1947
Oct. 2
Dec. 8

BETWEEN:

COMMERCIAL HOTEL LIMITED,

APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE

RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 47, 54, 58(1)—Determination of Minister under s. 47—Power of Minister under s. 47 is general and relates to assessment for tax as a whole—Onus of proof of error on appellant—Failure to discharge onus—Appeal dismissed.

Appellant operates a beer parlour in connection with its hotel business carried on in Vancouver, B.C. Respondent refused to accept the returns for income tax filed by the appellant for the years in question in this appeal, and, acting under s. 47 of the Income War Tax Act, determined the amount of tax to be paid by appellant, from which it appealed to this Court.

Held: That the Minister's power under s. 47 of the Act is general in nature and relates to the assessment for tax as a whole.

2. That the onus of proof of error in the amount of the determination by the Minister rests on the appellant and since the appellant has not discharged this onus the appeal must be dismissed.

APPEAL under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice O'Connor at Vancouver.

J. A. MacInnes, K.C. and *C. S. Arnold* for appellant.

John L. Farris for respondent.

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

O'CONNOR J. now (December 8, 1947) delivered the following judgment:

This is an appeal under the Income War Tax Act, R.S.C. 1927 c. 97, from assessments for income tax for the taxation years 1939, 1940, 1941, 1942 and 1943. The appellant during these years carried on a general hotel business, including a beer parlour, in the City of Vancouver.

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The appellant filed annual returns for each of the said years. The respondent under section 47 of the Act refused to be bound by these returns and determined the amount of the tax to be paid by the appellant.

These appeals are concerned only with the items that relate to the sale of beer in the beer parlour and the profits therefrom.

The appeals were argued on the basis that the Minister in determining the amount of the tax under section 47 had exercised a discretion similar to that given him by section 6(2). On that basis counsel for the appellant argued that the material, which the Minister had before him at the time he determined the amount, was insufficient in law to support such determination and that the taxpayer had not been given a fair opportunity of meeting the case against it. And that the Minister had determined the tax on a theoretical basis of the revenue a barrel of beer should produce and not on the basis of what was actually produced. The appellant tendered evidence to establish the actual revenue.

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.

After considering section 47 I have reached the conclusion that the power given the Minister to determine the amount of the tax is not a discretion similar to that in section 6(2). What the Minister does under section 47 is to make his estimate of the tax payable by the taxpayer in two cases; (1) where the Minister refuses to be bound by the return filed, and (2) where no return has been made. In those two cases he determines the amount of the tax, that is, he makes an assessment. In *Harry Dezura* v. *The Minister of National Revenue* (*ante* p. 10), Thorson P., said:—

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.

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In the English Income Tax Act, 1918, section 112 provides:—

112. If the surveyor or the assessor does not receive a statement from a person liable to be charged to tax, the assessor shall to the best of his information and judgment—

(*a*) make an assessment upon that person of the amount at which he ought to be charged under Schedules A, B, and E.

Under section 121 of the same Act, subsection (4) provides:—

121. (4). If—

(*a*) a person makes default in the delivery of a statement in respect of any tax under Schedule D with which he has not been otherwise charged; or

(*b*) the additional commissioners are not satisfied with a statement which has been delivered, or have received any information as to its insufficiency; or

(*c*).....

the additional commissioners shall make an assessment on the person concerned in such sum as, according to the best of their judgment, ought to be charged on him.

While the language is not the same as that of section 47 of the Dominion Act, the purpose and the effect is, in my opinion, the same. Under section 47 this power is given to enable the Minister "to proceed with the best available estimate". This was the language that Lord Shaw used in the House of Lords in *Attorney-General* v. *Till* (1):—

My Lords, the power of assessment and surcharge does not appear to me to assist the construction of s.55. Such powers are inserted in the Act simply because, in addition to all kinds of penalties, the Board of Inland Revenue must ingather taxation; and if the taxpayer will not furnish the information himself, some means must be provided of recovering the duty, and these powers are given to enable the Board to proceed with the best available estimate.

