
Saint John 1967 Oct. 4-5 Nov. 27

BETWEEN:

GERALD J. RYAN .....APPELLANT;

AND

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

Income tax—Capital cost allowance—Non arm's length sale of depreciable property—"Depreciable property", meaning of—Income Tax Act, ss. 6(1)(j), 20(4), 20(6)(b).

In August 1962 appellant's mother bought for $11,200 a 75-acre parcel of land outside Saint John which contained three cottages and a sand pit. Her intention was to build a home for herself thereon and to sell the remainder for building lots or sell sand from the pit, and she forthwith sold two of the cottages for $7,000 and authorized a company to remove sand from the property; the company (which after commencing operations found gravel in the pit) paid her some $4,000 for material removed between November 1962 and March 1963. Appellant's mother could not build a home on the parcel because it was zoned for industrial use, and on April 1st 1963 she sold the remainder of the parcel to appellant for $45,000 payable in 10 equal annual payments. Appellant, who was in the sand and gravel business, claimed a capital cost allowance in respect of the gravel pit on the basis that its capital cost was $45,000, but the Minister applied s. 20(4) of the *Income Tax Act* and fixed his capital cost at $11,100 (being its cost to his mother less $100 for the two cottages).

Held, appellant's appeal must be dismissed.

It is not essential to the application of s. 20(4) of the *Income Tax Act* that the property be "depreciable property" when owned by the transferor. *Caine Lumber Co. v. M.N.R.* [1959] S.C.R. 556, per Mart-

land J. at p. 561, followed. But in any event the property was "depreciable property" in the transferor's hands, since part of her purpose in acquiring it was to deal in any feasible way with the property, whose character made it suitable for such purpose, and it was therefore a capital asset of a business which she carried on. Even if she was not engaged in a business her receipts from the sale of material from the pit were income from property under s. 6(1)(*j*) of the *Income Tax Act*, and therefore the cost of the property, from the time when she authorized the sale of the material, was "depreciable property" by reason of the provisions of s. 20(6) of the *Income Tax Act*. Finally, if s. 20(6)(*b*) of the *Income Tax Act* applied and the property became depreciable property at its fair market value at a time subsequent to its purchase by appellant's mother the evidence did not establish that its fair market value at such time exceeded $11,100.

Income tax—Capital cost allowances—Increasing amount of—Income Tax Act, s. 20(5)(e)—"Allowed", meaning.

Appellant in his 1962 income tax return reported a net income of $3,900 and exemptions of $3,900, and thus no taxable income. In computing his net income he deducted $4,451 for capital cost allowances which was less than the maximum In 1965 it appeared that the Minister would compute appellant's taxable income for 1962 at $3,900. Appellant therefore requested the Minister by letter to increase his capital cost allowance for 1962 by an offsetting amount and though no assessment for 1962 was issued, the notices of assessment for 1963 and 1964 were computed on the basis of the appellant having been entitled to the increased allowance in 1962. Appellant objected to the 1963 and 1964 assessments and on this appeal contended that the effect of such objection was to countermand his request for an increased capital cost allowance for 1962.

Held, rejecting appellant's contention, the increased amount of capital cost allowance requested by appellant had been "allowed" him for 1962 within the meaning of s 20(5)(*e*) of the *Income Tax Act* and such amount must be excluded in computing his capital cost allowance for 1963 and 1964 under Regulation 1100(1)(*a*)

INCOME TAX APPEAL.

E. Neil McKelvey, Q.C. and *J. Ian M. Whitcomb* for appellant.

M. A. Mogan and *M. J. Bonner* for respondent.

THURLOW J.:—This is an appeal from re-assessments of income tax for the years 1963 and 1964. There are two issues, the first and more important of which is the extent of the deductions to which the appellant is entitled, in computing his income, in respect of the capital cost of a gravel pit used in his business. It is common ground that the gravel pit is an "industrial mineral mine" within the meaning of section 1100(1)(*g*) of the Income Tax Regulations and that the appellant is entitled to the deduction

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provided by the regulations in respect of such property. The appellant, however, claims the deduction on the basis of a capital cost of $45,000 while the Minister bases his computation on a capital cost of $11,100.

