BETWEEN:

JOSEPH S. IRWIN .....APPELLANT;

1962
Mar. 19
Nov. 15

AND

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

Revenue—Income tax—Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 3, 4, 14(2), 46(4) (English and French versions, 127(1)(e))—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 14(2), 139(1)(e)—Income Tax Regulations, s. 1800—Interpretation Act, R.S.C. 1952, c. 158, ss. 31(o), 36—Time limit for re-assessment—Whether day of original assessment counted—Proceeds from sale of petroleum and natural gas rights—Whether profits from a business—Valuation of inventory of unsold rights—Appeals allowed.

Appellant, a consulting geologist with long experience in western oil and gas fields, had acquired over a period of twenty years various rights to oil and gas lands on twelve occasions, sometimes in association with others, and had disposed of such rights without himself developing any of the properties. The appellant was assessed for income tax purposes on the profits realized from these sales and an appeal from that assessment was denied by the Tax Appeal Board from which decision appellant appeals to this Court. He contends that the proceeds received represented the realization of an investment from which he had hoped to obtain a royalty income. The respondent contends that the transactions represented ventures in the nature of trade the profits of which were taxable.

Held: That the profit of the appellant from his oil and gas transactions was a profit from a business within the meaning of the Act.

2. That appellant was entitled to evaluate his inventories of unsold rights at the estimated fair market value thereof, pursuant to s. 14(2) of the Act and s. 1800 of the Regulations and since it was a trial *de*

1962

IRWIN
v.
MINISTER OF NATIONAL REVENUE

novo the appellant was not prevented from establishing at this late date before the Court a "market" basis in the valuation of his inventory.

3. That the day on which the original assessment was issued must be excluded in calculating the four year period that the re-assessment in question was accordingly valid.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Noël at Calgary.

J. H. Laycraft for appellant.

R. L. Fenerty, Q.C., and *D. F. Coate* for respondent.

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

NOËL J now (November 15, 1963) delivered the following judgment:

This is an appeal from a judgment of the Income Tax Appeal Board[1] which affirmed reassessments with respect to the appellant's income tax assessments for the years 1952, 1953 and 1955, by which the amount of profits realized on the sale of a number of oil and gas leases and rights was added to the taxpayer's income for the above years.

The Minister of National Revenue assessed the appellant additional taxes on the basis of an increase of $37,556.06 in taxable income for 1952, of $13,047.54 for 1953 and $16,864.62 for 1955, on the allegation that the appellant had realized net gains as income for trading in petroleum and natural gas reservations as follows:

For 1952		
Crown Petroleum & Natural Gas Reservation 1268		$ 41,952.40
Crown Petroleum & Natural Gas Reservation 1326		$ 1,280.00
		$ 43,232.40
Deduct Losses Sustained		
Costs incurred to 1952 on C.P.R. Reservation	$2,211.81	
Costs incurred on Crown Petroleum & Natural Gas Reservation 730 to Dec. 31, 1952	$2,229.37	
Lease Rentals Paid	$1,235.16	$ 5,676.34
Increase		$ 37,556.06

[1] 23 Tax A.B.C. 233.

For 1953		
⅓ interest in Petroleum and Natural Gas Reservations 1317 and 1318		$ 1,000.00
⅓ interest in Petroleum & Natural Gas Reservation 1326 and interspersed leases plus a ⅓ interest in 2½% gross royalty therein		$ 13,885.44
		$ 14,885.44
Deduct:		
Rentals paid on C.P.R. Reservation	$1,217.50	
1954 Revised loss	$ 620.40	$ 1,837.90
		$ 13,047.54
For 1955		
Interest received New Superior Oils reported in error	$ 50.00	
Interest received Western Tungsten & Copper Mines not reported in error	$ 90.00	$ 140.00
Net gains		
Crown Petroleum & Natural Gas Reservations 513 and 514	$ 1,264.34	
Crown Petroleum & Natural Gas Reservation 1268	$ 2,976.40	
Crown Petroleum & Natural Gas Reservation 1326 plus interspersed leases	$ 14,102.50	
	$ 18,343.24	
Deduct lease rentals	$ 1,618.62	$ 16,724.62
		$ 16,864.62

The appellant, a resident of the City of Calgary, Alberta, describes himself as a professional consulting geologist engaged in preparing geological reports and giving geological advice. He attended the Missouri School of Mines and graduated as a Bachelor of Science in mining engineering in 1912; in 1922, after ten years of experience, he obtained the degree of Engineer of Mines. In 1916 he joined the Carter Oil Company in Tulsa as an exploration geologist. After the First Great War, following a stay in the United States Army, he joined the Producers and Refiners Corporation, in Denver, Colorado, as exploration geologist and remained with them until about 1928 when he became a consulting geologist in Denver. In 1929 he did some consulting work for a Canadian company, in Alberta, the Nordon Corporation. In 1930 he rejoined the Producers and

1962

IRWIN v. MINISTER OF NATIONAL REVENUE

Noël J.

Refiners Corporation who had formed a subsidiary in Calgary called the Parco Oil Company and remained with them until they withdrew from the province in 1932. He then became a consulting geologist and maintains he has been in that business ever since.

The taxpayer explained that a consulting geologist does geological exploration, renders geological reports to clients for a fee and also attempts to determine favourable places for drilling; in addition he sometimes does valuation work to determine or estimate oil and gas reserves, adding that he, the taxpayer, did all this.

According to this witness, oil lands in Alberta are developed as follows: Certain companies do their own exploration work and have company geologists and others, when they do not have a geological department, hire consulting geologists; certain individuals and groups employ consulting geologists to locate favourable places for drilling and if these individuals and groups are not of a size or competent to do their own drilling and have not sufficient finances to do so, they make deals or farm-outs with oil companies to secure the drilling.

A farm-out is an arrangement whereby the owners of the oil or gas lands delegate to others an obligation to drill wells for a certain percentage of interest or a royalty or for both and in some cases with a bonus thrown in.

It is essentially a transaction which is in the nature of an option, whereby the farmee by performing certain work at his own expense may acquire an interest in the property, and that may be an entire title to whatever leases may be obtained out of the reservation or it may be a divided interest depending entirely on what the agreement is, or it may be the entire title subject to a gross overriding royalty which is a participation in the gross amount of receipts from the sale of the substances. In some cases a carried interest may be retained which, in essence, is a net royalty. In such a case, the grantor makes no expenditure with respect to the percentage interest he has retained on the property and all expenditures are assumed by the developer, the percentage of the grantor being applied after recovery of costs by the developer. In the case of a working interest, the grantor pays his own portion of the development costs. In other cases, where the conditions are so apparently good or where the regards for the possibilities in certain areas

are such that the land apparently has great merit, in addition to the interests and royalties, a cash bonus may be paid.

In some cases, one prefers paying a cash bonus rather than granting a royalty because the latter is expressed in a percentage and as the wells go down and are depleted, the percentage looms higher and higher.

The drilling of an Alberta oil well, according to the taxpayer, is an expensive operation particularly from the point of view of an individual and might run from a minimum of $25,000 or $30,000 up to half a million dollars and in many cases in the deeper drilling, up to a million dollars a well and is therefore beyond the capacity of an individual.

The taxpayer stated that in the last twenty years he had acquired rights to oil lands on twelve occasions for the purpose of having them explored and then developed if exploration warranted it and finally if the development was successful he would obtain a royalty or a payment out of the oil or gas found. Seven of these lands are involved in the reassessments.

He admitted at p. 48 of the transcript that he never intended to do any development himself because development is beyond the capacity of an individual and at p. 86 with regard to the properties dealt with by him in accordance with this appeal he stated:

Q. Would it be fair to say in regard to each of these properties that we have referred to, you did not intend to do anything on your own behalf other than dispose of them to some other agency?

A. That is certainly correct, yes.

Q. Right.

A. I couldn't develop them myself, never had any intention to.

Q. You also intended to turn each of these interests to account at its fair value, did you not?

A. Yes, yes, either in royalty or royalty and bonus.

Q. Yes?

A. And in two cases the bonus was—

Q. And you did in each case obtain the best deal that you were able to obtain on these lands?

A. Oh, yes, yes.

Q. On each of these interests?

A. Yes.

Q. Right. Now, it is pretty obvious, the payment of a rental under a lease doesn't enhance its value, does it, it just keeps it alive?

A. Keeps it alive, yes.

1962

IRWIN
v.
MINISTER OF
NATIONAL
REVENUE

Noël J.

The taxpayer has a professional office in Calgary, Alberta, where he practices alone and without a staff at the present time although he has had a staff at times.

