect of the loss of any year until the deductible losses of previous years have been deducted, and
>
> (iii) no amount is deductible in respect of losses from the income of any year except to the extent of the lesser of
>
> (A) the taxpayer's income for the taxation year from the business in which the loss was sustained, or
>
> (B) the taxpayer's income for the taxation year minus all deductions permitted by the provisions of this Division other than this paragraph or section 25.

The facts may be stated briefly. The respondent was incorporated by New Brunswick Letters Patent, dated October 28, 1943, and had its chief place of business at Saint John. For several years it carried on business there in rented premises. Its business was the manufacturing of textile products such as pyjamas, boxer shorts, overalls, mackinaws and other such goods and the selling of the products so manufactured by it. Mr. J. J. Block, the respondent's president, said that in the early part of 1951, about March, the respondent sold its manufacturing plant and arranged to have its purchaser manufacture for it the

[1] (1955) 13 Tax A.B.C. 362.

products which it had previously produced. Thereupon the respondent stopped manufacturing but continued to sell the products which the purchaser of the plant manufactured for it. While the date of the sale of the plant and the cessation of manufacturing was put by Mr. Block at about March in 1951, Mr. F. Windsor, a chartered accountant with the firm of McDonald Currie & Company, who were the respondent's auditors in 1951 and prepared its income tax return for that year, said that Mr. Block must have been in error in saying that the sale was in 1951 and that it must have been prior to October 31, 1950. He said that if there had been a sale during the respondent's fiscal year ending on October 31, 1951, there would have been some indication to that effect in its financial statement for that year and there was no such indication. Mr. Windsor's statement is confirmed by a letter which the respondent wrote to the Director of Income Tax at Saint John, dated February 12, 1952, re its 1950 T return, giving particulars not only of the equipment that had been sold by it but also of sales of raw materials. In my opinion, the evidence points to the sale having been made, not early in March, 1951, as Mr. Block recalled, but at some time prior to October 31, 1950, and I so find.

It follows that in 1951 the respondent was not engaged in the business of manufacturing. In addition to selling the textile products which the purchaser of its plant manufactured for it the respondent in 1951 purchased a stock of canvas shoes from War Assets Corporation and sold them at a profit.

In October or November of 1950, the exact date not being established, the respondent entered into a joint venture with Ottawa Car and Aircraft Limited for the purchase of Packard Merlin Rolls Royce engines, related aircraft parts and 87 twin Diesel Motors, with a view to selling them. These articles were sold in 1951 by Bancroft Industries Limited as commission agents for the parties to the joint venture and the respondent made a substantial profit from it.

I now set out the financial results. In the four years immediately preceding the taxation year with which this appeal is concerned, that is to say, 1951, the respondent sustained business losses and I set out their amounts as

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follows, namely; $16,432.43 in 1947, $15,392.97 in 1948, $87,228.08 in 1949 and $22,818.02 in 1950.

But in 1951 the respondent made a profit of $16,560.38 prior to tax from its sale of textiles and a profit of $168,853.41 from its joint venture.

In its income tax return for 1951 the respondent claimed that it was entitled to deduct from its profit of $16,560.38 from its sale of textiles, its business loss in 1947 of $16,432.43 so far as necessary, the amount claimed being $15,771.38, leaving it with a nil taxable income. In its return it disclosed a surplus of $168,853.41 arising from aircraft investment, this being the amount of its profit from the joint venture, but it did not report this amount as an item of taxable income, apparently taking the view that it was apart from its business and, consequently, a non-taxable capital gain.

When the Minister assessed the respondent for 1951 he added to the amount of taxable income reported by it, that is to say, nil, the sum of $15,771.38 which it had sought to deduct in respect of its 1947 business loss and the sum of $168,853.41, being its profit from the joint venture, making a total addition of $184,624.79, involving a tax (including penalty) of $79,410.92.

The respondent objected to the assessment. It did not persist in the pretence that its profit of $168,853.41 was a capital gain but attacked the assessment on the ground that under section 26(*d*) of the Act it was entitled to deduct from its income for 1951 the total amount of the business losses sustained by it in 1947, 1948, 1949 and 1950, amounting to $141,871.50, which would leave $32,753.29 as the amount properly assessable against it. The minister notified the respondent that he confirmed the assessment whereupon it appealed to the Income Tax Appeal Board which allowed the appeal. It is from that decision that the appeal to this Court is brought.