These words were quoted with approval by Rinfret, J., now Chief Justice of Canada, in *International Harvester Company of Canada, Ltd.*, v. *The Provincial Tax Commission et al* (2). In that case under the Income Tax Act 1932 (Saskatchewan), regulations were issued:—

covering such cases where the Minister is unable to determine or obtain information required to ascertain the income within the province of a corporation or joint stock company carrying on a trade or business within and without the province.

The Chief Justice termed the method adopted by the Commissioner of Income Tax under the provisions in the regulations, "nothing else than the adoption of the best available

(1) (1910) A.C. 50 at 72. (2) (1941) S.C.R., 325 at 352.

means to ascertain the income of the appellant arising from its business in Saskatchewan, and nothing more".

Section 54 of the Dominion Act provides:—

54. After examination of the taxpayer's return the Minister shall send a notice of assessment to the taxpayer verifying or altering the amount of the tax as estimated by him in his return.

Whether the Minister has determined the *amount* of the tax under section 47 or has altered the *amount* of the tax under section 47 or has altered the *amount* of the tax estimated by the taxpayer in his return under section 54, the taxpayer has a right of appeal because section 58(1) provides:—

58 (1). Any person who *objects to the amount* at which he is assessed, ...may...serve a notice of appeal upon the Minister,

(*a*)....

The Minister in determining the amount of the tax under section 47 does not have to have material sufficient in law to support his determination, or to give the taxpayer an opportunity of meeting the case against him.

In this case, however, before the assessment was made, the Inspector of Income Tax at Vancouver wrote to the solicitors for the appellant in part as follows:—

In regard to the B.C. Hotels Association they have for years urged their members to file with the Department returns that were reasonably accurate and realizing that, acting on a ruling from Ottawa, the Department meant business they appointed a special committee from their Executive to see if satisfactory arrangements could be made whereby no prosecutions would be undertaken. The barrelage rate was such that no reasonable member could protest. It further was agreed that if any member felt his assessments to be unjust the Association would review them and make recommendation to the Department for an adjustment. This Association is both the purchasing and protective agency of the members. Needless to say Mr. Johnson did not invoke their assistance and he probably realized that his barrelage was the lowest on record. The Association was, and is motivated by the desire that no undue publicity be made of any of its members in view of public animosity then existing.

When this writer examined the company's books to enable assessments to be made for 1940 and 1941 Mr. Johnson made a suggestion that he knew the barrelage was too low but if the writer would fix the matter up at Ottawa he would see that a satisfactory arrangement would be made at this end. In other words, a bribe was offered to close the matter up. Also, the late Mr. Lee, the company's book-keeper, told the writer that the figures given him from Mr. Johnson were not correct and that his request for register tapes and readings were ignored and he was told to mind his own business. And finally, in a meeting held in this office in April, 1943, Mr. Johnson announced his barrelage had risen

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to $62.00 per barrel. This is a rather substantial increase from $45.00 to $50.00 for 1942, but merely is in line with the magical increase reported by all delinquent members. The explanation Mr. Johnson will give you as he gave me, was that he was using larger glasses. Actually the Department had taken the precaution, as it did in all cases, to take a glass which was labelled with the company's name and date. In any event the only glasses that could be procured from October, 1939, was from one source only—a reported 7½ oz. glass, but actually a 6 oz. one, containing somewhat better than 5 ozs. when an honest glass was given. Any operator who had larger glasses than the ones referred to were instructed by the Association to discard them to prevent unfair competition.

The solicitors for the appellant, under date of June 12, 1945, replied as follows:—

> We acknowledge receipt of your letter of the 5th inst., and while we disagree with many of the statements therein contained, it seems useless to enter into a discussion over matters which in all probability will come before the Minister and, later on, before the Exchequer Court of Canada.

The assessments were then made on the 9th August, 1945.

In the light of these letters the appellant cannot now be heard to say that the Minister determined the amount of the tax without giving the appellant a fair opportunity of meeting the case against it.

The Minister's decision under section 47 is not an absolute one. As Thorson, P., said in the *Dezura case* (*supra*):—

> 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.

And—

> 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.