The taxpayer had this to say in connection with his interests in oil lands:

With respect to his interests in oil and gas lands in the Princess-Steveville-Denhart area he stated that he acquired leases in this area in 1944. They were obtained as a reservation from the C.P.R. Company and held in the name of H. S. Flock who held a one-half interest. The net cost to the taxpayer was $2,211.81 which represented the number of years of rentals. No development was attempted on this reservation. The taxpayer had done work for Mr. Flock's syndicate on a certain reservation on which development work was done and Mr. Flock and the taxpayer felt that the surrounding areas had merit so they took up these two reservations. In 1953 Mr. Flock had formed the Flock Gas and Oil Company and he wanted the property contained in these reservations transferred to that company for which the taxpayer was given 34,500 shares of the Flock Gas and Oil Company plus a 1¼% gross overriding royalty. These shares are still in escrow. He never had them and they have no market value. On the original reservation, the arrangement with Mr. Flock was that they each would pay their one-half interest or one-half portion of the expense and for that they would have an undivided half interest in the thing and that they would retain a 2½% jointly or a 1¼% individually overriding royalty.

Crown Petroleum and Natural Gas Reservation, #730, in the Sullivan Lake area of Alberta was acquired in December 1948 and the taxpayer's interest was one-half in return for paying one half of the cost. That interest was later reduced to 10% due to the fact that the rentals on the leases out of the reservation had reached such proportions that it was beyond the taxpayer's capability. This reservation was exchanged to leases so that development could take place and the taxpayer's interest ended up as 10% of the lease with no obligation to pay annual rentals. Considerable exploration was done on this reservation in the way of geological work comprising the drilling of shallow test wells to determine the geological structure and in addition to that two deep exploratory or test wells were

drilled at a cost to Western Leasehold of $160,000. The latter acquired the right to drill on the basis of receiving one-half interest on the whole. The two wells, however, were unsuccessful and were abandoned and the leases have long since been surrendered. The net cost to the taxpayer for this reservation was $2,229.37 which represents rentals.

Crown Petroleum and Natural Gas Reservations #513 and #514, were acquired in March 1948 and were located in the same general area as #730. The taxpayer had a ½% royalty interest at first and during the attempts to get them drilled, that ½% was changed to 20% undivided interest in order to facilitate the deals for the drilling. The people who had approached the taxpayer for prospects gave him that ½% interest for services rendered and the taxpayer added for geological knowledge. The value of that ½% interest turned out to be nil because there was no discovery. A substantial amount of exploration work was done on this reservation, and some 26 shallow structure test holes were drilled in the average of 450 or 500 feet for testing the geological structure. The drilling was done by the Pacific Western Oil Company for the first well and the New British Dominion Oil Company for the other. The total cost of the drilling was $114,000 and was done, according to the taxpayer, on a probable basis of one half of the whole thing. Those two wells were unsuccessful and abandoned. After this abandonment, the taxpayer still had some interest in the property as the leases were held by the original permit holders and in order to liquidate the whole thing, they were sold. There was no cost or expenses incurred by him on this reservation. Receipts from the sales of leases to Canadian Gulf Oil Company was $1,264.34 in 1955 and $64 in 1956. The taxpayer did some exploration work but incurred no expenses. Pacific Western had obtained an option type of farm-out. It was not obligated but was permitted to drill and the leases depended on the results of its exploration work.

Crown Petroleum and Natural Gas Reservation, #1268, was the taxpayer's entirely because he liked it. He acquired it on the basis of a Canadian geological survey report by a Dr. Hume. The anticline is about 20 miles southeast of Calgary and the taxpayer felt that the location had merit. He applied to the Crown in November 1950 and obtained the reservation. He claims that he undertook exploration

1962

IRWIN v. MINISTER OF NATIONAL REVENUE

Noël J.

obligations in respect of this reservation but while he was wondering what he could do with it, he was approached by a Mr. Oscar Weiss of the Weiss Geophysical Company who asked him if he knew of any prospects that he might explore. The taxpayer mentioned this one and Weiss Geophysical Company took it under option with the obligation to do geophysical exploration work and with the understanding that if they liked it well enough they could drill a well. They did the geophysical work but were not sufficiently impressed to exercise the option and gave it up. Later, in 1952, Mr. Frank Reubens, of the Northern Canadian Oil Company came to the taxpayer and wanted to do some drilling so he made a deal with him. As the reservation was in a hot area, the taxpayer felt that a bonus was in order. He also sought to obtain a royalty and there was no trouble there and the royalty that Northern Canadian Oil Company was quite willing to give him was a 2½% overriding or gross royalty and $4.50 an acre bonus. The deal with Northern Canadian Oil Company took place around June 1956 when the taxpayer received a payment of $20,000 for the option. On November 17, 1957, an additional amount of $25,000 was paid and upon the payment of this amount Northern Canadian acquired the right to all the leases subject only to an overriding royalty to the taxpayer. Northern Canadian then took over the entire 9,920 acres of leases and had they made a discovery, the entire 9,920 acres would have become theirs. Here again, there was no drilling obligation. It was only in the case where in their opinion their exploratory geological and geophysical work would warrant it that they would drill a well, which they eventually did at a cost of $270,000. The well, however, was dry and abandoned. At that time the leases held on the reservation were entirely in the hands of Northern Canadian Oil Company and the taxpayer's 2¼% royalty (later reduced to 2% in order to allow Northern Canadian to peddle off the leases) still obtained; as the Northern Canadian Oil Company wanted to liquidate the situation and sell the leases with no royalty attached to them, the taxpayer received $2,976 for a complete release. The taxpayer's expenses here amounted to $2,047.60.

Crown Reservations 1317-1318 are located in the Medicine Hat and Eagle Butte areas of Alberta. Here the taxpayer had a one-third interest along with two partners, a

Mr. Siebens and a Mr. Knight. He and his partners disposed of them because there did not seem to be any likelihood of getting any drilling or development. The taxpayer's one-third receipt from that was $1,000. These reservations were acquired on January 22, 1952, and sold on November 3, 1953. The taxpayer here admits that he received his one-third interest for geological services although he had charged $300 for the fee but did not get that. The taxpayer's intent was not to make any expenditures on account of development work. What he intended to do was to try to make a farm-out which would result in somebody else developing these reservations. He would retain a royalty interest and always with the intention of getting a bonus if possible.

Reservation #1326 located in the Gladys Ridge area which is about 20 miles east of Calgary was acquired in 1951. This reservation is contiguous to Reservation #1268 on the west. The taxpayer acquired a one-third interest in 1326 and paid one-third of the expenses. He and his partners attempted to get development of this property and succeeded in interesting the Shell Oil Company. The latter took an option on it and did substantial geophysical work. Shell undertook this development on the basis that it would pay $10 an acre bonus, part of it on the option and the remainder on the exercise of the option plus a $2\frac{1}{2}\%$ royalty. The shareholder's share amounted to one-third of $10, $\$3.33\frac{1}{3}$ plus one-third of $2\frac{1}{2}\%$ which is $\frac{5}{6}$ths of a 1% royalty. The taxpayer's net return, after expenses, was $12,516.56, as the amount received from Shell was $21,980.16 and the taxpayer's expenses for rentals were in the amount of $9,463.60. There has been no development on this reservation and, therefore, no discovery and the only thing that now remains is the $\frac{5}{6}$ths of 1% royalty payable to him if production is ever obtained and that will remain so long as Shell retains those leases. Shell did not select all the leases available out of the reservation and the remainder of those leases were later sold in 1955 by his two partners to Imperial Oil Company for a price of $9 an acre. The taxpayer's share of that was one-third which was $3.00 an acre and his receipt from this was $14,102.50. There was no override here and the taxpayer did not try to negotiate any. The taxpayer had no part in the agreement with Shell. His partners had the agreement

1962

IRWIN
v.
MINISTER OF
NATIONAL
REVENUE

Noël J.

with Shell and the taxpayer had an agreement with them which covered his one-third interest. The two people in question were again Mr. Siebens and Mr. Knight. The taxpayer admits that to his knowledge these two partners purchased and sold interests in oil rights at that time. In 1951 he received from Shell $3,500.16 which was his one-third part of the option payment. The Shell and Imperial freehold leases were interspersed with Reservation #1326. Under the Shell deal made in 1951, or subsequently, the taxpayer was permitted to lease such portion of the 50% of the total acreage of the reservation available for leases that Shell Oil did not want to lease.

