1949
Sept. 19
Nov. 26

BETWEEN:

EAGLE LAKE SAWMILLS LIMITED, ..APPELLANT;

AND

MINISTER OF NATIONAL REVENUE, RESPONDENT.

Revenue—Excess Profits—Standard Profits—Excess Profits Tax Act, 1940, s. 2(1) (i), 4(1) (b) (i), 4(1) (b) (iii), 5(3), 5(5)—"Final and conclusive"—Power to adjust standard profits as conferred by s. 4 of the Act applies to all standard profits however ascertained—Onus on appellant to establish under which clause of s. 5(3) of the Act the Minister was satisfied that excessive taxation might result—Reduction in capital by appellant—Position of the appellant during the standard period considered in fixing standard profits and not as it was after capital reduced—Appeals dismissed.

In December 1944, appellant's standard profits were ascertained by the Board of Referees under s. 5(3) of the Excess Profits Tax Act, 1940, and were duly approved by or on behalf of the respondent under s. 5(5) of the Act.

The capital employed by the appellant in its business had, in February, 1944, and since the commencement of the last fiscal period of the appellant in the standard period, been reduced and such reduction had been accompanied by an equivalent reduction in capital stock.

Respondent, in 1946 and in 1948 adjusted appellant's standard profits for the fiscal years ending November 30, 1944, and November 30, 1945 and computed the tax payable by appellant accordingly.

From these assessments the appellant appealed to this Court.

Held: That the power to adjust standard profits, as conferred on the respondent by s. 4 of the Act, applies to all standard profits whether ascertained by the Board of Referees or otherwise, subject to the conditions and within the limits therein provided.

2. That the appellant having failed to establish affirmatively under which clause of s. 5(3) of the Act the Minister was satisfied that standard profits ascertained by reference to capital employed would result in the imposition of excessive taxation the Court is unable to determine that in exercising his discretion under s. 4 of the Act the Minister must have reached a conclusion opposed to that which he had reached in considering appellant's application under s. 5(3).

3. That in ascertaining the standard profits the Board of Referees considered the position of the appellant as it was during the standard period and not as it was after its capital was reduced in 1944 and the appellant had the full benefit of the standard profits so fixed by the Board of Referees from the coming into effect of the Act until 1944 when its capital was reduced and there is nothing to show that that reduction in capital was taken into consideration by the Board of Referees or that when the Minister approved of the decision of the Board of Referees he had any knowledge of such reduction in capital.

APPEALS under the Excess Profits Tax Act, 1940.

The appeals were heard before the Honourable Mr. Justice Cameron at Vancouver.

R. H. Tupper for appellant.

W. S. Owen, K.C. and *D. K. Petapiece* for respondent.

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

CAMERON J. now (November 26, 1949) delivered the following judgment:

In this case the appellant appeals from assessments made under the Excess Profits Tax Act, 1940, and amendments, in respect of its fiscal years ending November 30, 1944, and November 30, 1945. The facts are not in dispute and are set forth in the special case submitted to the Court, as follows:

SPECIAL CASE

The parties to this cause have concurred in stating the questions of law arising herein in the following case for the opinion of the Court:

1. The Appellant is a company incorporated under the laws of British Columbia and, during its fiscal years ending November 30, 1944, and November 30, 1945, was resident and carried on business in Canada;

2. The Appellant had profits for the fiscal years referred to in paragraph 1 in respect of which it is subject to tax under The Excess Profits Tax Act, 1940;

3. Pursuant to the provisions of subsection (3) of section 5 of The Excess Profits Tax Act, 1940, the standard profits of the appellant, for the purposes of the said Act, were ascertained by the Board of Referees at $90,000 on December 11, 1944, and the decision of the Board so ascertaining the Appellant's profits was duly approved by the Deputy Minister of National Revenue for Taxation, exercising the powers of the Respondent under subsection (5) of section 5. On January 5, 1945, the Deputy Minister of National Revenue communicated the aforesaid decision to the Appellant;

4. By assessment dated December 11, 1946, the Respondent assessed the Appellant for tax under The Excess Profits Tax Act, 1940, for the

