1959
Apr. 15
Nov. 13

BETWEEN:

UTAH CO. OF THE AMERICAS .....APPELLANT;

AND

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

Revenue—Income—Corporation engaged in mining and construction—Whether more than one business—Right to deduct losses of one operation from profits of other—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3 and 27(1)(e).

The appellant company's 1955 taxable income was $43,164 of which $2,005 was from its mining operations and $41,158 from construction operations. In 1956 it had a loss of $48,854 when construction operations showed a profit of $227,874 and mining operations a loss of $276,728. Because of the 1956 loss the Minister re-assessed the appellant for 1955 and allowed a deduction of $2,005 as "application of 1956 loss against mining profits". In an appeal from the re-assessment the appellant submitted that its business in 1955 and 1956 was the same and constituted but one business, consisting of a number of operations and that on a proper interpretation of s. 27(1)(*e*) of *The Income Tax Act,* the 1956 loss should have been applied against the whole of the 1955 profit, so that no tax would be payable for that year and the balance of the 1956 loss could be carried forward to subsequent years.

Held: That s. 3 of *The Income Tax Act* clearly contemplates that a taxpayer (which includes a corporation) may carry on more than one business.

2. That there was ample evidence to establish that the appellant was in fact carrying on two separate businesses in 1955 and 1956, namely mining and construction.

[1] (1959) 28 W.W.R. 140.

3. That under s. 27(1)(*e*) of the Act the right to deduct losses does not extend to a profit from an activity or business other than the business in which the loss was sustained.

4. That as here the losses were sustained in one business of the appellant, namely mining, the 1956 losses could be carried back and deducted only to the extent of the appellant's 1955 profit from the same business.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Cameron at Vancouver.

C. W. Brazier, Q.C. and *A. B. Ferris* for appellant.

A. H. Ray, Q. C. and *T. E. Jackson* for respondent.

CAMERON J. now (November 13, 1959) delivered the following judgment:

This is an appeal by Utah Co. of the Americas (hereinafter referred to as "the appellant") from a re-assessment to income tax dated July 23, 1957, for its taxation year ending October 31, 1955. The appellant was incorporated under the laws of the state of Nevada on May 21, 1951, and is a wholly owned subsidiary of the Utah Construction Co.—a Delaware corporation; it was registered in British Columbia as an extra-provincial company on September 8, 1954.

The appellant's first income tax return for the period September 8, 1954, to October 31, 1954, showed no taxable income. For the year 1955, the revised taxable income was $43,164.12, of which $2,005.29 was from its mining operations, and $41,158.63 from construction operations. In 1956, its total loss on all operations was $48,854.53, construction operations showing a profit of $227,874.10 and mining operations a loss of $276,728.63. Because of the loss sustained in 1956, the Minister re-assessed the appellant for 1955 and, purporting to follow the provisions of s. 27(1)(*e*) of *The Income Tax Act,* allowed a deduction of $2,005.29 as "Application of 1956 loss against mining profits". The deduction of that portion only of the 1956 losses was on the ground that the appellant's losses in 1956, which were incurred entirely in the mining operations, could be applied against the appellant's 1955 income only to the extent of

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its income in that year from mining operations. The appellant was accordingly assessed to tax of $17,608.20 and interest. I was advised that the full amount had been paid under protest, pending this appeal.

The appellant submits that on a proper interpretation of s. 27 (1)(*e*), the Minister in his re-assessment should have applied the 1956 loss against the whole of the appellant's profit for 1955, and that had he done so, no tax would have been payable for 1955 and the appellant would have been able to carry forward to subsequent years the balance of the 1956 loss, namely, $5,690.41. The section in question is as follows:

> 27.(1) For the purpose of computing the taxable income of the taxpayer for a taxation year, there may be deducted from the income for the year such of the following amounts as are applicable:
>
> (*e*) 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 26.

Subparagraph (iii) prescribes the income figure from which the deduction is to be made, and it is common ground that clause (A) thereof is here applicable. That being so, the limit of the loss deductible is in this case the appellant's income for the year 1955 "from the business in which the loss was sustained". The appellant's submission is that the business in 1955 and 1956 was the same and constituted but one business, although consisting of a number of operations. For the respondent it is submitted that the appellant carried on two businesses, namely, mining and construction, and that consequently the net losses sustained in 1956 and which arose solely because of the losses

in that year in the mining operations, can be carried back and deducted from the 1955 taxable income only to the extent of the appellant's income from mining operations in the latter year.