If the taxpayer can establish to the satisfaction of the Court that the actual income was less than the amount determined by the Minister, then such amount will be reduced in accordance with the findings of the Court.

In this case the appellant tendered evidence to establish the actual income from the sale of the beer. In fairness to the appellant, I should state that because of the death of the manager, Mr. Johnson, and two of the three bookkeepers, who were employed by the appellant during the period in question, the appellant was greatly handicapped at the trial. But the evidence adduced by the appellant

did not prove to my satisfaction that the actual revenue was as disclosed by the books and returns filed by the appellant. In fact quite the contrary.

The evidence showed that each night the cash receipts were placed in a box and given to Mr. Johnson with a slip of paper on which was written the total of the daily sales shown by the cash register. Every day during Eckardt's employment as a bookkeeper, he received a piece of paper on which was written a sum purporting to be the total beer sales for the previous day.

Crawford, one of the bar tenders employed by the appellant, said that he worked three days a week in the mornings and the other three days in the week he worked at night. Perras worked when Crawford was off. Crawford said that he put the cash each night in the box with a slip on which the total amount taken in during the day was written by him or was stamped with the cash register. Perras stated that the only time he attended to the totalling of the cash at night was when Crawford was away.

Eckardt stated that he got the slips from Johnson and entered the books with the amount shown on the slip and—

Q. Where did you get those figures from in each case?
A. From the slips handed in to me.
Q. In whose handwriting were those slips?
A. Mostly in Perras'.
Q. Were there any in anybody else's writing?
A. At times, yes.
Q. Do you know in whose handwriting they were?
A. I wouldn't like to swear to that.
Q. Did you get any printed memos?
A. No.

While Crawford worked three nights a week and either wrote the daily total or printed it on the cash register, the bookkeeper, Eckardt, received slips "mostly in Perras' handwriting", and did not receive any printed memos, i.e., stamped in the cash register. No explanation of this was given.

Eckardt did not receive cash register tapes because there were none on the machine and he stated that Johnson never counted the cash before him. At the end of every month he showed Johnson the cash balance and asked him if he had that amount on hand and Johnson replied, "That's right".

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William Findlay, employed by the Inspector of Income Tax at Vancouver up to April, 1947, stated that the barrelage shown in the appellant's returns was $7.00 and $8.00 lower than the average of other hotels in Vancouver as shown in their returns, and that in a conversation about the 5th May, 1947, about the barrelage of the appellant, Johnson said to him, "Findlay, I know the barrelage is too low, but you get it passed by Ottawa and I will fix you". Findlay also stated that he requested them to put tapes on the cash register so these could be handed to the bookkeeper, thus permitting him to verify the total daily amount and that the appellant did not get these tapes.

Perras stated that these daily slips were destroyed because, "We didn't need them". On cross-examination, he swore that all the entries in the cash book for beer sales were correct, and—

Q. Every single one of them?

A. Yes.

Q. No doubt about that?

A. Yes, sir, they are right.

Q. You are swearing to the days you weren't there, that they are correct, are you? Are you swearing to that?

A. Well I guess I have to.

I do not accept his evidence.

The respondent tendered certain evidence to show that Mr. Johnson lived in a manner which indicated personal revenue beyond that which he obtained from the appellant, and which could not be otherwise explained than that undisclosed profits of the appellant were being diverted to his personal benefit. The evidence given did not establish this and moreover the evidence given on behalf of the appellant established that there were other sources of income or capital open to him.

The appellant further contended that the Minister had certain reports before him at the time he affirmed the assessment, and the appellant had no knowledge of these reports and had no opportunity of meeting the case against it.

The Minister when he affirms or amends the assessment may be right or he may be wrong. But when the appellant continues his appeal to the Court he then has a full opportunity of presenting all the facts, statutory provisions and

reasons in support of his appeal, so that he is not prejudiced by the decision of the Minister in affirming the assessment.

The appeal has not satisfied me that the actual revenue was less than the revenue estimated by the Minister under section 47 during the years in question, and the appeal must, therefore, be dismissed with costs.

Judgment accordingly.