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fiscal year ending November 30, 1944, and in so doing, purporting to exercise or exercising the power conferred on him by subsection (1) of section 4 of the said Act (capital employed by the Appellant in its business having, since the commencement of the last fiscal period of the Appellant in the standard period, been reduced in or about the month of February, 1944, and such reduction having been accompanied by an equivalent reduction in capital stock), adjusted the Appellant's standard profits in accordance with subparagraph (i) of paragraph (b) of the said subsection (1) from $90,000 to $78,656.59 and computed the tax payable accordingly;

5. By assessment dated March 5, 1948, the Respondent assessed the Appellant for tax under the Excess Profits Tax Act, 1940, for the fiscal year ending November 30, 1945, and in so doing, purporting to exercise or exercising the power conferred on him by subsection (1) of section 4 of the said Act (the capital employed by the Appellant in its business having, since the commencement of the last fiscal period of the Appellant in the standard period, been reduced in or about the month of February, 1944, and such reduction having been accompanied by an equivalent reduction in capital stock), adjusted the Appellant's standard profits in accordance with subparagraph (i) of paragraph (*b*) of the said subsection (1) from $90,000 to $76,984.38 and computed the tax payable accordingly;

6. The Appellant thereupon duly appealed from the aforesaid assessments to this Honourable Court

The question for the opinion of the Court is whether, in making the adjustments in the Appellant's standard profits referred to in paragraphs 4 and 5 of this Stated Case, the Respondent exercised authority conferred upon him by subsection (1) of section 4 of The Excess Profits Tax Act, 1940, in which case the appeals should be disallowed with costs, or whether the said subsection (1) did not authorize him to make adjustments in the circumstances of this case, in which case the appeals should be allowed with costs and the assessments should be referred back to the Respondent for re-assessment.

The sole question for determination, therefore, is whether the respondent had authority in the circumstances here disclosed to adjust the standard profits of the appellant when its standard profits had been ascertained by the Board of Referees under section 5(3) of the Act and duly approved by or on behalf of the respondent under section 5(5) of the Act. The appellant does not raise any question as to whether the discretion of the respondent was properly exercised, but submits that he had no discretion whatever and that under all the circumstances later to be discussed, the provisions of section 4 of the Act could not be invoked by him.

In assessing the appellant the respondent purported to act under the provisions of section 4(1) (*b*) (i) which is in part as follows:

Sec. 4(1) The Minister may in his discretion make the following adjustments in the standard profits of a taxpayer:

(*b*) adjust the standard profits

(i) in the case where any alteration in the capital employed since the commencement of the last year or fiscal period of the taxpayer in the standard period has occurred, by adding to or deducting from (accordingly as the capital has been increased or reduced) the standard profits an amount equal to seven and one-half per centum per annum of the amount of the alteration in the capital: Provided that in the case of a corporation or joint stock company such adjustments may only be made if the alteration in capital was accompanied by an equivalent alteration in capital stock . . .

"Standard profits" is defined in section 2(1) (i) as follows:

"Standard profits" means the average yearly profits of a taxpayer in the standard period in carrying on what was in the opinion of the Minister the same class of business as the business of the taxpayer in the year of taxation or *the standard profits ascertained in accordance with section five of this Act.*

In my opinion, therefore, as the standard profits which the respondent has a discretion to adjust under section 4 include the standard profits ascertained by the Board of Referees by virtue of the definition of standard profits, the appellant's admission that in each of the years in question its employed capital had been reduced below its capital so used at the commencement of its last fiscal year in the standard period (1939) and that such reduction had been accompanied by an equivalent reduction in its capital stock, quite clearly brings the appellant within the ambit of section 4(1) (*b*) (i)—unless by some section of the Act the respondent's discretion to adjust its standard profits is taken away.

Section 5 of the Act contains provision for the ascertainment of standard profits by the Board of Referees and it is admitted that upon application of the appellant the Board proceeded under subsection (3) thereof and on December 11, 1944, reported its decision to the respondent. That decision was duly approved by the Deputy Minister of National Revenue for Taxation on behalf of the respondent, in accordance with section 5(5), and on January 5, 1945, the Deputy Minister communicated the decision to the appellant.

Subsection (5) of section 5 is as follows:

Notwithstanding anything contained in this section a decision of the Board given under this section shall not be operative until approved by the Minister whereupon the said decision shall be final and conclusive: Provided that if a decision is not approved by the Minister it shall be

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submitted to the Treasury Board who shall thereupon determine the standard profits and the decision of the Treasury Board shall be final and conclusive.