The other issue is concerned with the capital cost allowances to which the appellant is entitled in respect of certain automotive equipment falling within class 10 of Schedule B of the Income Tax Regulations. This equipment had been partially depreciated in 1962 and the dispute is as to the correct amount to be taken as the undepreciated capital cost of this equipment at the beginning of the 1963 taxation year. This the appellant contends was $3,905.77 greater than the undepreciated capital cost thereof which formed the basis of the Minister's calculation. The details of how this issue arose will be outlined when dealing with it later in these reasons.

The appellant lives at Saint John in the Province of New Brunswick and in 1962 and earlier years he was engaged in a general trucking business which included the supplying of trucks and construction equipment to others on a rental basis. In 1963 his business was expanded to include the supplying of sand and gravel which he obtained from a pit situate on a parcel of land which he had purchased from his mother, Eunice Ryan, by an agreement in writing dated April 1, 1963. The consideration expressed in the agreement was $45,000 payable in ten equal yearly payments and it is this amount which the appellant contends should be taken as the starting point for the purpose of calculating capital cost allowance on the gravel pit.

The property in question was, however, a part of a somewhat larger property which had been acquired by the appellant's mother in the summer of 1962 from the trustee of a bankrupt estate for $11,200. The trustee had endeavoured to interest the appellant in the property, apparently without success, and had twice called for tenders for it. On the second occasion Eunice Ryan had a solicitor put in a tender for her and she was advised some time later that her tender had been accepted. The property was conveyed to her shortly afterwards by a deed dated August 13, 1962.

The property so purchased consisted of some 75 acres of land situated on the southern side of Grandview Avenue to

the eastward of the City of Saint John and across the road from the site of a large oil refinery. The land was zoned for industrial purposes but there were three cottages on it fronting on Grandview Avenue. These had apparently been there for some years and may have been erected before the zoning of the land for industrial purposes came into effect. More than half of the Grandview Avenue frontage, however, was undeveloped, part of this lying between the cottages and the western boundary of the property and a much larger portion lying between the cottages and the eastern boundary of the property.

Near the western boundary line of the property a driveway led southwardly to an abandoned sand or gravel pit located between Grandview Avenue and a stream which crossed the property and thence across the stream to a second sand or gravel pit located to the southward of the stream. The stream itself flowed through a ravine said to be about a hundred feet deep. The previous owner had used the property to some extent as a source of supply for its business of dealing in sand and gravel.

Mrs. Ryan stated in evidence that she bought this property "for building a home" for herself on the particular portion of the Grandview Avenue frontage which lay between the cottages and the western boundary of the property but that she was unable to proceed with this plan because the property was zoned for industrial use. She did not know of the zoning restriction when she bought the property but learned of it some time later. She also said, when asked in cross-examination what she intended to do with the rest of the property, that she thought she might sell it for building lots or sell sand from the pit.

After being advised of the acceptance of her tender but before receiving her deed and without having so much as entered any of the buildings on the property Eunice Ryan by agreements in writing dated July 26, 1962 sold two of the three cottages with, in each case, the lot of land fronting on Grandview Avenue on which it stood, one for $2,500 and the other for $4,500. These transactions were completed by deeds dated October 1, 1962. In both cases the purchaser had been referred to her by the appellant. At about that time or shortly afterwards Mrs. Ryan gave her permission to Universal Constructors Limited to remove sand from the property and in a period commencing in

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November 1962 and terminating in March 1963 that company removed from the property material for which she received a sum in the vicinity of $4,000 calculated on a yard or ton basis. The company had been referred to Mrs. Ryan by the appellant who had also advised her on the price she should charge. In the course of these operations it was discovered that in the pit south of the stream there was a considerable amount of material in which the proportion of gravel to sand was such that it was useful without screening for making concrete.

In March 1963 Mrs. Ryan agreed to give to J. C. Van Horne an option exercisable at any time prior to September 1, 1963 for the purchase of the remaining property for $75,000. She received $500 for the option but it was not exercised. Late in 1962 plans had been announced for the construction of a pulp and paper mill on a site about a mile to the westward of the property and it was said that this had stimulated the interest of speculators in land in the neighborhood and that Mr. Van Horne had taken options on this and other properties on the basis of $1,000 per acre.