As stated in *Frankel Corporation Ltd. v. M. N. R.*[1]—a decision of the Supreme Court of Canada—"Section 3 clearly contemplates that a taxpayer (which includes a corporation) may carry on more than one business". The question as to whether he does so is one of fact and it therefore becomes necessary to state in some detail the origin, history and operations of the appellant.

The appellant's parent company, the Utah Construction Co., has been engaged for many years in general engineering, contracting and mining, carrying on business throughout the western hemisphere, as well as in parts of the Orient, Australia and Africa. It was incorporated in 1900, originally for railroad contracting. Later its activities expanded and have included mining (both on its own account and for others by contract), the construction of power plants, houses, refineries, bridges, and building construction of all types. In 1951, it incorporated the appellant company in order to secure the tax advantages permitted by the United States statute referred to as *"The Western Hemisphere Act"*. The appellant was incorporated to carry on all the business of Utah Construction Co. in the western hemisphere outside of the United States and now operates in Colombia, Peru and Canada.

Prior to the registration of the appellant company in Canada in 1954, the Utah Construction Co. was the sole owner of Argonaut Mining Co. Ltd., incorporated in British Columbia in 1949. It commenced mining in 1951 and continued to produce and sell ore until February 1955, when all its shares and assets were transferred and donated by arrangement with the parent company, the Utah Construction Co., to the appellant, and the Argonaut Mining Co. Ltd. was then wound up. The appellant continued the operation of the mine and the sale of its products as the Argonaut Mining Division until 1957, and it was from that mining operation that a small profit was made in 1955 and a heavy loss incurred in 1956.

[1] [1959] C.T.C. 244 at 255; 59 D.T.C. 1161 at 1167.

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The other main operation of the appellant in Canada was that of construction, Riverdale Park Ltd.—a housing development on Lulu Island in the Fraser River—was incorporated in 1954, presumably by Utah Construction Co. It entered into a contract with the appellant for the construction of houses. The only other construction project of the appellant in Canada was that of erecting a very large and costly building in Vancouver (the Burrard Building), the contract for which was signed in July 1955. It was from these two operations that substantial profits were made in 1955 and 1956.

The main evidence relating to the appellant's management field and financial operations was that of the president, Mr. Christensen. It is managed by one Board consisting of five directors and has its head office at San Francisco. The company has three main divisions, namely, mining, construction and real estate development, each having a general supervisor in charge at the head office. In Canada, up to the date of the hearing, the company had but two main divisions, namely, mining and construction. Each activity of these main departments is conducted as an individual project with a project manager and an administrative staff located at the site. Separate accounts are kept for each job and at the year end they are reported to the general supervisor in charge of mining, construction or real estate development, according to the nature of the project, and then the accounts are consolidated.

I do not find it necessary to set out all the evidence of Mr. Christensen. He said quite frankly: "In general, I think mining is regarded as a different business than construction". He endeavoured to qualify that statement somewhat by adding:

> We ourselves feel there are greater differences between several branches of the construction industry than there are between the heavy engineering branch of the construction industry and the mining industry.
>
> We draw a greater distinction between housing construction and heavy engineering construction—the personnel, the tools, the products are more different than are those of our divisions operating as contractors for other mining companies.

I attach great significance to Mr. Christensen's statement that in general mining and construction are regarded as different businesses. Mining, I think, is generally regarded

as meaning the extraction of minerals or coal from the earth and it might well include such further steps as refining and processing the ore. Construction, on the other hand, connotes the idea of putting parts together such as a building, a dam, highways, railway, etc., although such activities might also include preparatory steps such as excavation, blasting and the like, I find it difficult to believe that anyone when referring to a mining company would normally and properly refer to it as being in the construction business, and the reverse is equally true.