On the facts the question for decision is whether the respondent was entitled to deduct from its income for 1951 the business losses sustained by it in 1947, 1948, 1949 and 1950.

The general scheme of *The Income Tax Act,* as also of the *Income War Tax Act,* R.S.C. 1927, Chapter 97, is that

income for tax purposes is computed on an annual basis. Section 3 of the Act provides:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

And section 4 provides:

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

It is emphasized that the taxpayer's income for any taxation year is his income "for the year" and when that comes from a business, his income for the year is the profit from his business "for the year".

The right given to a taxpayer by section 26(*d*) to deduct from his income for a taxation year business losses sustained by him in other years is, therefore, a departure from the general scheme of the Act and as such must be confined within the expressed limits of the section.

It would, I think, be desirable to set out briefly the history of this statutory right. It was first granted by section 5(7) of the Statutes of Canada, 1942-43, Chapter 28, when paragraph (*p*) was first added to section 5 of the *Income War Tax Act*. This provided for a deduction from income of losses sustained in the process of earning income during the year last preceding the taxation year by a person carrying on the same business in both of such years, subject to certain limitations and qualifications. There was a slight change made by section 5 of Chapter 14 of the Statutes of Canada, 1943-44, and, finally, by section 4(5) of Chapter 43 of the Statutes of Canada, 1944-45, section 5(*p*) of the *Income War Tax Act* was made to read as follows:

5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

(*p*) amounts in respect of losses sustained in the three years immediately preceding and the year immediately following the taxation year, but

(i) no more is deductible in respect of a loss than the amount by which the loss exceeds the aggregate of the amounts deductible in respect thereof in previous years under this Act,

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(ii) an amount is only deductible in respect of the loss of any year after deduction of amounts in respect of the losses of previous years, and

(iii) nothing is deductible in respect of a loss unless the taxpayer carried on the same business in the taxation year as he carried on in the year the loss was sustained,

if, in ascertaining the losses, no account is taken of an outlay, loss or replacement of capital, a payment on account of capital, any depreciation, depletion or obsolescence or disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income, except such amount for depreciation and depletion as the Minister may allow for the purpose of this paragraph.

To this paragraph there was a proviso with which we are not here concerned.

When *The Income Tax Act* was enacted section 26(*d*) took the place of section 5(*p*) of the *Income War Tax Act* except that the opening words of paragraph (*d*) were as follows:

business losses sustained in the three years immediately preceding and the year immediately following the taxation year, but

Section 26(*d*) in its present form was enacted by section 11(5) of Chapter 25 of the Statutes of Canada, 1949, 2nd Session.

It should be noted that the words "the same" preceding the word "business" in section 5(*p*) of the *Income War Tax* do not appear in section 26(*d*) of *The Income Tax Act.* This fact led counsel for the respondent to point out that in the memorandum, dated February 19, 1954, attached to the notice of re-assessment, dated May 17, 1954, the position was taken that the losses incurred in 1950 and prior years were not deductible on the ground that the business then carried on by the respondent was not similar to that carried on in 1951 and that in the Minister's notification under section 53 of the Act the assessment was confirmed as having been made in accordance with the provisions of the Act and in particular on the ground that

the taxpayer is not entitled to a deduction from income in respect of losses sustained in 1947, 1948, 1949 and 1950 taxation years as its income for the 1951 taxation year was not from the same business in which the losses were sustained within the meaning of paragraph (*d*) of subsection (1) of section 26 of the Act

and it was suggested that this showed error on the Minister's part.

By way of answer to the suggestion I re-iterate what I have said in several cases that in an appeal to this Court from an income tax assessment the Court is not concerned with the correctness of the reasons given by the Minister either for the assessment or for his confirmation of it after the taxpayer's objection to it. They may be erroneous. The appeal to the Court is not from the Minister's reasons but against the assessment. It is the validity of the assessment that is before the Court. It carries a statutory presumption of validity and that enures to it unless the taxpayer who attacks it shows that it was erroneous either in fact or in law: *vide Dezura v. Minister of National Revenue*[1] or, as Rand J. put it in *Johnston v. Minister of National Revenue*[2] discharges his onus to "demolish the basic fact on which the taxation rested."