The proposal for this option was made by the optionee to the appellant who communicated it to his mother and later passed over to her the $500 which the optionee had paid to him. According to the evidence of the appellant and his mother it was after this option was arranged that they discussed the subject of the appellant buying the property if the option was not exercised, and agreed on the price of $45,000. This price was set without obtaining advice or assistance from anyone but Mrs. Ryan's other two sons neither of whom was in the real estate business. There is, however, evidence that following a lack of interest in land in that neighborhood, which had persisted for about 14 months prior to November 1962, the announcement of the construction of the pulp and paper mill had stimulated speculative interest and had caused the acreage value of land to rally from the low point it had reached in the sale to Mrs. Ryan to something nearer the $500 per acre point it had reached some years earlier and to go on to increase somewhat further in 1963. None of the sales cited in support of this view, however, occurred in 1962 and only one other than the sale by Mrs. Ryan to the appellant occurred in 1963. I do not therefore attribute much weight to this evidence. On the other hand there is evidence that

the third cottage and the lot on which it stood was sold by the appellant in September 1963 and netted him $6,524.26 and that in 1963 and 1964 alone he removed sand and gravel from the property to the value of from $20,000 to $25,000 calculated on the basis of 10 cents a yard for it before moving it from its natural site. As the presence of useful gravel had been discovered before the sale of the property to the appellant I do not think it can be taken that a more cautious owner or purchaser would not have known of it or gone to the trouble of testing to ascertain some measure of the quantity of gravel present before concluding a sale, in which event the price might well have been even higher. On the whole, therefore, I would not regard the amount agreed upon, that is to say, $45,000 payable over a ten year period without interest, as being off the mark as an estimate of the fair market value of the property. As will appear, however, this, in my opinion, has no effect on the result of the appeal. Nor does either the fact that the appellant has so far paid nothing on account of the $45,000 or the fact that he has in the meantime built a house have any effect on the result.

Mrs. Ryan filed no income tax returns for either year in which she owned the property and never claimed capital cost allowance in respect of the gravel pit.

In assessing the appellant the Minister took the position that as the transaction by which the appellant acquired the property was one between parties not dealing at arm's length the capital cost of the property to the appellant for the purpose of calculating capital cost allowance in computing his income must be the capital cost thereof to Mrs. Ryan. After deducting from the $11,200 which she had paid for the whole property an amount of $100 in respect of the two cottages which she had sold for a total of $7,000 the Minister adopted $11,100 as the capital cost to her of the portion of the property which she later sold to the appellant and this amount was then used as the basis for the Minister's calculation of the appellant's deductions of capital cost allowance in respect of the sand and gravel pit. The statutory foundation for this course is found in sections 20(4), 20(5)(*a*), 139(5)(*a*), 139(5a)(*a*) and 139(6)(*a*) of the Act the relevant portions of which read as follows:

> 20(4) Where depreciable property did, at any time after the commencement of 1949, belong to a person (hereinafter referred to as the

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original owner) and has, by one or more transactions between persons not dealing at arm's length, become vested in a taxpayer, the following rules are, notwithstanding section 17, applicable for the purposes of this section and regulations made under paragraph (*a*) of subsection (1) of section 11:

(*a*) the capital cost of the property to the taxpayer shall be deemed to be the amount that was the capital cost of the property to the original owner;

20(5) In this section and regulations made under paragraph (*a*) of subsection (1) of section 11,

(*a*) "depreciable property" of a taxpayer as of any time in a taxation year means property in respect of which the taxpayer has been allowed, or is entitled to, a deduction under regulations made under paragraph (*a*) of subsection (1) of section 11 in computing income for that or a previous taxation year;

139(5) For the purposes of this Act,

(*a*) related persons shall be deemed not to deal with each other at arm's length;

139(5a) For the purpose of subsection (5), (5c) and this subsection, "related persons", or persons related to each other, are

(*a*) individuals connected by blood relationship, marriage or adoption;

139(6) For the purpose of paragraph (*a*) of subsection (5a),

(*a*) persons are connected by blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;

The appellant's first position on these provisions was that section 20(4) does not apply unless the property in question was "depreciable property" when owned by the transferor, and that the property transferred by Eunice Ryan to the appellant was never "depreciable property" while she owned it. Alternatively it was urged that if the property was "depreciable property" while owned by Eunice Ryan it did not become "depreciable property" until she commenced to use it for the purpose of income—since her purpose in acquiring it was to obtain a site for a residence—that accordingly under section 20(6)(*b*)[1] she is deemed to have acquired the property at its fair market value at the time when she commenced to use it for the

[1] 20(6) For the purpose of this section and regulations made under paragraph (*a*) of subsection (1) of section 11, the following rules apply

. .