Counsel for the appellant relies mainly on the provisions of that subsection and submits that the decision of the Board, when it has been approved by the Minister, is for all purposes "final and conclusive" and is not subject to adjustment by the respondent under section 4. He contends that section 5 must be read by itself and without reference to section 4, and, in effect, that the power to adjust standard profits conferred on the respondent under section 4 is limited to those standard profits ascertained otherwise than by the Board of Referees. Finally, however, in argument he admitted that the respondent might have power to adjust upwards the standard profits ascertained by the Board of Referees but had no power to lower them.

In dealing with these submissions it is necessary to consider the reasons for establishing a Board of Referees. The object of the Act was to establish a special tax on excess profits—namely, those profits in excess of standard profits. It was necessary, therefore, to define "standard profits". Normally, they were the average yearly profits in the standard period—1936 to 1939, both inclusive—and such standard profits were capable of exact computation. They were referred to at the trial as "factual standard profits." But in order to take care of taxpayers not in business in the standard period and of other special cases a Board of Referees was established to ascertain such standard profits in the manner laid down in section 5. The decision of the Board, however, was not operative until its decision had been approved by the Minister, when it became "final and conclusive"; and, if not approved by him, it would then be submitted to the Treasury Board whose determination was "final and conclusive."

What is the proper interpretation to be placed on the words "final and conclusive"? It is not necessary for me to consider the effect of section 14 of the Act which, *inter alia,* makes the appeal sections of The Income War Tax Act apply *mutatis mutandis* to this Act (see *Nanaimo Community Hotel Limited* v. *Board of Referees* (1); and *The M. Company* v. *M. N.R.* (2)). I think that I need

(1) (1945) C.T.C. 125.

(2) (1948) C.T.C. 213.
(1948) Ex. C.R. 483.

only consider whether they have the meaning attributed to them by the appellant, namely, that they are fixed and unalterable and not subject to adjustment under section 4.

Now it is the decision of the Board that upon approval of the respondent becomes "final and conclusive"; and the decision is the determination by the Board of the only matter that is referred to it for consideration, namely, the ascertainment, in accordance with the provisions of section 5, of the taxpayer's standard profits. As I have suggested above, the function of the Board is to determine the standard profits in special cases and when, because of special circumstances, it would be unfair or impossible to ascertain them in the normal way by averaging the actual profits over the standard period. When the Board's decision has been made and the necessary approval given by the Minister (or, alternatively, the standard profits have been fixed by the Treasury Board), the standard profits of those taxpayers whose standard profits have been so fixed are as definitely and finally fixed as those of other taxpayers whose standard profits have been determined in the normal way. The ascertainment of that which was previously not established, or uncertain, has been completed. That decision would then, in the absence of any further powers in the respondent to adjust the standard profits, be binding on the respondent.

In my opinion, section 4 confers a limited power on the respondent to do so. The power to adjust the standard profits is not by the terms of section 4 confined to cases where the standard profits have been fixed in the normal way inasmuch as "standard profits" includes those ascertained by the Board. Moreover, in one specific instance at least, the respondent is given power to increase the standard profits above those ascertained by the Board of Referees, namely, under section 4(1) (*b*) (iii), which is as follows:

> Sec. 4(1). The Minister may in his discretion make the following adjustments in the standard profits of a taxpayer:
>
> (*b*) adjust the standard profits
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> (iii) in the case of a corporation or joint stock company where the capital employed at the beginning of the nineteen hundred and forty-four fiscal period has been increased over the capital employed
>
> (*a*) at the commencement of the nineteen hundred and thirty-nine taxation period, or

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(*b*) at the commencement of the fiscal period, after the year nineteen hundred and thirty-nine *in respect of which the Board of Referees has last determined standard profits,*

whichever is later in time, by adding to the standard profits an amount equal to five per centum of the amount by which such increase exceeds an accompanying increase in capital stock by reason of which an addition to standard profits was made under sub-paragraph (1) of this paragraph.

In my opinion, section 5 cannot be read separate and apart from section 4. They must be read together. Nowhere in the Act can I find any indication that after the standard profits have been ascertained different treatment is to be accorded to taxpayers whose standard profits have been ascertained normally and those whose standard profits have been ascertained by the Board. And I am not surprised to find that no such distinction exists, for if it did gross and unfair discrimination would be the result. The obvious intention is that all should be treated alike. In section 5, the Board is required "to compare (an applicant) with other businesses of the same class," to take into consideration "the rate earned by taxpayers during the standard period in similar circumstances engaged in the same or an analogous class of business," and "to have regard to the standard profits of taxpayers in similar circumstances engaged in the same or an analogous class of business." Counsel advances no sound reason for his suggestion that taxpayers whose standard profits had been fixed by the Board should be in any better (or worse) position than the others, and I am unable to find one.