Counsel for the respondent contended that under section 26(*d*) of the Act it was entitled to deduct from its income for 1951, including its profit from the joint venture, the business losses sustained by it in 1947, 1948, 1949 and 1950. He referred to the definition of "business" in section 127(1)(*e*) of the Act which provides:

> 127. (1) In this Act,
>
> (*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

and contended that the word "business" in *The Income Tax Act* had a larger ambit than previously. He also referred to sections 10, 21 and 31(1)(*j*) of the *Interpretation Act*, R.S.C. 1952, Chapter 158, which I need not set out. Then he cited several decisions to show that the word business is a word of "large and indefinite import", namely, *Smith v. Anderson*[3]; *Rolls v. Miller*[4]; *Anderson Logging Company v. The King*[5]; *Samson v. Minister of National Revenue*[6]; *Economic Trust Company v. Minister of National Revenue*[7]; *Atlantic Sugar Refineries Limited v. Minister of*

[1] [1948] Ex. C.R. 10 at 15.
[2] [1948] S.C.R. 486 at 489.
[3] (1880) 15 Ch. D. 247 at 258.
[4] (1884) 53 L.J. Ch. D. 99.
[5] [1925] S.C.R. 45; [1926] A.C. 140.
[6] [1943] Ex. C.R. 17 at 32.
[7] [1946] Ex. C.R. 446.

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National Revenue[1]; *Gardiner Securities Limited v. Minister of National Revenue*[2]; *Minister of National Revenue v. Taylor*[3]; *No. 123 v. M.N.R.*[4] and *Edith Petroleums Ltd. v. M.N.R.*[5].

Counsel also referred to Simon's Income Tax, Second Edition, Vol 1, page 43, as authority for saying that the meaning and intention of a provision will be ascertained from the words used in the light of the statutes as a whole and that in cases of doubt or ambiguity recourse may be had to the former statutes.

On the strength of the authorities referred to, the change in the Act from the words "the same business" to "the business", the large import of the word "business", its enlarged scope because of its definition in section 127(1)(*e*) and the wording of the Act as a whole and read in the light of the history of the section counsel submitted that the right of deduction of business losses was greater under section 26(*d*) of *The Income Tax Act* than it had been under section 5(*p*) of the *Income War Tax Act,* and that the words "the business" in section 26(*d*) meant essentially the business of the respondent as it might be from time to time. Put specifically, his submission was that the business of the respondent in 1951 was the business of buying and selling commodities with a view to making a profit thereby, that its business in the loss years was likewise the business of manufacturing and selling commodities with a view to the same objective, and, in short, that its business in 1951 was "the business" of the respondent within the meaning of section 26(*d*) and that since its income for 1951 from such business under section 26(*d*)(iii)(A) was less than its income for 1951, minus all permitted deductions, under 26(*d*)(iii)(B) it was entitled to deduct all the business losses sustained by it in 1947, 1948, 1949 and 1950 to their full extent.

I do not agree with the contention thus put forward. There are, in my opinion, several reasons for rejecting it. In the first place, as Mr. Boland for the appellant clearly showed, section 26(*d*) of *The Income Tax Act,* instead of being less restrictive of a taxpayer's right to deduct business

[1] [1948] Ex. C.R. 622; [1949] S.C.R. 706 at 707.
[2] [1952] Ex. C.R. 448; [1954] C.T.C. 24.
[3] [1956] C.T.C. 189.
[4] (1953) 9 Tax A.B.C. 216.
[5] (1956) 16 Tax A.B.C. 17.

losses than section 5(*p*) of the *Income War Tax* had been, was more restrictive. This was illustrated by two examples. It was assumed in a case to which section 5(*p*) would have applied that a company in 1947 carried on business A and sustained a business loss in that year and that in 1948 it carried on business A and also business B and that it did not make a profit from business A but made a profit from business B. Under section 5(*p*) of the *Income War Tax Act* the company would be entitled to deduct its 1947 loss from its 1948 profit even although it had not made any profit from the same business as it had carried on in the loss year by reason of the fact that in 1948 it carried on the same business in that year as it had carried on in 1947 when its loss was sustained. This anomaly was removed when section 26(*d*) of *The Income Tax Act* was enacted. It was assumed in a case to which that section would have applied that a company in 1949 carried on business A and sustained a business loss in that year and that in 1950 it carried on business A and also business B and that it did not make a profit from business A but made a profit from business B. In that case the company would not be entitled to deduct its 1949 loss from its 1950 profit because its income for 1950 from the business in which the loss was sustained was nil and, therefore, it was the lesser of the two amounts referred to in (A) and (B) of subsection (iii) of section 26(*d*). It was, therefore, erroneous to contend that the right of deduction of business losses was enlarged by section 26(*d*). On the contrary, it was restricted.