(*b*) Where a taxpayer, having acquired property for some other purpose, has commenced at a later time to use it for the purpose of gaining or producing income therefrom, or for the purpose of gaining or producing income from a business, he shall be deemed to have acquired it at that later time at its fair market value at that time;

purpose of earning income, that by that time its fair market value was $45,000, and that that amount is therefore to be taken as the capital cost of the property to her for the purpose of section 20(4)(*a*).

Turning to the first of these submissions there is, in my opinion, nothing in the wording of section 20(4) which requires that the property referred to be "depreciable property" while owned by the transferor. The subject matter with which the subsection is concerned is the capital cost of depreciable property of a taxpayer who has acquired it through a non arm's length transaction and what the subsection does is to prescribe what is to be taken as the capital cost of the property to that taxpayer. I can see no reason of substance why in making such a provision it would have been desirable or necessary to limit its operation to situations in which the property had been used by the former owner to earn income and had thus been depreciable property while in the former owner's hands and the language used does not appear to me to warrant such a limitation. Reference was made to the word "did" as supporting the appellant's position but when the subject to which the verb applies is considered as referring to property of the taxpayer whose assessment is under consideration the contention appears to me to be untenable. Nor does the scheme of the subsection appear to require such a limitation since what the subsection prescribes is that the former owner's capital cost is to be taken as the capital cost of the taxpayer and this would be the same amount whether the former owner had been allowed capital cost allowance in respect of it or not. The most persuasive point made was that if Mrs. Ryan had given the property to the appellant instead of selling it to him he would have been entitled under section 20(6)(*c*) to calculate capital cost allowance on the basis of fair market value at the time he commenced to use the property to earn income. This may appear to indicate some lack of equity in the rules prescribed but the transaction by which the appellant acquired the property does not fall within section 20(6)(*c*) and the result which might have ensued if it had, as I see it, cannot affect what I think is the plain meaning of the wording of section 20(4)(*a*).

I reach this conclusion on my own view of what I take to be the ordinary meaning of the language used in section

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40(4) but I would in any case have regarded the point as concluded in this Court by the opinion expressed by Martland J. (Cartwright J. as he then was, concurring) when he said in *Caine Lumber Co. Ltd. v. Minister of National Revenue*[2] at page 561:

> I agree with the conclusions of my brother Locke and merely wish to add that, in my opinion, the result of this appeal would be the same even if the definition of "depreciable property of a taxpayer" in subs. (3) of s. 20 of the *Income Tax Act* were to be applied in construing the meaning of the words "depreciable property" in subs. (2) of that section. It seems to me that subs. (2) applies if the property in question constitutes depreciable property vested in the taxpayer who claims the allowance provided under s. 11(1)(*b*) irrespective of whether or not the property was "depreciable property" in the hands of the person from whom the taxpayer acquired it by a transaction not at arm's length.

This conclusion is sufficient to dispose of the appellant's first position on the issue but as the conclusion I have reached on the other submission, that is to say, that the property was not at any time depreciable property while Mrs. Ryan owned it, bears on the appellant's alternative position I shall express my view on it as well.

On the evidence it is, I think, plain that the property in question was "depreciable property" while it was owned by Mrs. Ryan. While I accept the evidence that when she bought the property she intended to build a residence thereon for her own use that to my mind was but a part of her purpose in acquiring the property. In my view she also intended to sell the remaining frontage for building lots and to sell sand and this is what she proceeded to do. It is clear that she had no intention of making any personal use of any of the cottages on the property and that she proceeded at once to dispose of two of them with the lots on which they stood without so much as having entered them. It is also clear that within a few months of acquiring the property she carried out her purpose to sell sand. To my mind it is apparent both from her evidence of her intention and from what she actually did that, saving her intention to use a particular part of the land as a site for a residence, she had no personal use for any of the property and that her purpose in acquiring it was to deal with it in any way

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[2] [1959] S.C.R. 556. The reference to s. 11(1)(*b*) seems to have been intended as a reference to s. 11(1)(*a*) which the judgment of Locke J. shows to have been the provision under consideration.