The Crown leases in the Pekisko area of Alberta were contiguous to the Duke of Windsor's E.R. Ranch. The taxpayer had long been interested in the possibilities of oil on the Duke's ranch and had written a report summarizing those possibilities which he sent to the Duke who had made a deal on the lease that he had on his ranch with Socony Mobile Oil Company and he sent this company a copy of Mr. Irwin's report where they learned of his interest in the oil possibilities at the ranch. In 1953 Socony asked him if he would like a farm-out of the lease because they had not thought enough of it to drill it. The taxpayer obtained a farm-out and interested Anglo Canadian Oil Company in the lease because they had leases and reservations surrounding the ranch and they were willing to drill a well on it. This well was drilled at a cost of $250,000 and proved unsuccessful. The taxpayer states that he would have had a royalty on this well if it had been successful. In the agreement with the Anglo Canadian Oil Company to drill a well he specified that any leases which they acquired outside of the Duke's ranch would, if the well was unsuccessful and they wished to surrender them, be surrendered back to him, which they did and the taxpayer retained those leases. The royalty in this case was ½%. There was here an obligation to drill by anyone taking the farm-out. The taxpayer, however, did not undertake any obligation to drill. What he did do in taking the farm-out was to undertake to try to get somebody who would take the obligation to drill. The taxpayer had the right to dispose of these leases to somebody that would develop them and he could have made an override or perhaps even a bonus on disposing of them in that way, although here he was unable

to do so. He however retained the right to have them offered to him free of cost prior to surrendering the leases to the Crown. During the time that these have come back to him, and up to 1955, he had paid $6,066 in rentals.

The properties obtained in 1942-1944 from C.P.R., Reservation #436, in the Vermilion area of Alberta, situated at about 200 miles northeast of Calgary, were acquired in 1947 and assigned to the Commonwealth Petroleum Ltd. in 1948. A well was drilled on it by Commonwealth Petroleum Ltd. and Hudson's Bay Oil and Gas Company but the well was dry. The taxpayer's net receipt here was $3,975.84; there was a 2½% royalty that was surrendered back to the C.P.R. and the royalty, therefore, ceased to exist. In this case there was a commitment on the part of Commonwealth to drill the reservation. It would either be at their expense or at the expense of anyone that they might get to join with them.

The Dina, Saskatchewan, lease was a Government lease assigned to Northern Canadian Oil in 1949. The basis of the agreement with Northern Canadian Oil was $1,400 plus 2½% royalty. There was no drilling commitment here.

C.P.R. Reservation #141 was acquired in 1942 and #231 in 1944 both of which were cancelled in 1945. The taxpayer attempted to make some disposition or find someone who might take these reservations but he could not get anyone to take them on any terms and he was not prepared to develop them himself.

C.P.R. Reservation #308 was acquired in 1946 but was disposed of to Wessex Petroleums in 1946 for shares having a nominal or par value of $800. He has never sold these shares. There was no requirement to develop with Wessex nor an overriding royalty. The company is now defunct so the shares are worthless.

The Silverdale syndicate, situated in the Lloydmunster area covered between 60 and 160 acres on which the taxpayer had a ½% royalty which he received during the life of the well. As there was no royalty received in 1961, the taxpayer assumes the well is now depleted. These receipts were reported by the taxpayer annually and tax was paid thereon.

1962

IRWIN
v.
MINISTER OF
NATIONAL
REVENUE

Noël J.

The taxpayer stated that outside of the oil lands listed here he has acquired no other oil or gas rights during the period 1942 to 1945 and that since 1955 he has not acquired any interest in such rights.

The appellant advanced as his first argument, and this applies to his 1952 assessment only, that s. 45(4)(*b*) of the *Income Tax Act*, R.S.C. 1952 c. 148 provided that reassessment be made

> (b) within four years from the day of an original assessment . . . .

The original assessment for the year 1952 was dated May 23, 1953, and the reassessment was dated May 23, 1957, and it was submitted that consequently the Minister had reassessed one day too late, the last day for reassessment being May 22, 1957, as the four year period started running from midnight on May 23, 1953, to midnight on May 22, 1957. He contended that when a document is executed at any time on a certain day it becomes effective at midnight and a fraction of a second on that day and throughout the whole of that day on the basis that in law there is no fraction of a day and he argued additionally that the word "from" was to be interpreted as inclusive of the day upon which reassessment was made.

Counsel for the appellant quoted a number of authorities such as *Pugh v. Duke of Leeds*[1] and *Lester v. Garland*[2] to the effect that the word "from" may mean either inclusive or exclusive according to the context and subject matter and *Canadian Fina Oil Limited v. Paschke*[3] *West et al. v. Barr*[4], *In re Railway Sleepers Supply Company*[5] to the effect that the date of a document should be included when payments to be made under a document are to be received within a certain period from the document.

A perusal of these authorities discloses that the Courts looked into what had been intended between the parties and as the parties intended that the rights exist for the entire day on which the document was made, effect was given to this intent.

[1] 2 Cowp. 718, 98 Eng. Rep. 1323.
[2] 15 Ves. Jun. 249, 33 Eng. Rep. Ch. 748.
[3] (1957) 21 W.W.R. 260.
[4] (1945) 1 W.W.R. 337.
[5] (1885) 29 L.R. Ch. D. 204.

This, however, is not quite the same as the present case where things have to be done within a certain time from, and which can obviously not be done until a certain thing has occurred.

Indeed, according to *Halsbury's Laws of England*, Second Edition, volume 32, at p. 42, nos. 207 and 208:

> The general rule in cases in which a period fixed within which a person must act or take the consequences is that the day of the act or event from which the period runs, should not be counted against him.
>
> . . . and, also, where a Statute provides that something may only be done within a certain period from the passing of the Act, the day on which the Act was passed is excluded.

In *Radcliffe v. Bartholomew*[1] which dealt with the interpretation of the English Act in the prevention of cruelty to animals in which it was stated that "every complaint under the provisions of the Act is to be made within one calendar month after the cause of such complaint shall arise", it was held that the day on which the original offence was committed was to be excluded from the computation of the calendar month within which the complaint was to be made.

In *McCann v. Martin*[2] which dealt with the time for renewal of registration, it was decided that the year within which the renewal was to be filed was to be computed from the day on which the mortgage itself was filed, which meant that the year began at the first moment of time after that day had been completed.

In *South Staffordshire Tramway Company v. The Sickness and Accident Insurance Company Limited*[3], Mr. Justice Day stated:

> . . . as regards time, the word "from" is akin to "after" and excludes the day fixed for commencement of the computation.

In *Brown v. Croucher*[4] Riddel J. stated:

> It may be said at once that had it not been for the case in our own Court of Appeal McLean v. Pinkerton, 7 A.R. 490, there could have been no doubt as to the law in this Province being in that regard the same as the law in England, as thus expressed by Mathew L.J. in Goldsmith's Co. v. West Metropolitan Railway Co., (1904) King's Bench 1, at p. 5.
>
> The rule is now well established that where a particular time is given from a certain date within which an act is to be done, the day of the date is to be excluded.

[1] [1892] Q.B. 161.
[2] 15 O.L.R. 193.
[3] [1891] Q.B. 402.
[4] [1931] O.L.R. 541.

1962

IRWIN
v.
MINISTER OF
NATIONAL
REVENUE

Noël J.

In *Lester v. Garland* (*supra*) at p. 752 it was stated:

> It is not necessary to lay down any general rule upon this subject; but upon technical reasoning I rather think, it would be more easy to maintain, that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does.

It was pointed out by counsel for the respondent that recourse should be had here to the *Interpretation Act*, 1952 R.S.C. c. 148, ss. 31(*o*) and 35(36). Indeed, in s. 31(*o*) it is stated that:

> (*o*) where a number of days not expressed to be "clear days" is prescribed the same shall be reckoned exclusively of the first day and inclusively of the last; where the days are expressed to be "clear days" or where the term "at least" is used both the first day and the last shall be excluded.

In s. 35(36) it is stated that:

> (36) "year" means a calendar year.

The above, in my opinion, is sufficient authority to exclude the day upon which the assessment was made. However, should I have any hesitancy in excluding that day, the French text of s. 46(4)(*b*) of the *Income Tax Act* dispels any doubts I might have in this regard. Indeed it reads as follows:

> (*b*) dans les quatre années *qui suivent le jour* d'une première cotisation en tout autre cas;

Now it is clear as was held by the Supreme Court in *King v. Dubois*[1] a statute in the English version must be read with the statute in the French version.

> Before calling attention to the effect of this language, it is right to mention, first of all, that the statutes of the Parliament of Canada in their French version pass through the two houses of Parliament and receive the assent of His Majesty at the same time and according to the same procedure as those statutes in their English version. The enactment quoted is an enactment of the Parliament of Canada just as the enactments of the same section, expressed in English, are. My understanding of the principle is that if there is difficulty in interpretation, and if this difficulty can be cleared up by reference to the other, then, of course, that is done; and certainly they are throughout Canada of equal weight.

Further authorities on this point can be found in *Stevenson v. Canadian National Railways*[2]; *McArthur v. The King*[3]; *Food Machinery Corporation v. Registrar of*

[1] [1935] S.C.R. 401.
[2] (1948) 1 W.W.R. 129.
[3] [1943] Ex. C.R. 104.

Trade Marks[1] and finally *Composers, Authors and Publishers Association of Canada Limited v. Western Fair Association*[2].