In the case of *Scales (H. M. Inspector of Taxes) v. George Thompson & Co. Ltd.*[1], the question was whether the respondent company's business, which consisted of ship-owning and underwriting, constituted one business or two separate businesses. The Commissioners held that there were two separate businesses and Rowlatt J., in dismissing an appeal from their finding, pointed out some of the tests to be applied. At pp. 88-9 he said:

> I think this is a plain case. I am bound to say I do not think there is any question of law raised here and, whether question of law or question of fact, I certainly should not say the Commissioners were wrong. This company carried on the business of underwriting. It also had a fleet of steamers. I cannot conceive two businesses that could be more easily separated than those two. They both have something to do with ships; that is all that can be said about them. One does not depend upon the other; they are not interlaced; they do not dovetail into each other, except that the people who are in them know about ships; but the actual conduct of the business shows no dovetailing of the one into the other at all. They might stop the underwriting; it does not affect the ships. They might stop the ships and it does not affect the underwriting. They might carry on underwriting in a country where there were no ships, except that it would not be commercially convenient; but the two things have nothing whatever to do with one another.
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> It is said that as a matter of law the Court must hold that they are one business, for these reasons, that the two businesses were bought together from a firm who had carried on both businesses; that the deposit at Lloyd's was bought by the same company that bought the ships and supplied the working capital to run the ships; that the company is one company. Of course it is, but the fact that the company is one company and declares one dividend and so on cannot affect this case. The company can carry on two businesses, although it may, for the purposes of convenience, if it wishes, amalgamate the proceeds before paying the shareholders. Then it was said the profit and loss account throws some light upon it. What is the profit and loss account? The profit and loss account has entered in it upon the one side the result of the working account, that is to say, the profit made upon running the ships—that comes in. It is a very short profit

[1] (1927) 13 T.C. 83.

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and loss account. Then there comes in the profit on the underwriting at Lloyd's; then there comes in the subscriptions to Lloyd's on the other side—a very small item. That is all on that.

That method of book-keeping does not seem to me to throw any light upon this matter at all. I think the real question is, was there any interconnection, any interlacing, any interdependence, any unity at all embracing those two businesses; and I should have thought, if it was a question for me, that there was none. But I do not think it was a question of law. I think the Commissioners had ample evidence upon which they could decide, and they did so decide.

As in that case, there is ample evidence here to indicate that the appellant was in fact carrying on two businesses, namely, mining and contracting. The evidence is that these two operations or divisions had different (*a*) processes; (*b*) products; (*c*) services; (*d*) customers for the products, except possibly in one unusual case; (*e*) inventories; (*f*) locations; (*g*) union contracts; (*h*) offices; and (*i*) staffs. In addition, the acounting and records for each of the two divisions were maintained separately as is shown by the various statements attached to the 1955 tax return (Exhibit 2). The general overhead costs incurred at head office for directors' fees, legal, engineering and accounting fees, etc., were divided in an equitable manner between the three main divisions which included (outside of Canada) real estate development operations. It is the fact, however, that certain equipment, such as trucks and the like, might on some occasions be switched from mining to construction and on one occasion, as Mr. Christensen recalled, a senior accounting clerk was transferred from the Argonaut Mining operation to the construction of the Burrard Building, but these are of relatively small importance. In such cases, the charges for these operations would be changed from the original to the later business.

It is to be recalled, also, that the mining operation was originally carried on by a separate company—the Argonaut Mining Co. Ltd.—and the only change after it was acquired by the appellant was that it became known as the Argonaut Mining Division of the appellant company. When it ceased operations in 1957, the other operation, that of contracting, was completely unaffected by that occurrence, but continued as before.

Counsel for the appellant drew my attention to the Articles of Incorporation (Exhibit 4) and pointed out the purposes of incorporation and the very large number of powers thereby conferred. He submitted that as all the activities carried on by the appellant fell within the powers conferred by the Articles of Incorporation, I should infer that as the appellant was but one corporation, the intention was to carry on but one business, namely, anything that fell within the corporate powers. I am unable to agree with that submission. An individual or a corporation may carry on a number of businesses concurrently. Here the Articles of Incorporation grant to the appellant the power to carry on the "business of stevedoring", and a further power to buy, develop and sell trademarks, patents and copyrights. If the appellant had chosen to embark on these two wholly unrelated activities, I think that it would have to be found that it was carrying on not one, but two businesses.

In my view, the appellant on the facts before me was carrying on two separate businesses in 1955 and 1956, namely, mining and construction. To use the language of Rowlatt J. in the *Scales* case (*supra*), I find here no interconnection, interlacing or interdependence, and no unity embracing these two operations. They were kept completely separate until at the year end when, for the purposes of convenience, the proceeds of each operation were amalgamated before paying out dividends to the shareholders.

