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Sept. 20
1947
Nov. 17

BETWEEN:

HARRY DEZURA .....APPELLANT;

AND

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

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 6 (2), 47, 55, 58, 66—Determination of Minister under s. 47 distinguished from exercise of particular discretionary powers—Power of Minister under s. 47 subject to the Act—Minister's determination a finding of fact and subject to review by the Court—Onus of proof of error on appellant.

Appellant, a hotel keeper, was unable to produce proper books of accounts or accounting records. The correctness of his returns for 1940 and 1941 was questioned and the Minister, acting under section 47, determined the amount of the tax to be paid by him, from which amount he appealed. Appeal allowed in part.

Held: That the Minister's power under section 47 is not of the same kind as the various discretionary powers vested in the Minister by the Act in respect of particular items but is general in nature and relates to the amount of the assessment as a whole.

2. That the Minister's power under section 47 must be exercised within the Act and subject to it.

3. That, when the Minister, acting under section 47, has determined the amount of the tax to be paid by any person, he has made a finding of fact as to the amount of the assessment which is subject to review by the Court under its appellate jurisdiction.

4. That the onus of proof of error in the amount of the determination rests on the appellant.

5. That the amounts of the assessments under appeal were incorrect and should be reduced.

APPEALS under the Income War Tax Act.

The appeals were heard before the Honourable Mr. Justice Thorson, President of the Court, at Regina.

E. W. Gerrand K.C. for appellant.

J. N. Gale and *E. S. MacLatchy* for respondent.

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

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THE PRESIDENT now (November 17, 1947) delivered the following judgment:

These appeals under the Income War Tax Act, R.S.C. 1927, chap. 97, raise an important question as to the nature of the Minister's power under section 47 of the Act, which provides as follows:

47. The Minister shall not be bound by any return or information supplied by or on behalf of a taxpayer, and notwithstanding such return or information, or if no return has been made, the Minister may determine the amount of the tax to be paid by any person.

During 1940 and 1941 the appellant kept a 10 room hotel at Aylsham, Saskatchewan, a hamlet of from 200 to 250 persons, situate about 250 miles northeast of Regina in the Carrot River valley, a well settled agricultural area. In addition to letting the hotel rooms he also ran a dining room and a beer parlor. His income was derived solely from these sources. In his income tax returns for these years he reported a net taxable income of $135.70 for 1940 and $338.43 for 1941. The Minister took the position that the appellant had failed to produce proper books of accounts or accounting records and, acting under section 47 of the Act, determined his net taxable income to be $2,565.31 for 1940 and $1,025.98 for 1941 and, as shown by amended assessment notices, dated March 31, 1945, assessed him accordingly. Appeals from these assessments were taken to the Minister who affirmed them on the ground that in the absence of proper proof and accounting records and upon investigation and in view of all the facts the Minister had under section 47 determined the amount of tax to be paid by the appellant for the said years. Being dissatisfied with the Minister's decision the appellant now brings his appeals from the assessments to this Court.

While the amounts of net taxable income as determined by the Minister differ in a number of respects from those shown on the appellant's returns, the appeals are concerned only with the items that relate to the sale of beer in the appellant's beer parlor and the profits therefrom. He sold both draught and bottled beer, some of the latter being sold for consumption off the premises. In his returns for 1940 he showed total sales amounting to $8,710.04 with a cost of $6,631.54, making a profit of $2,078.50. The details

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of the amended assessment as determined by the Minister showed total sales of $11,044.80 with a cost of $6,631.54, making a profit of $4,413.26. In respect of 1941 the appellant's return showed total sales of $10,526.50 with a cost of $6,819.04, making a profit of $3,707.46, whereas the Minister's determination showed total sales of $10,984.10 with a cost of $6,829.09, making a profit of $4,155.01.

There can be no doubt that the Minister had the right to act under section 47 in the present case. While there was evidence at the hearing of the appeal that the appellant had kept accounts of his receipts from the beer parlor, the dining room and the hotel rooms and of his expenses in a school exercise book for each of the years 1940 and 1941 and that these accounts had been used when his returns were being made out but that the exercise books had been lost, the fact is that there were no books of account or records of receipts and expenditures available for inspection by the income tax officials. Under the circumstances, the Minister, acting through his officials, could properly question the correctness of the appellant's returns and determine the amount of the tax to be paid by him. But that is not the end of the matter.