The French text in my opinion clearly indicates that the four years run following the day of an original assessment as the words "suivent le jour" are used which in English is translated by "follow the day". This in my opinion answers the point raised by the appellant against the assessment made in respect of 1952 which, I therefore find, complies with the provisions of s. 46(4).

The next question in issue is as to whether the sums added to income for the years 1952, 1953 and 1955 are taxable income of the appellant or capital gains.

For the year 1952 the applicable statute was the *Income Tax Act*, S. of C. 1948 c. 52 and for the years 1953 and 1955, the *Income Tax Act*, R.S.C. 1952 c. 148. The relevant provisions of these statutes were ss. 3 and 4 which were the same in both statutes and s. 127(1)(*e*) of the 1948 Act which was merely renumbered as s. 139(1)(*e*) in the 1952 Act.

These provisions are as follows:

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 of 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.

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.

139(1)(*e*):

(*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;

For the appellant it is contended that the amounts so added to his income were merely the realization of a capital asset and as such were not taxable; that the transactions he made were investments from which he hoped to receive taxable income by way of royalties; that he is a developer and not a dealer and that he did develop completely and consistently in his status as an individual; that time after time he persuaded large companies to drill these properties; that in such a risky business as the development of gas

[1] [1946] 2 D.L.R. 258 at 263.

[2] [1951] S.C.R. 596.

1962

IRWIN
v.
MINISTER OF
NATIONAL
REVENUE

Noël J.

and oil lands, it would have been foolish to go it alone as people do not drill unproven acreage "with all their rigs in one basket" and that the thing to do is to spread them around in groups which the appellant did; that the properties acquired were not bought for resale but with the intention of arranging with responsible oil companies or other parties to have wells drilled thereon for which the taxpayer would turn over the properties after reserving a small gross royalty to himself; that this is borne out by the fact that the taxpayer caused or arranged to have drilled the last six wells on P. & N.G. Reservations #513, #514, #730 and #1268 and on the leases in the Pekisko area at a cost of $795,000.

For the Minister, it is submitted that the sums were income from a business and, therefore, within ss. 3, 4 and 127(1)(*e*) and later 139(1)(*e*) of the *Income Tax Act;* that this appears from the multiplicity of the transactions involved in dealing with various developments of oil interests by the appellant and from his unwillingness or inability to develop these properties himself; that these interests were wildcat or speculative.

Before considering the legal problems involved, it might be helpful to look into the various transactions of the appellant and determine from the outset what the true nature of these transactions were as from this true nature alone may we find whether we are faced here with sums that are of a capital nature, or income from a business within the extended meaning given to the word "business" by s. 127 (1)(*e*) and later 139(1)(*e*) of the Act.

Indeed, no single criterion can be adopted to decide whether a transaction or a number of transactions are adventures in the nature of trade, each case depending on its facts.

There is no question but that the evidence as to the nature of the deals the appellant or his partners made, showed that he or they intended each time he or they acquired any of these interests, to turn them to account by whatever was the most rewarding means possible.

In some cases he sold his interests for royalty only, sometimes for royalty and cash and sometimes for cash only; in other words, he was prepared in all cases to negotiate his interests to the highest bidder and for whatever he could get from them.

Such conduct on the part of the taxpayer is very close to that of a typical trader in oil leases as described in cross examination by Dr. John Campbell Sproule, a witness produced by the appellant as it appears on pp. 138 and 139 of the transcript.

Q. Just a few questions, Dr. Sproule, in general. In 1951 and 1952 prospective developers and even dealers or speculators were very busy searching out and acquiring interests in any particular areas in the province that interested them, were they not?

A. Yes, Mr. Fenerty.

Q. And as a matter of fact that, I might even call it a speculative fever, that had been going pretty strongly since about Leduc, 1957 was it? 1957?

A. That was the latest fever.

Q. Yes. I mean it had been going since 1957?

A. '47.

Q. Yes '47, yes, thank you doctor. And a speculator undoubtedly makes the best deal he can, doesn't he, for the land?

A. Yes.

Q. Perhaps typically doesn't impose a drilling covenant in his deals?

A. He may or may not.

Q. Yes. Even a speculator may impose a drilling covenant, is that right?

A. He may impose a drilling covenant, but for the most part speculators are more interested in disposing of it for a higher price. Yes.

Q. Regardless of whether or not there is obligations?

A. Yes.

Q. And a speculator is interested in getting cash plus a bit override as well if he can, isn't he?

A. If he can without sacrificing too much in the way of cash.

In my opinion the principle laid down in *C.I.R. v. Livingston, et al.*[1] by Lord Clyde is applicable here. He said:

I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, "in the nature of trade", is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as "in the nature of trade", merely because it was a single venture which only took three months to complete.

If in the case of one transaction the above principle can be applied, with how much more force must we apply it to a multiplicity of transactions such as we have here and where in two of which the taxpayer was in partnership with a Mr. Siebens and a Mr. Knight both of whom the taxpayer admitted were traders in oil rights at the time.

[1] (1926) 11 T.C. 538.

1962

IRWIN
v.
MINISTER OF
NATIONAL
REVENUE

Noël J.

The transactions of the taxpayer here are indeed very similar to those dealt with in *Western Leaseholds Limited v. M.N.R.*[1], where it was held that they were trading rights. Indeed in this case Western Leaseholds Limited in the year 1946 granted Shell Oil an option to purchase rights in certain acreage for which it received $30,000; in 1947 the Company granted a similar option to Imperial Oil for which it received $250,000; in 1949 and 1950 Imperial Oil exercised its option and as a result, Western Leaseholds Limited received payments totalling nearly $2,000,000.

In 1949 it received over $900,000 in respect of a leasing agreement made by Minerals with a group headed by Barntol Oil.

The Minister ruled that all of the above amounts received by Leaseholds were income subject to tax and this Court upheld the Minister's assessments.[2] Leaseholds appealed to the Supreme Court of Canada (*supra*) and the appeal was dismissed. At p. 1317 it was held:

> All of the payments received by Leaseholds were taxable as income. These amounts were profits realized from the business of dealing in mineral rights. It was contemplated that by granting subleases, reservations or options or otherwise turning to profitable account the rights held by Leaseholds under its contract with Minerals, money might be realized which would enable Leaseholds eventually to produce and market oil. Consistently with one of its declared objects, Leaseholds carried on the business of dealing in these rights with a view to profit.

It is true that the taxpayer had no organization set up for the purpose of dealing in these oil rights, but he was then, and still is, an experienced geologist of repute in Alberta and was more than able to deal with the oil rights alone which with the exception of his two partnership ventures he effectively did. This indeed was in the line of his own trade and as stated by Lord Normand in *C.I.R. v. Fraser*[3]:

> It is in general more easy to hold that a single transaction entered into by an individual in the line of his own trade (although not part and parcel of his ordinary business) is an adventure in the nature of trade than to hold that a transaction entered into by an individual outside of the line of his own trade or occupation is an adventure in the nature of trade.

Here again with how much more force may we apply this to the present case where again we are not dealing with

[1] 59 D.T.C. 1317. [2] [1958] Ex. C.R. 288
[3] (1942) 24 T.C. 498 at 502.

one transaction alone, but with several and where in two instances the interests of the taxpayer were professional awards in the performance of professional services.

I, therefore, feel compelled to find that the taxpayer here was in all these transactions buying and selling speculative interests in oil and gas reservations; that he was unwilling and unable financially to personally develop these properties and, therefore, sold his titles to others and with one exception, did not even impose an obligation on the purchaser to develop and because of this I fail to see anything of an investment nature in these transactions.

Quite the contrary, I can see in the conduct of the taxpayer, whether he had to sell his interests or not, the carrying on of a business or at least several adventures in the nature of trade. There is indeed no evidence that he intended to retain these interests as an investment particularly if one considers that his usual means of obtaining a return was by disposing of his interests in the properties. The argument advanced by him to the effect that he was a developer and not a trader and that he did develop completely and consistently with his status as an individual cannot, in my opinion, be entertained. He certainly cannot be called a developer as he in fact developed nothing; the potential or real developers in all these transactions were all those to whom he sold his rights and the fact that no individual could develop these rights because of the magnitude of the cost merely establishes that he could not, because of this financial impossibility, become a developer, but was forced in each and every instance to become a trader.

He, therefore, in my opinion, is a trading speculator and did exactly what one of his own witnesses, Dr. Sproule, describes as the typical speculator in Alberta at p. 119 of the transcript:

> Q. Is it typically the case that one sees a speculator developing the oil lands which he is buying and selling?
>
> A. No. A speculator very seldom makes any attempt to develop it, and he is not generally concerned with whether or not it is developed, as long as he gets a price for it, and the highest price possible.