As an instance of such unfairness one could take the example of a company commencing business in 1938 with a very small capital. Under section 5(2) its standard profits could be fixed by the Board on the basis of capital employed. If, in the course of four years, its business had increased to the point where it had three times as much capital employed, could it be argued successfully that the respondent had not the power under section 4(1) (*b*) (i) to increase its standard profits beyond those fixed by the Board, if the required conditions were met? I think not, and if he had the power to adjust its standard profits by increasing them, he also had a similar power to adjust them by decreasing them, providing the conditions laid down were established.

My conclusion on this submission is that the power to adjust standard profits, as conferred on the respondent by section 4, applies to all standard profits however ascertained, but, of course, subject to the conditions and within the limits therein provided.

A further submission is made by appellant's counsel that in this particular case, since the standard profits were ascertained under the provisions of section 5(3), it would be improper for the respondent to adjust them under section 4 as he would be giving consideration to the same factors as were before him and the Board of Referees when considering the application under section 5(3); and that in effect as the Minister, on the advice of the Board, had been satisfied that it would be unfair or improper for the Board to ascertain the standard profits by reference to capital employed, it would later be unfair for him, under the provisions of section 4, to determine that the standard profits should be adjusted downwards on the basis that the capital employed had been reduced. Section 5(3) is as follows:

> 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 earning 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.

Implicit in the above submission is the suggestion that in exercising his discretion under section 4, the Minister must have reached the conclusion that the capital employed by the appellant was an important factor in its profit-making potential, a conclusion contrary to that which he had reached in referring the application to the Board under section 5(3). But that is not necessarily so. Under section 5(3) the Minister, on the advice of the Board, could

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be satisfied that the standard profits should not be ascertained by reference to capital employed, because either

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

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

No evidence was given at the trial and the only material before me, in addition to that transmitted to the Court by the Minister, was the statement of agreed facts in the special case. The appellant furnished me with no information as to the nature of its application to have its standard profits fixed by the Board and I have, therefore, no knowledge as to whether its application was based on clause (*a*) or clause (*b*) of section 5(3). The satisfaction of the Minister may have been brought about on the ground that the appellant's capital had been abnormally impaired, or due to other extraordinary circumstances was abnormally low, rather than because its business was of such a nature that capital was not an important factor in the earning of profits. The onus in this matter lies on the appellant and in the absence of any evidence to establish affirmatively under which clause the Minister was satisfied, I am unable to determine that in exercising his discretion under section 4 he must have reached a conclusion opposed to that which he had reached in considering the appellant's application under section 5(3). The submission of counsel for the appellant on this point therefore fails.

There is a further suggestion as the Board's decision and the Minister's approval thereon were given after the appellant's capital had been reduced in February 1944, that that reduction in capital must have been taken into consideration in ascertaining the standard profits. But there is no evidence whatever to establish that such was the case. The application by the appellant was referred to the Board on September 3, 1941, and on December 11, 1944, the latter reported to the Minister as follows:

> Under the provisions of subsection three of section five of The Excess Profits Tax Act, 1940, as amended, the Board of Referees ascertains the yearly standard profits of the taxpayer at ninety thousand dollars ($90,000) *at 1st November, 1938.*

It is apparent from the concluding words that in ascertaining the standard profits the Board was considering the position of the appellant as it was during the standard

period and not as it was after its capital was reduced in 1944. It would appear that the finding of the Board was retroactive and that the appellant had the full benefit of the standard profits so fixed by the Board from the coming into effect of The Excess Profits Tax Act, until 1944 when its capital employed was reduced. There is no evidence to show that when the Board's finding was made it had any knowledge of the reduction of capital in February 1944, or that when the Minister approved of its decision he had any knowledge of such reduction in capital. The argument of counsel for the appellant on this point therefore fails.

I have considered all of the arguments advanced on behalf of the appellant and have reached the conclusion that none of them can be supported. The appeals therefore must fail and they will be dismissed with costs to be taxed.

Judgment accordingly.