The statement in section 47 that the Minister may determine the amount of the tax to be paid by any person is only another way of saying that he may determine the amount of any person's assessment, for when the amount of the assessment is determined the amount of the tax to be paid follows as a matter of course. It ought really to be included in the part of the Act dealing with assessments rather than in that relating to returns. When read with its context it means that the Minister is empowered to determine the amount of any assessment without being bound by any return or information and even although no return has been made. There is nothing extraordinary about the power at all. It might even be that it would exist without any mention of it in section 47 under the general power of assessment conferred upon the Minister by section 55 and that the statement in section 47 is made *ex abundanti cautela*. Indeed, it would be very strange if there were no such power and the Minister's power of

determining the amount of an assessment were limited to that shown by the taxpayer's own return or information supplied by or for him or made dependent on whether the taxpayer had made a return. The effect of the section is that when the Minister makes an assessment under the section there is a presumption of validity in its favour which is not rebuttable by proof that its amount is different from that shown on the taxpayer's return or information supplied by or for him or that no return has been made. The power is in the interests of adequate administration of the Act. It extends to the case of every taxpayer and is conferred so that there shall be no gap in the Minister's administrative power of assessment of every person and the determination of the amount of such assessment so that every one may be made subject to liability for the amount of tax he ought to pay and no one be able to confine the amount of his liability to that which he has himself stated or supplied or to escape liability by not making a return.

It was contended on behalf of the respondent that the Minister's determination was the exercise of an administrative discretionary power and as such not reviewable by the Court. I have come to the conclusion that this contention is quite untenable. In my opinion, the Minister's power under section 47 is not of the same kind as the various discretionary powers vested in the Minister by the Act such as, for example, that conferred by section 6 (2), whereby he is made the sole judge of the particular matter entrusted to his discretion so that when he has acted in the manner required by law in the exercise of his discretionary power his actual exercise of it is not subject to review by the Court. There is a difference between the exercise of discretionary powers in respect of particular items that may enter into an assessment and the assessment itself, as explained in *Pure Spring Company Limited* v. *Minister of National Revenue* (1). Such discretionary powers must be exercised before the assessment operation, which is purely an administrative function of the Minister not involving the exercise of discretion, can be performed at all. But the power under section 47 is not concerned

(1) (1946) Ex. C.R. 471 at 498.

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with any particular item. It is general in nature and relates to the amount of the assessment as a whole. In my view, a right of appeal from such amount is expressly given by section 58 of the Act which provides in part:

> 58. Any person who objects to the amount at which he is assessed, or who considers that he is not liable to taxation under this Act, may personally or by his solicitor serve a notice of appeal upon the Minister.

There may be sound reasons of policy why Parliament has entrusted particular matters that may be difficult or impossible of proof as matters of fact to the discretionary determination of the Minister and in such matters preferred the opinion of the Minister to that of the Court, but there can be no similar reasons in the case of such a general power of assessment as that conferred by section 47. The statement that the Minister may determine the amount of the tax to be paid by any person extends to the case of every taxpayer. Under the circumstances, the contention that the Minister's determination is not subject to review by the Court amounts to a total denial of the taxpayer's right of appeal against "the amount at which he is assessed" and renders the language of section 58 nugatory so far as the amount of any assessment is concerned. Moreover, if the Minister's determination under the section were to make an assessment binding, there would be no need for most of the specific provisions of the Act. A construction of the section that would lead to such astounding results ought, in the absence of clear and explicit terms, to be rejected as an unreasonable one. A more reasonable construction of the section must be sought.

While the Minister's power under section 47 is not expressly limited it is not unlimited in the sense that he may do as he pleases. It is qiute clear, I think, that the power must be exercised within the Act and subject to it. That opinion was expressed in *Trapp* v. *Minister of National Revenue* (1) where it was held that when the Act has fixed a particular basis of taxability of income section 47 does not empower the Minister to depart from such basis and fix a different one. Parliament could not have intended to confer any extraordinary or over-riding general power upon the Minister. All that he is empowered

(1) (1946) Ex. C.R. 245 at 255.

to do is to find the fact of the amount of the assessment in the case of any person regardless of the amount shown by his return or information supplied by or for him and regardless of whether he has made a return or not. When he exercises his power under the section he makes a finding of fact as to the amount of the assessment which is clearly subject to the appellate jurisdiction of the Court within the meaning of section 66 of the Act and not excluded therefrom by its opening words.