That the taxpayer during the period under review was a trader speculator is not too surprising. Indeed, with the special knowledge and experience he had of oil and gas

1962

IRWIN
v.
MINISTER OF
NATIONAL
REVENUE

Noël J.

interests at a time when Alberta was being so active in such fields, it would indeed have been surprising had he not gone into such ventures. At p. 118 of the transcript, Dr. Sproule confirms this oil activity from 1950 to 1955:

> A. Alberta was very active during that period and there was a great deal of wheeling and dealing, if you like, in oil lands,

For further authority on this point, what the taxpayer did as an individual is very similar to what was done by a company in the *Californian Copper Syndicate v. Harris*[1] case where Lord Justice Clerk stated:

> I feel compelled to hold that the Company was in its inception a company endeavouring to make a profit by a trade or business and that the profitable sale of its property was not truly a substitution of one form of investment for another. It is manifest that it never did intend to work the mineral field with a capital at its disposal. Such a thing was quite impossible. Its purpose was to exploit the field, and obtain gain by inducing others to take it up on lease terms that would bring substantial gain to themselves. This was that the turning of investment to account was not to be merely incidental, but was, as the Lord President put it in the case of the Scottish Investment Company, the essential feature of the business, speculation being among the appointed means of the Company's gains.

Or what was done in the *Sheddy v. M.N.R.*[2] case as reported in the headnote:

> The appellant was a member of a syndicate that held several oil and gas leases. Arrangements were made with a drilling operator whereby the latter undertook to drill wells on the syndicate's leases at his own expense. If a well proved to be productive, the driller agreed to pay the syndicate a specified lump sum plus a royalty on the oil produced; in return, the lease involved was to be assigned to the driller. . . . The appellant's share of the lump sum payments received by the syndicate was added to his declared income by the Minister. The appellant maintained that the lump sum payments were capital receipts since they had been received for the assignment of the syndicate's leases which were its capital assets.
>
> Held by this Court (Cameron J.):
>
> The appeal was dismissed. The lump sum payments were taxable in the hands of the appellant and the other members of the syndicate as income from a business. The syndicate was formed for the purpose of carrying on a business for profit. The leases were acquired with the intention of turning them to account for the benefit of the members in the best manner possible. There never was a firm and fixed intention on the part of the members (who possessed relatively little capital) to regard the leases as an investment which the syndicate would retain and develop on its own account. The disposal of the leases was one of the contemplated modes of carrying on the syndicate's business.

[1] (1904) 5 T.C. 166. [2] 59 D.T.C. 1073.

In the present case also the taxpayer possessed very little capital and had a financial burden in that the rentals became so costly that he had to sell his interests to the highest bidder.

He purchased these reservations for the purpose, as he put it himself, "of disposing them to some other agent, of turning each of them to account at its fair value" and may I add, basing myself on the evidence presented, of obtaining the best deal he was able to; such objects, in my opinion, are all of a business nature and are similar to those that would have motivated a trader or a dealer. I am, therefore, of the opinion that the appellant's transactions were at least adventures in the nature of trade and that his profit from them was profit from a business within the meaning of ss. 3 and 4 of the *Income Tax Act* as extended by s. 127(1)(*e*) and later s. 139(1)(*e*).

It is now necessary to consider the alternative contention of the appellant that he is entitled to apply rule 1800 of the *Income Tax Regulations* pursuant to s. 14, s-s. 2 of the *Income Tax Act* and place his inventory of petroleum and natural gas interests for the three years under review on a market value figure which on that basis would indicate that the taxpayer has sustained no profit, but has incurred losses. Section 14(2) of the *Income Tax Act* and regulation 1800 read as follows:

(2) For the purpose of computing income, the property described in an inventory shall be valued at its cost to the taxpayer or its fair market value, whichever is lower, or in such other manner as may be permitted by regulation.

Regulation 1800:

For the purpose of computing the income of a taxpayer from a business

(*a*) all the property described in all the inventories of the business may be valued at the cost to him; or

(*b*) all the property described in all the inventories of the business may be valued at the fair market value.

At the time of the reassessments the properties of the taxpayer had been taken at cost. Later, before the Tax Appeal Board, in 1957, the taxpayer produced Exhibit A prepared by Mr. Morton, the chartered accountant of the

1962

IRWIN v. MINISTER OF NATIONAL REVENUE

Noël J.

taxpayer, and which purported to be a schedule of inventories of petroleum and natural gas reservations of the taxpayer, part of the figures of which came from cost prices and others from the taxpayer himself partially substantiated by Dr. Sproule and purported to be market prices.

In 1962, before this Court, the taxpayer produced as witness the same Mr. Morton and Mr. John Campbell Sproule, a consulting geologist. The latter valued the various properties of the taxpayer on a fair market value basis and produced as Exhibits 1, 2 and 3 written reports of such values. Mr. Morton produced as Exhibit 4 statements of the profits realized and the losses incurred by using the provisions of regulation 1800 under the *Income Tax Act* for the years 1952 to 1955 as well as the market values of the inventories as set down in Dr. Sproule's reports.

In other words, Mr. Morton took Dr. Sproule's figures and assuming them to be correct for market value prepared inventories based upon them with the result that the taxpayer instead of making profits in the three years under review now sustained losses.

At the hearing, a general objection was made by counsel for the respondent to the production of the written reports prepared by Dr. Sproule evaluating on a market price basis the properties of the taxpayer and produced as Exhibits 1, 2 and 3 as well as to the production of Exhibit 4 by Mr. Morton which, as we have seen, is a statement of the profits and losses realized, on the basis that the only document with respect to inventories of the taxpayer that can be considered in the present appeal is the one that was in existence before the Appeal Board and that it is most irregular to attempt to bring up now a new inventory prepared four weeks before this appeal.

He further argued that as the Minister had based the assessments appealed against on valuation of the taxpayer's properties at cost, unless the appellant can establish that this is an error in fact or in law on the part of the Minister to have so proceeded, the assessments in this Court are not subject to appeal.

He admitted that taken together s. 14(2) and regulation 1800 are somewhat confusing and so does it appear to this

Court, but he maintains that as the assessments were based on cost, they were made in accordance with the Act and with the regulations as both bases were provided for.

His next point was that there was no inventory or document or valuation in existence at any relevant time, i.e. when the assessments or reassessments were made, under which any other valuation could have been adopted by the Minister at the time other than that of cost as the new inventory basis proposed by the appellant at market price was an afterthought prepared a few weeks before the present appeal.

He further urged that the documents prepared by the appellant and produced under reserve of respondent's objection as to admissibility purports to be an evaluation or refers to an evaluation in March of the present year. It does not appear to relate to the confirmation or otherwise of the accuracy of a document in existence at any time relevant to the matters in appeal, these matters being the times of assessment, the times of reassessment or at latest the date of the hearing before the Income Tax Appeal Board of the present appeal.

Counsel for the respondent stated that he could not object to the witness (Sproule) giving evidence as to evaluation, if that is relevant on the basis of inventory documents in existence at the time of the assessment or perhaps even at the time appealed from, but he submitted these documents do not appear to relate to that at all.

He then stated that he had deliberately put in evidence Exhibit A as being the only document that existed in the nature of an inventory or an evaluation existing at the time of the decision appealed from and not even existing at the time of the assessment.

He then suggested that to try now under the guise of evidence of value to create an inventory document which does not exist is in his mind quite improper.

What respondent is saying is that back in 1951, 1952, 1953, 1954 and 1955, the taxpayer should have made an inventory document and that if he did not rush to get this done at the time he will be forever barred from doing so.

Now if we go back to the above years, the taxpayer at the time took it for granted that whatever he received from the properties listed in the inventory was capital

1962

IRWIN
v.
MINISTER OF NATIONAL REVENUE

Noël J.

gains and, therefore, no taxes having to be paid there was no necessity to consider the value of the properties at all. On what legal basis was the appellant here obliged to have an inventory document in existence at least before the Income Tax Appeal Board as suggested by counsel for the respondent.

To the following question by the Court, p. 232, counsel for the respondent had this to say with regard to the manner in which the Minister can choose either cost or market price for the evaluation of inventory.

THE COURT: Are you saying then that the Minister, within his discretion, can choose either one of the two ways and the taxpayer has nothing to say?

MR. FENERTY: I would go this far, this much further, my lord, if by any chance the taxpayer had prepared an inventory, had filed a return, and had asserted a right to have a particular method dealt, to be dealt with in a particular method at the time that he filed his return, then perhaps he might have some status to say that he could choose between the methods (*a*) and (*b*) under the Regulations, but he is coming into this Court on the basis that he has to say, "This assessment is wrong because there is an error in law or there is an error in fact."

I fail to see any provision of the law which would oblige the appellant to have such a document prepared at any time unless, of course, the matters being dealt with are clearly used to carry on a business and then, of course, s. 125 of the Act requires an inventory to be kept. This section reads in part as follows:

125(1) Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (*including an annual inventory kept in prescribed manner*) at his place of business or residence in Canada or at such other place as may be designated by the Minister, in such form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined.