What, then, is the effect of s. 27(1)(*e*) on these findings of fact, namely, that the appellant was carrying on the same two businesses in 1955 and 1956? Counsel for the appellant submits that even if two businesses were carried on, they were the same business in each year and that therefore the overall business in which the loss was sustained in 1956 was the same business as the overall business carried on in 1955.

An examination of s-s. (1)(*e*) of s. 27 shows that Parliament intended to put specific limits on the deductibility of losses. First they must be business losses as required by the opening words of s-s. (*e*). Then a further limit is put on the deductibility of business losses by the terms of para. (iii), under which no amount is deductible in respect of

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losses from the income of any year except to the extent of the lesser of the amounts calculated in accordance with the terms of clauses (A) and (B) thereof. Admittedly, the amount calculated under clause (A) is here the lesser and consequently the losses incurred in 1956 may be carried back and applied against the income of 1955 only to the extent of the appellant's income for 1955 "from the business in which the loss was sustained". The interpretation to be put upon the last phrase, in view of the facts which I have found, will determine the success or failure of this appeal.

This phrase was considered by the President of this Court in *M. N. R. v. Eastern Textile Products Ltd.*[1]. That appeal had to do with the respondent's taxation year 1951 and the applicable section was s. 26(1)(*d*) of the 1948 *Income Tax Act* which, save for the section numbers, was identical to s. 27(1)(*e*) now under consideration. There the taxpayer, prior to 1951, had carried on a manufacturing business in which it had sustained heavy losses for a number of years. In 1951 it did not carry on the manufacturing business, and made a substantial profit. It was held that as the losses were incurred in its manufacturing business, they could not be carried forward and be deducted from the profits of 1951 because in the latter year, the taxpayer made no profit from manufacturing—but from something else. The same result was reached in the case of *M. N. R. v. Ottawa Car and Aircraft Ltd.*[2].

In the *Eastern Textile Products* case, the President rejected the submission of respondent's counsel that the word "business" means whatever the taxpayer is doing from time to time. At p. 56 he stated:

> 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(1)(*d*). It is well established that a company can carry on more than one business: *vide*, for example, *Birt, Potter and Hughes, Ltd. v. C. I. R.* (1926), 12 T.C. 976; *Scales v. George Thompson & Co., Ltd.* (1927), 13 T.C. 83, and *H. & G. Kinemas, Ltd. v. Cook* (1933), 18 T.C. 116. But if counsel for the respondent's contention that the word "business" in Section 26(1)(*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] [1957] C.T.C. 48; 57 D.T.C. 1070.
[2] [1957] C.T.C. 59; 57 D.T.C. 1076.

Furthermore, the adoption of the contention would make subparagraph (A) in Section 26(1)(*d*)(iii) meaningless. And it is a cardinal principle that an interpretation leading to such a result must be erroneous.

* * *

. . . If it had been intended to give effect to such a contention it is inconceivable that paragraph (A) of Section 26(1)(*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.

That case, of course, is not precisely the same as the instant one. There the taxpayer in 1951 was engaged in a business different from that of prior years, whereas here the appellant was engaged in two businesses in 1955 and the same two businesses in 1956. The President, in the *Eastern Textile* case, considered the general effect of s. 26(1)(*d*), stating at pp. 57-8:

It seems to me that Section 26(1)(*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.

I am in complete agreement with the opinion of the President that the right to deduct losses does not extend to a profit from an activity or business other than the business in which the loss was sustained. Here the losses were sustained in one business of the appellant, namely, mining,

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and in my view, the losses for 1956 can be carried back and deducted only to the extent of the appellant's profit in 1955 from the same business, namely, mining. That is precisely what the respondent by his re-assessment has done.

It may be noted here that by s. 12(1) of c. 32, Statutes of Canada 1958, clause (A) of sub-para. (iii) of para. (*e*) of s-s. (1) of s. 27 was repealed, and the following substituted therefor:

> (A) the taxpayer's income for the taxation year from the business in which the loss was sustained and his income for the taxation year from any other business, or

That clause, however, is applicable only to the 1958 and subsequent taxation years.

Accordingly, the appeal will be dismissed and the re-assessment affirmed. The respondent is also entitled to his costs after taxation.

Judgment accordingly.