The result is that when the Minister, acting under section 47, has determined the amount of the tax to be paid by any person, the amount so determined is subject to review by the Court under its appellate jurisdiction. If on the hearing of the appeal the Court finds that the amount determined by the Minister is incorrect in fact the appeal must be allowed to the extent of the error. But if the Court is not satisfied on the evidence that there has been error in the amount then the appeal must be dismissed, in which case the assessment stands as the fixation of the amount of the taxpayer's liability. The onus of proof of error in the amount of the determination rests on the appellant.

This view of the nature of the Minister's power under section 47 is, I think, a reasonable one. It is consistent with the other provisions of the Act and complete and equitable administration of it. The object of an assessment is the ascertainment of the amount of the taxpayer's taxable income and the fixation of his liability in accordance with the provisions of the Act. If the taxpayer makes no return or gives incorrect information either in his return or otherwise he can have no just cause for complaint on the ground that the Minister has determined the amount of tax he ought to pay provided he has a right of appeal therefrom and is given an opportunity of showing that the amount determined by the Minister is incorrect in fact. Nor need the taxpayer who has made a true return have any fear of the Minister's power if he has a right of appeal. The interests of the revenue are thus protected with the rights of the taxpayers being fully maintained. Ordinarily, the taxpayer knows better than any one else the amount of his taxable income and should be able to

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prove it to the satisfaction of the Court. If he does so and it is less than the amount determined by the Minister, then such amount must be reduced in accordance with the finding of the Court. If, on the other hand, he fails to show that the amount determined by the Minister is erroneous, he cannot justly complain if the amount stands. If his failure to satisfy the Court is due to his own fault or neglect such as his failure to keep proper accounts or records with which to support his own statements, he has no one to blame but himself. A different view of the nature of the Minister's power under section 47, namely. that it is not subject to the specific provisions of the Act and that the amount of his determination is not subject to review by the Court would lead to such extraordinary results, without any need or justification for them, that they ought not to be considered as having been within the intention of Parliament.

The amount of the Minister's determination being thus subject to review by the Court the issue on these appeals is solely one of fact. The amounts of $8,710.04 and $10,526.50 shown on the appellant's returns as the amounts of his total sales in the beer parlor for 1940 and 1941 respectively are not broken up to show the receipts from draught beer, bottled beer, and the return of kegs separately. But the memoranda filed on behalf of the Minister at the hearing (Exhibits I and H) giving the details of the amended assessments do show the estimates of such receipts separately. The important details so far as these appeals are concerned are those dealing with the returns from the sale of draught beer. The memorandum for 1940 (Exhibit I) shows the sale of 208 kegs at $32.00 per keg and the one for 1941 (Exhibit H) 167½ kegs at $32.00 per keg. The information as to the number of kegs was obtained from the Saskatchewan Liquor Board and its correctness is not questioned. At the hearing counsel for the appellant confined his attack on the assessment solely to the Minister's estimate of gross receipts of $32.00 per keg. The correctness of the other items was conceded. The issue of fact is thus a narrow one.

The Court has had the advantage of evidence as to how the amount of $32.00 per keg was arrived at. Mr. J. B.

McFadyen, the chief assessor of the Saskatoon Income Tax Office, who was the person actually dealing with the appellant's returns, explained that he was familiar with the returns of about 200 beer parlor operators in Saskatchewan; that 50% of these kept good records, 25% incomplete ones and the rest practically no records; that he had arrived at the gross receipts of $32.00 per keg as a result of comparison with other returns filed in the office; that the returns from hotels that kept good records indicated that the realization from sales of draught beer amounted to $32.00 per keg or better; that he knew of cases where the return was as high as $37.00 but that he had taken $32.00 as an average. The estimate made by Mr. McFadyen must be taken to have been adopted by the Minister as his estimate. An assessment made under section 47 is often called an arbitrary assessment but it would be more nearly correct in view of Mr. McFadyen's evidence to describe the assessments under appeal as estimated assessments rather than as arbitrary ones. While I was favourably impressed with the manner in which Mr. McFadyen gave his evidence I have come to the conclusion that the estimate of gross receipts of $32.00 per keg was too high. There are a number of reasons for this conclusion. It is clear that it was intended that the estimate should not be too low but should amply protect the revenue and this is to be expected. The viewpoint of the taxing authorities is shown in a letter from the Inspector of Income Tax at Saskatoon, per Mr. McFadyen, to the appellant's accountants, dated November 19, 1943, in the following well expressed statement:

> I would point out that in the absence of specific records and where it becomes necessary to issue an arbitrary assessment, as in the case of your client, the interests of the Crown must be fully protected, and while there is no desire to estimate the taxpayer's income beyond what is a reasonable figure, it must be borne in mind that the estimated income should be sufficiently high that it is comparable with that reported by like businesses where accurate records are kept. The taxpayer who does not maintain records cannot reasonably expect his income to be estimated on a basis lower than the taxpayer who does maintain records.

No exception can be taken to this statement of the objectives to be sought in the exercise of the Minister's power under Section 47, but I think the estimate in this

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case has gone beyond them. In my opinion, the returns with which Mr. McFadyen was familiar did not warrant him in making the estimate he did. He admitted that the hotels that kept good records were mostly city hotels and he could not recall the return of any rural hotel similar to the appellant's where good records were kept and gross receipts of $32.00 per keg were realized. Furthermore, receipts from the sale of draught beer in beer parlors even where records were well kept did not always appear separately from those from the sale of bottled beer. The experience on which Mr. McFadyen based his estimate was thus much narrower than at first appears and was in respect of beer parlors not comparable with that run by the appellant. A gross return of $32.00 per keg is possible only if the beer parlor operator supplies only 6¼ ounces instead of the 8 ounces which the law prescribes. This is a mathematical calculation based upon 2,000 ounces per keg and the sale of the beer at 10 cents per glass and makes no allowance whatever for any wastage. There must always be some wastage so that in actual practice the operator of the beer parlor would have to put even less than 6¼ ounces of beer in the 8 ounce glass in order to realize a gross return of $32.00 per keg. While it appears from the evidence that this practice of cheating beer parlor patrons was widespread in the province it is clearly established that it was much more common in the large city beer parlors than in the small ones in the country. Of the complaints regarding short measure sales 75% came in respect of city beer parlors and only 25% from rural ones. Mr. McFadyen frankly admitted that a city beer parlor would make a larger gross return per keg than a country one. Moreover, there would also be less wastage in city beer parlors than in country ones because of the more efficient beer drawing equipment in the former. In the country beer parlors wastage would amount to 4% as compared with 2% in the case of those in the cities. This was the evidence of Mr. Boyle, President of the Hotels Association of Regina and Vice-President of the Saskatchewan Hotels Association, who also stated that the glasses were filled nearer the top in country beer parlors than in city ones. His experience was that any rural beer parlor

operator who put less than 7 ounces in the glass was creating trouble for himself. These statements lend strong support to the appellant's own evidence that he served full glasses to his patrons, that he had had no complaints and that his business had been growing, which without such support I would have held at some discount. Moreover, there is the evidence of Mr. Pearson that the appellant was very generous and filled up the glasses and that there had been no complaints. I find no difficulty in believing that in country beer parlors the operator would not be as likely to succeed in selling short measure beer as he would be in larger city beer parlors and that he would not be likely to realize $32.00 per keg.

While I am satisfied that the estimate of $32.00 per keg is too high, it is difficult in the absence of reliable records to find precisely how much too high it is. But since the Minister's estimate is reviewable the Court may substitute its finding even although such finding may itself have to be an estimate. On the evidence as a whole, I am of the opinion that a gross return of $28.00 per keg was more likely in the appellant's case than the amount estimated by the Minister, and I so find. This would mean approximately 7 ounces of beer per glass rather than $6\frac{1}{4}$. While I do not think the appellant is entitled to full credence in view of his initial erroneous returns I am of the opinion that he has sufficiently satisfied the onus of showing that the amounts of the assessments under appeal were incorrect and that a reduction of $4.00 per keg ought to be made. The assessment for 1940 should, therefore, be reduced by $832.00 and that for 1941 by $670.00. To the extent of such reductions the appeals will be allowed. The appellant is entitled to costs to be taxed in the usual way.

Judgment accordingly.