(2) Where a person has failed to keep adequate records and books of account for the purposes of this Act, the Minister may require him to keep such records and books of account as he may specify and that person shall thereafter keep records and books of account as so required.

Subsection (2) above merely provides that when a person fails to keep such an inventory, the Minister may require him to keep one and one shall thereafter be kept. This is far from compelling a taxpayer to have an inventory prepared at the time of assessment, reassessment or at the time of the appeal before the Appeal Board as suggested by the respondent.

Section 14(1) of the *Income Tax Act* which states that "when a taxpayer has adopted a method for computing income from a business or property for a taxation year and that method has been accepted for the purposes of this Part, income from the business or property for a subsequent year shall, subject to the other provisions of this Part, be computed according to that method" does not appear to me of being of any assistance to the respondent because the taxpayer here had adopted no method for computing income from his business as he thought the amounts received were capital gains and not business receipts. He therefore had the right to adopt whatever method of inventory the law or the regulations provided.

It would indeed be most unreasonable that where a taxpayer was under the false impression as here that the amounts received were capital gains and therefore not taxable, and he could easily be so in these capital gains or taxable income cases where the whole conduct must be examined in order to determine the taxability of a particular amount and where, may I add, the capital gain question is becoming more and more confused, he would be precluded from establishing an inventory in a manner provided for under the law.

A further objection was proposed by counsel for the respondent on the basis that the Notice of Appeal to this Court referred to an inventory having a total figure of $130,466.80 and this amount is pleaded specifically by the appellant.

Immediately at the hearing and before this Court, counsel for the appellant applied for such amendment as was required to make the figures in the pleadings correspond to the evidence to be adduced.

This objection, and the appellant's application, were taken under reserve and the Court stated it would render a decision herein once the evidence had been adduced and, of course, if the documents prepared by the appellant were accepted it would follow that the amendment would be granted.

The first matter to be dealt with here is the proposition advanced by the respondent that unless the taxpayer can establish that the assessments made by the Minister on the basis of an evaluation of the properties at cost was an

1962

IRWIN v. MINISTER OF NATIONAL REVENUE

Noël J.

error in law or fact at the time on the part of the Minister, the assessments in this Court should not be subject to appeal.

In my opinion such a proposition cannot be entertained as if the appeal before this Court is a trial *de novo* or a new trial, the parties are not restricted to the issues either of fact or of law that were proven and argued before the Tax Appeal Board and, therefore, new facts or even different facts can be adduced, proven and argued before this Court.

This situation was dealt with in *Goldman v. M.N.R.*[1] by Thorson P. where he stated:

> . . . that the appeal to this Court from a decision of the Income Tax Appeal Board, whether by the taxpayer or by the Minister, is a trial *de novo* of the issues involved, that the parties are not restricted to the issues either of fact or of law that were before the Board but are free to raise whatever issues they wish even if different from those raised before the Board and that it is the duty of the Court to hear and determine such issues without regard to the proceedings before the Board and without being affected by any findings made by it.

It was, therefore, permissible here for the taxpayer before this Court to prove something new which had not been adduced before the Board and on the basis of which the Minister's decision may be in error in fact or in law. Consequently, Exhibits 1, 2, 3 and 4 of the appellant are admitted and his motion to amend his pleadings to make the figures therein correspond to the evidence adduced herein is granted.

The second matter of importance to be dealt with is what are the rights of a taxpayer under s. 14(2) of the *Income Tax Act* and regulation 1800.

This section, as we have seen, provides that for the purpose of computing income, the property described in an inventory shall be valued at the lower of its cost to the taxpayer or its fair market value, or in any such other manner as may be permitted by regulations and, of course, regulation 1800 provides that:

> (*a*) all the property described in all the inventories of the business may be valued at the cost to him; or
>
> (*b*) all the property described in all the inventories of the business may be valued at the fair market value.

[1] [1951] C.T.C. 247.

Section 139(1)(*w*) defines inventory as meaning:

> . . . a description of property the cost or value of which is relevant in computing a taxpayer's income from a business for a taxation year;

It is also provided that for the purpose of s. 125 an inventory must show the quantities and costs of the properties:

> . . . that should be included therein in such a manner and in sufficient detail that the property may be valued in accordance with this Part or section 14 of the Act.

Section 14(2) of the *Income Tax Act* appears to be much broader than the regulations on the manner of evaluation and in the event of inconsistency between the two, the provisions of the Act would prevail. However, as the Act provides that other manners may be provided for by regulations, any regulation so providing pursuant to the Act would have the same authority as the Act itself.

According to s. 14(2) and regulation 1800 of the *Income Tax Act*, as we have just seen, inventory can be valued according to either of the three methods mentioned above namely:

(*a*) Cost (Regulation 1800(*a*))
(*b*) Market (Regulation 1800(*b*))
(*c*) Cost or market whichever is the lower, s. 14(2).

In the latter case (*c*) one of three methods may be adopted: 1) each inventory item is valued at cost and at market and the lower of the two amounts is entered on the inventory sheet; 2) inventory items are grouped by departments or otherwise, each group being evaluated at cost or market whichever is the lower; 3) the taking of the lower as between cost and market is applied to the inventory total.

In (*a*), i.e. "Cost", the property described in all the inventories of the business may be valued at cost and in (*b*), i.e. "Market", all the property described in all the inventories of the business may be valued at the fair market value.

Now unless there is any other provision in the law, and I understand there is not, which would prohibit the taxpayer from choosing one or the other of these methods of establishing his inventory, I cannot see how he could be pre-

1962

IRWIN v. MINISTER OF NATIONAL REVENUE

Noël J.

cluded even at this late stage before this Court from using one of the three above methods given to him in the Act.

It would seem that as Exhibit A is partly cost and partly market price and not the lower of the two for each item, or for each group or the taking of the lower as between cost and market applied to the inventory total it is of no assistance to the taxpayer and must, therefore, be rejected.

However, the taxpayer before this Court has attempted to establish the fair market value for all of his properties. This he had the right to do under regulation 1800(*b*) but he also had the burden of establishing this fair market value in a satisfactory manner.

This burden is well defined in *M.N.R. v. Simpsons Limited*[1]:

> . . . the true position is that on an appeal to this Court from a decision of the Income Tax Appeal Board, whether the taxpayer or the Minister is the appellant, the assessment under consideration carries with it a presumption of its validity until the taxpayer establishes that it is incorrect either in fact or in law.

Exhibit 4 which is the fair market evaluation of the taxpayer's properties as established by J. C. Sproule and associates and Mr. Morton indicates that these properties at the relevant times had fair market values as follows:

$269,473.00 as of December 31, 1951
$154,133.40 as of December 31, 1952
$ 49,859.40 as of December 31, 1953
$ 30,599.40 as of December 31, 1954
$ 23,501.00 as of December 31, 1955
$ 23,034.00 as of December 31, 1956

Has the appellant established to the satisfaction of this Court that the figures proposed are the true fair market values of his properties? In *Sellars Gough v. M.N.R.*[2] this Court decided that the question of fair market value was entirely a question of fact.

The expression "market value" is either (1) the price at which it is estimated that the stock can be realized after deducting all expenditures incurred before disposal or (2) the cost of replacing the stock at the accounting date.

[1] [1953] Ex. C.R. 93 at 97. [2] 54 D.T.C. 1170.

As we are dealing here with property to be sold immediately in its existing condition and not as incorporated in a manufactured product, the first method, i.e. selling price must of necessity be adopted and for each of these properties the taxpayer must establish what could have been realized at the relevant times.

Dr. John Campbell Sproule, a consulting geologist testified on behalf of the taxpayer as an expert evaluator of his oil and gas interests. This gentleman graduated from the University of Alberta with a Bachelor of Science degree in 1930, in geology with a Master of Arts degree in 1931 and with a Doctorate of Philosophy in geology in 1935. He opened a Geology Consulting Office in Calgary in 1951 with a group of engineers and geologists and stated that his firm did anywhere between 400 and 1,000 evaluations of oil properties in a year.

He testified that in order to evaluate oil lands or unproven acreage an evaluation is made of the potential of the wells drilled nearest to the project property, and then a detailed study of the sub-surface geological horizon is made. He added that the evaluation reports produced as Exhibits 1, 2 and 3 are based on his knowledge of the local and regional geology in the vicinity of the project's parcels at the time and upon his knowledge of private sales. In other words, he claims to have restored the situation as at the time from year to year, from 1951 to 1956, on the basis of his own records, published records, as well as what he knew about the properties at those periods. The witness mentioned that it so happened that on three out of seven of the taxpayer's properties he had on file detailed records as he had evaluated them for other companies.

This witness admitted that evaluations for whatever purpose they are made, on wildcat or undeveloped acreage, are either more or less educated guesses. This is what he had to say on this matter at p. 136 of the transcript:

THE COURT: It is pretty hard to establish a value then, isn't it?