Moreover, section 3 of the Act contemplates that a taxpayer may carry on more than one business and that concept is also embodied in section 26(*d*). It is well established that a company can carry on more than one business: *vide*, for example, *Birt, Potter and Hughes, Ltd. v. Commissioners of Inland Revenue*[1]; *Scales v. George Thompson & Co., Ltd.*[2] and H & G. *Kinemas, Ltd. v. Cook*[3]. But if counsel for the respondent's contention that the word "business" in section 26(*d*) means whatever the company is doing from time to time were adopted it would be tantamount to saying that its business is always the same. That would, of course, make it impossible for it to carry on more than one business.

[1] (1926) 12 T.C. 976. [2] (1927) 13 T.C. 83.
[3] (1933) 18 T.C. 116.

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Furthermore, the adoption of the contention would make sub-paragraph (A) in section 26(*d*)(iii) meaningless. And it is a cardinal principle that an interpretation leading to such a result must be erroneous.

Section 26(*d*) confers upon a taxpayer the right, subject to certain limitations, to deduct from his income for a taxation year business losses sustained by him in other years. This is a statutory right that would not exist apart from the enactment by which it is granted. The extent of the right and the conditions to which it is subject are expressed in the section. It follows that the right must not be extended beyond the permission of its express terms and that the conditions for its exercise must be strictly complied with. Subsection (iii) of section 26(*d*) puts a limitation on the extent to which losses may be deducted but the contention advanced by counsel for the respondent ignores this limitation. If it had been intended to give effect to such a contention it is inconceivable that paragraph (A) of section 26(*d*)(iii) would have been worded as it was. Instead of using the expression "from the business in which the loss was sustained" some such expression as simply "from the business" would have been used. Counsel's contention brushes to one side the limiting and definitive effect of the expression "in which the loss was sustained" and amounts to a reading of the paragraph as if the limiting and definitive expression were omitted.

Counsel's contention as applied to the respondent is, in effect, that in 1951 its business in the course of which it made a profit from its joint venture was the business of manufacturing and selling textiles in which it had sustained its losses although prior to 1951 it had abandoned such business. The contention is untenable.

It is, I think, sound to say that there is a difference between ambiguity of an enactment and difficulty in its interpretation and it ought not to be assumed from the fact that it is difficult to interpret an enactment that it is ambiguous in its terms. I am not confronted with such a situation here. I do not see any ambiguity in section 26(*d*) and I have not found any difficulty in its interpretation.

It seems to me that section 26(*d*) contemplates that a taxpayer may continue in the business in which he has previously sustained business losses or engage in some other

business, either by itself or together with his former business, with varying results that need not be enumerated, but that subsection (iii), by limiting the extent of the taxpayer's right to deduct losses to the lesser of the amounts specified in paragraphs (A) and (B) of the subsection, makes it clear that the extent of the amount that may be deducted in respect of losses from the income for any year shall never be greater but may be less than the amount of the taxpayer's profit from the business in which the loss was sustained. From this it follows, of necessity, that if he does not make a profit from the business in which the loss was sustained, whether by reason of having ceased such business or otherwise, the extent of the amount which he may deduct in respect of losses is nil. The right to deduct losses does not extend to a profit from an activity other than the business in which the loss was sustained. It seems to me that it is contrary to the policy as declared in the section that a taxpayer should have the right to deduct from his income for any taxation year a business loss sustained in another year in a case where his income is not from the business in which the loss was sustained. Thus, if he ceases to carry on the business in which the loss was sustained and, therefore, does not make any profit from it the right to deduct a business loss does not enure to him. The purpose of the policy no longer exists.

Consequently, since the respondent ceased its manufacturing business prior to 1951 and that was the business in which its losses in 1947, 1948, 1949 and 1950 were sustained, and it did not in 1951 make any profit from such business but made it from something else, its case comes within the limitation of subsection (iii) of section 26(*d*) and it is not entitled to deduct from its income for 1951, even its income from the sale of textiles in that year, any of the business losses sustained by it in 1947, 1948, 1949 and 1950.

It follows from what I have said that the appeal herein must be allowed with costs and the Minister's assessment restored.

Judgment accordingly.