A. At that point, my lord, you must depend, to a great extent, on geological interpretation of the sub-surface and geophysical interpretation of sub-surface and any tools that you have at hand, and it can be said that any evaluation is subject to correction and to error, that is correct, all we can do is the best that can be done at a given time, with the evidence available at that time.

Q. Another one of these uncertain things?

A Yes, my lord.

1962

IRWIN
v.
MINISTER OF
NATIONAL
REVENUE

Noël J.

Q. To evaluate a building and to evaluate a lease is a pretty hard job, isn't it—

A. It is—

Q. —it is just sketchy, I mean the best we can do is guess, you say it is intelligent guessing, but it is guessing?

A. It is educated guessing—

Q. Educated guessing?

A. And I think that that should be followed by the comment that it is educated guessing but it is room, there is room for so much error that a consultant or the estimator must, of necessity, lean toward the conservative side, and I may say that in our guessing, our educated guesswork we have always tried to do that and as witnessed by the seven pipeline hearings that we have given evidence at, in which we have used geological evidence beside engineering evidence, and used them both rather than the engineering evidence that others, that some others prefer to be happy with, in those seven pipeline hearings we have come up with the highest estimate for undeveloped and unknown reserves at every hearing, that we have given at the hearing, and in every case those reserves are now too low on a proven basis; . . . Where there are a number, where there is a large number of evaluations we make mistakes, and you are bound to make mistakes in some of them, some of them in the light of later evidence would look very bad, but on balance where you have a large number of these or a fair number of these evaluations, such as this group here—

Q. Your batting average is good?

A. Your batting average is good, . . .

Dr. Sproule dealt firstly with the two C.P.R. permits of the Denhart area shown as Block No. 1 and Block No. 2 on Figures I to VI of Exhibit 1. These two Blocks were acquired in 1944. The development work around these two permits are detailed in Exhibit 1 from year to year on a basis of the wells completed and known as at the end of each of these years. Figure 1 represents the drilling and developing situation as at the end of 1951, December 31. Figure II as at the end of 1952 and so on to the end of 1956 so that one gets a running account of what happened in the way of development and acquisition of knowledge around those two parcels during the six year period as stated by Dr. Sproule on p. 107 of the record:

A. . . . it is the completion dates of those wells in those areas and a knowledge of the oil and gas reserves that were proven and a knowledge of the dry holes and the discouraging results, and a

knowledge of certain encouraging results within dry holes that were not taken advantage of at that time, and anyway the total situation with respect to knowledge is represented in each year, so that we can, with that background of knowledge recorded in Government publications from time to time, we can, at any period in history, go back and tell you exactly what the situation was at a given date, and that is what we have done here. I have used that background of geological information in conjunction with another set of information, it's called, it is called Land Information Card, that is published by an accepted firm in Western Canada, the name is Well Information Services, and they turn out records of all sales, petroleum and natural gas reservations, Crown leases, drilling reservations, gas licensed sales, different sorts of sales that give you in detail the prices in, as at a given time, so I have used all those published figures, as well as certain private information and the sub-surface data in order to arrive at values for Irwin's interest in each of those years.

He pointed out that in Township 22, Range 13 for instance a sale made in that area on July 22, 1953 showed a price per acre of $11.29 plus $1.00 which is $12.29 and another parcel was sold at $22.79 an acre. A row of gas wells in the vicinity had alerted industry to this high valuation at the time. However, despite the fact industry thought very highly of this area, as an extension off to the northwest, there are now no producing wells there which as mentioned by Dr. Sproule has nothing to do with the situation, it being one of the vagaries of the oil business and adding—"you can make some bad mistakes in terms of evaluation at a given time,".

With respect to the evaluation of overriding royalties, Dr. Sproule stated that they are expressed in terms of dollars per 1% gross royalty per 160 acres which is the common way of expressing royalty. He added that over the past eleven years his firm had bought several millions of dollars of such royalties for a client and that he had arrived at these valuations on the basis of those records over the province.

The fair market value figures of the taxpayer as arrived on by Dr. Sproule and Mr. Morton and as listed in Exhibit

1962

IRWIN v. MINISTER OF NATIONAL REVENUE

Noël J.

4 are in the amount of $269,473 as of December 31, 1951, and are broken down as follows:

Holdings	*Gross Acreage*	*Nature of J.S.Irwin Interest*	*J.S.Irwin Net Acreage*	*Fair Market Value J.S.Irwin Interest*
		December 31, 1951		
Leases out of				
Reservation # 730 ..	16,275	50 % working	8,137	$ 8,544.00
Reservation # 513 ..	10,080	20 % carried	2,016	2,117.00
Reservation # 514 ..	3,840	20 % carried	768	941.00
Reservation #1317 ..	40,000	33⅓% working	13,333	9,333.00
Reservation #1318 ..	67,040	33⅓% working	22,346	18,771.00
Reservation #1326 ..	17,920	33⅓% working	5,973	41,811.00
Shell Freehold	640	33⅓% working	213	1,864.00
Imperial Freehold ..	3,040	33⅓% working	1,013	8,509.00
Reservation #1268 ..	9,920	100%	9,920	99,200.00
2 C.P.R. Reservations re Flock Gas & Oil				78,383.00
Market value of inventory December 31, 1951				$269,473.00

A close examination of this inventory, item by item as listed above, may give us a general idea of the accurateness of the evaluations submitted.

The leases out of Reservation #730 were acquired by the taxpayer in 1948, drilled by Western Leasehold at a cost of $160,000 in 1951 and abandoned in 1952. The net cost to the taxpayer was $2,229.37 which represents rentals. The taxpayer's interest in 1952 was reduced to 50% and later in the same year it was reduced to 10%. This reservation is adjacent to Reservations #513 and #514. The closest oil production is from the Viking Sand in the Hamilton Lakefield, located in township 35, Range 9, W.4M, about twenty miles northeast of the reservation and the Provost gas field, located about fifteen miles east of the reservation which was discovered in 1946 and finally the western region, Watt Lake well, completed in October 1952. However, during the period that the taxpayer held the interest, no discoveries were made in the immediate vicinity.

The calculation of $8,544 for the taxpayer's 50% working interest in 1951 and $2,148 for his 10% working interest in 1952 is based for the 50% working interest on a basis of $1.50 an acre and for the 10% working interest, on the basis of $2.50 an acre. Dr. Sproule arrived at these figures by

taking land purchases in the vicinity. According to this witness, the two most significant land purchases were Anglo Canadian Oil Company Limited, in 1951 at $1.16 an acre and $10.11 an acre for the western corner of the same parcel made in 1952. This, and an examination of the common sales records prior to and during the years 1951 to 1956 inclusive, indicates, in my opinion, that Dr. Sproule's estimate for Reservation #730 does not appear to be unreasonable or unequitable but should, however, be restricted to $8,544 as this amount only appears in Exhibit 4.

The leases out of Reservations #513 and #514 were also acquired in March, 1948, by the taxpayer in return for services rendered and his interests were sold partly in 1951 and partly in 1956. A substantial amount of exploration work was done here and the Pacific Western Oil Company and the new British Dominion Oil Company both drilled a well at a total cost of $114,000. The two wells, however, were unsuccessful and abandoned. The taxpayer still retained some interest in this property as the leases were held by the original permit holders and in order to liquidate the whole thing they were sold to Canadian Gulf Oil Company for $1,264.34 in 1955 and $64 in 1956. The taxpayer did some exploration work here, but incurred no expenses. Here again Dr. Sproule's evaluation of $2,117 for #513 and $941 for #514 does not appear to be unreasonable under the circumstances, bearing in mind that the prospects here were similar to those in Reservation #730.

With respect to Reservations #1317 (Medicine Hat) and #1318 (Eagle Butte), the taxpayer had a one-third interest with two partners, a Mr. Siebens and a Mr. Knight. This one-third interest was received by the taxpayer for geological services.

According to the taxpayer, these reservations were acquired on January 22, 1952, although Dr. Sproule stated that they were acquired in 1951. They were sold on November 3, 1953 because there did not seem to be any likelihood of obtaining any drilling or development, the taxpayer's one-third receipt being the sum of $1,000.

Dr. Sproule's evaluation of the interests of the taxpayer in Reservation #1317 in the sum of $9,333 and in the sum of $18,771 in Reservation #1318 would, under the circumstances appear to be exaggerated, particularly in view of

1962

IRWIN v. MINISTER OF NATIONAL REVENUE

Noël J.

the fact that it was impossible to obtain any drilling and development on these lands, that they were retained for such a short period of time and sold for such a small amount. Dr. Sproule admits that at the time the taxpayer held Reservations #1317 and #1318, the oil prospects were not generally highly regarded and, at the time, the market for gas was not good. He is, however, of the opinion that the proximity of the Medicine gas field, at the time the largest gas field in western Canada, made Reservation #1318 a fairly valuable land holding through both of the years concerned. There were, however, few land sales in the general area of these two reservations in 1951 and 1952 and, consequently, there were few land sales published. The Crown sales relating to #1318 during the years 1951 and 1952 were on an average of 82 cents per acre and there were no Crown sales for Reservation #1317. Should we apply this 82 cents per acre to both reservations, we would obtain a figure of $6,050.60 for #1317 and $15,392.22 for Reservation #1318 which would be the fair market values respectively of these reservations.

Reservation #1326 was acquired on January 19, 1951, by Messrs. Harold Siebens and Jesse Knight and the taxpayer acquired a one-third interest in this reservation and paid one-third of the expenses. The Shell Company, in 1951, became interested in this property and took an option on it on the basis that it would pay $10 an acre bonus, part of it on the option and the remainder on the exercise of the option plus a 2½% working royalty. The shareholder's share here amounted to one-third of $10, 3.33⅓ plus ⅓ of 2½% which is ⅝ths of 1% royalty. His net return after expenses was $12,516.56 as the amount received from Shell was $21,980.16 and his expenses for rentals were in the amount of $9,463.60. These rights were sold late in 1953.

Shell did not select all the leases available out of this reservation and the remainder were later sold in 1955 by his two partners to Imperial Oil for a price of $9 an acre. The taxpayer's share of that was one-third, $3 an acre and his receipt was in the amount of $14,102.50.

The Shell and Imperial Freeholds were interspersed with Reservation #1326 and the taxpayer's interest was a 33⅓% working royalty.

Dr. Sproule placed valuation of between $10 and $12 per acre on Reservation #1326 based on the fact that late in 1951 he made a valuation of $20 an acre for the A. G. Bailey Company of lands held by Alberta Leaseholds which, according to this witness, checkerboarded with the taxpayer's land and also because of the Weiss Geophysical Corporation of Canada's seismic profile of March 21, 1951, which ran across the Twin Dome structure and through the taxpayer's acreage and also because of the completed Shell McKid gas well drilled only 12 miles west along the same Twin Dome structure on which the taxpayer's acreage was concentrated and which acreage showed on the Weiss geophysical as a pronounced ridge. Dr. Sproule also based his valuation on lands sold in 1953 for $5.11, $10.93, $10.86, $15.00, $25.17 and $20.07 per acre in the vicinity of the taxpayer's properties.

He, therefore, feels that $10-$12 an acre is the minimum fair market value of the taxpayer's Reservation #1326 and this is in his opinion a conservative estimate.

The evidence, on the other hand, discloses that there has been no development on this reservation and, therefore, no discovery and the only interest retained by the taxpayer is the $\frac{5}{6}$ths of 1% royalty payable to him if production is ever obtained and which will remain so as long as Shell retains the leases. This applies also for the Shell and Imperial Freeholds interspersed leases.

Furthermore, as the option taken on this reservation by the Shell Company took place in 1951 and that from then on the interest from the taxpayer was only $\frac{5}{6}$ths of 1%, one may well ask how a one-third interest can be included in the inventory at the end of the very year that the greater part of that interest was sold.

Dr. Sproule's valuation of the taxpayer's interests on a gross acreage of 17,920 of Reservation #1326 is $41,811 which is $7 an acre; his valuation of his interest in the 640 acres Shell Freehold is $1,864 and that in the 3,040 acres Imperial Freehold is $8,509. In view of the circumstances mentioned above, it would seem that an estimation of $7 per acre as applied by Dr. Sproule himself to Reservation #1326 should also be applied to both the Shell and Imperial Freeholds. Consequently, Reservation #1326 would remain with a valuation of $41,811 for 5,973 acres, Shell Freehold would have a value of $1,491 for 313 acres

1962

IRWIN v. MINISTER OF NATIONAL REVENUE

Noël J.

and Imperial Freehold would have a value of $7,091 for 1,013 acres which appears to be the fair market value for these interests.

Reservation #1268 was acquired in 1950 from the Crown and belonged to the taxpayer entirely. Weiss Geophysical took this reservation under option in 1951 and after doing geophysical work was not sufficiently impressed to exercise the option and gave it up. In 1952 a deal was made with Northern Canadian Oil Company who wanted to do some drilling and the taxpayer obtained a 2½% overriding royalty and $4.50 an acre bonus. From this he received an amount of $20,000 in June 1952 and on November 17, 1952, an additional amount of $25,000.

A well was drilled and found dry and abandoned. This 2½% override royalty was then reduced to 2% in order to allow Northern Canadian to peddle off the leases and subsequently in 1955 the taxpayer received $2,976.40 for a complete release of his 2% override royalty. As the taxpayer's expenses were in the amount of $2,047.60 his net receipts from this reservation are in the amount of $45,922.40.

Dr. Sproule's estimate of the value of the taxpayer's interests as at December 31, 1951, is $99,200 at $10 per acre. Here also Dr. Sproule states that in 1951 he made an evaluation for the A. G. Bailey Company of lands held by Alberta Leaseholds and his estimate of these properties was on a basis of $13 an acre. These lands checkerboarded with those of the taxpayer. Furthermore, lands were sold for $10.93 and $10.86 an acre in adjoining ranges but no sales were made in range 25 where the taxpayer's properties were located. The amount of $99,200, in my opinion, is not supported by the evidence. Indeed the reservation was acquired in 1950, examined and rejected by Weiss Geophysics in 1951 and by the end of 1951 beginning 1952, as admitted by the taxpayer himself, it was getting stale. Consequently, the amount of $45,922.40 would appear to be the fair market value of this reservation as of December 31, 1951.

The two C.P.R. reservations in the Princess-Steveville-Denhart area were acquired from the C.P.R. Company in 1944 and held in the name of H. S. Flock who held a one-half interest, the taxpayer holding the other half. These reservations comprised an acreage of 7,465. No development

was attempted on this reservation. In 1953 Mr. Flock formed the Flock Gas & Oil Company and caused the property contained in this reservation to be transferred to the Company. For his interests the taxpayer was given 34,500 shares of the Flock Gas & Oil Company and a 1¼% gross overriding royalty. These shares have no market value and are still in escrow. The net cost to the taxpayer for his interest was $2,211.81 representing the number of years of rentals. These reservations comprise a total acreage of 14,930.

Dr. Sproule valued the taxpayer's interest here for the years 1951 and 1952 on the basis of a 50% interest at $15 an acre and the value of the 1¼% overriding royalty for the years 1953 to 1956 inclusive was expressed in points which means 1% overriding royalty per 160 acres.

His figures are based on the drilling progress made from year to year in the closely associated Princess, South Princess and Denhart Jefferson, Rundle lower cretaceous and Bow Island (Viking Oil and Gas fields) and on sales in 1952 and 1953 which took place in the immediate vicinity of the taxpayer's properties. The three sales mentioned were made at a price of .54, $1.12, .63 per acre for each lot. The average approximate price per acre would, therefore, be $0.76.

Bearing in mind that these properties could not be sold between 1950 and 1952 and that they were turned in for escrow shares which are now worthless and that the reservations were finally abandoned, the amount suggested by Dr. Sproule of $78,333 would appear to be way beyond what the fair market price of these properties were.

Indeed it would appear that a fair and equitable valuation might be obtained on the basis of $1.12 an acre which, as we have seen is the higher selling price for the three sales made in the immediate vicinity of the taxpayer's properties during the period under review. Using that price as a yard stick and applying it to the 7,468 acreage, the amount of $8,360.80 is arrived at which, in my opinion, is the fair market value of the taxpayer's interest in these reservations.

I have therefore come to the conclusion that the assessment made in respect of the year 1952 complies with the provisions of s. 46(4) of the *Income Tax Act* and was not tardy, that the profit of the taxpayer from his oil and gas

1962

IRWIN
v.
MINISTER OF
NATIONAL
REVENUE

Noël J.

rights transactions was profit from a business within the meaning of ss. 3 and 4 of the Act as extended by s. 127(1)(*e*) and later 139(1)(*e*) of the same Act; that the taxpayer was entitled under s. 4(2) of the *Income Tax Act* and regulation 1800 passed pursuant thereto to produce an inventory of his properties on a fair market value basis which for the properties of the appellant as of December 31, 1951, have the following fair market values:

#730	$ 8,544.00
#513	$ 2,117.00
#514	$ 941.00
#1317	$ 6,050.60
#1318	$ 15,392.22
#1326	$ 41,811.00
Shell Freehold	$ 1,491.00
Imperial Freehold	$ 7,091.00
#1268	$ 45,922.40
C.P.R.	$ 8,360.80
	$137,721.02

The appeals will therefore be allowed with costs and the assessments referred back to the Minister to be revised accordingly.

Judgment accordingly.