that might be feasible whether by selling lots with or without buildings thereon or by selling sand from the pits or by selling the property itself. With this is I think to be considered the nature of the property itself which, in her hands, did not have the characteristics of an ordinary investment but on the contrary was suited to the carrying out of a scheme for profit making by selling off the cottages and the Grandview Avenue frontage and selling material from the pit if no better way of disposing of it to advantage appeared. I would accordingly conclude that while in her hands the land was an asset of a business in which she engaged, whether on the prompting of the appellant or some other person or on her own initiative, and that the sand and gravel pit by the exploitation of which she realized income was an asset used in that business in respect of which she was "entitled to" capital cost allowance under section 11(1)(*a*) and the regulations within the meaning of that expression in section 20(5)(*a*). Moreover even if, as I think, the definition of "depreciable property" in section 20(5)(*a*), as amended since the decision in the *Caine Lumber* case, is inapplicable to that expression in section 20(4) when the nature of the property while in the hands of the "original owner" is under consideration the reasoning of Locke J., in the *Caine Lumber* case appears to me to indicate that the sand and gravel pit, being a wasting asset when used for that purpose, is to be regarded as "depreciable property" in the ordinary sense of that expression.

To my mind a similar conclusion also follows even if Mrs. Ryan is not considered as having been engaged in a business venture but as having simply carried out with respect to the sand and gravel pit her purpose to sell material therefrom. It was submitted that the sums which she received from Universal Constructors Limited while taxable as income under section 6(1)(*j*)[3] of the Act were not income in fact, that Mrs. Ryan's intention to sell sand

[3] 6(1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year

. . .

(*j*) amounts received by the taxpayer in the year that were dependent upon use of or production from property whether or not they were instalments of the sale price of the property, but instalments of the sale price of agricultural land shall not be included by virtue of this paragraph;

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at the time when she acquired the property was therefore not an intention to use it for the purpose of gaining or producing income and that accordingly capital cost allowance could not be claimed because of Regulation 1102(1)(*c*)[4]. However, having sold material from the property for a consideration the amount of which was dependent upon the extent of use of or production from her property and which she was, as I see it, required by section 6(1)(*j*) to include as receipts in computing her income and having thus put the property to a use which would result in the receipt of amounts which she was required to include in computing her income she was, in my opinion, at least from the time when she gave the permission, using the property "for the purpose of gaining or producing income therefrom" within the meaning of that expression in section 20(6)(*b*)[5] of the Act. I am accordingly of the view that the sand and gravel pit was in fact depreciable property of Mrs. Eunice Ryan throughout the time she owned it on the basis that it was property used in her business and in any event from the time she gave permission to Universal Constructors Limited to take material from the sand pit if not earlier, on the basis of her having used it to produce receipts taxable as income under section 6(1)(*j*) of the Act.

I turn now to the alternative argument. This is based on the contention that the sand and gravel pit was not in any event depreciable property of Mrs. Eunice Ryan until she gave permission to Universal Constructors Limited to enter and take sand from it and that section 20(6)(*b*) came into play and fixed the capital cost to her of the property at its fair market value at that time.

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[4] 1102(1) The classes of property described in this Part and in Schedule B shall be deemed not to include property

. . .

(*c*) that was not acquired by the taxpayer for the purpose of gaining or producing income,

[5] 20(6) For the purpose of this section and regulations made under paragraph (*a*) of subsection (1) of section 11, the following rules apply:

. . .

(*b*) Where a taxpayer, having acquired property for some other purpose, has commenced at a later time to use it for the purpose of gaining or producing income therefrom, or for the purpose of gaining or producing income from a business, he shall be deemed to have acquired it at that later time at its fair market value at that time;

I do not think it should be taken as settled that section 20(6)(*b*), which states a rule for determining on a fictional basis in a particular situation the capital cost of property to a taxpayer upon which the extent of his entitlement to capital cost allowance deductions would depend, would necessarily also apply in determining under section 20(4) the capital cost of the same property to a different taxpayer but it does not appear to me to be necessary for the purposes of this case to decide the question and I therefore express no opinion on it. Assuming that on appropriate facts section 20(6)(*b*) would apply to fix the capital cost to the original owner within the meaning of section 20(4) and thus also to the taxpayer referred to in that subsection there are, in my view, two answers to the appellants submissions.

The first of these is the conclusion which I have already expressed that the property purchased by Mrs. Ryan was from the time of its purchase an asset of a business venture in which she engaged and was depreciable property throughout the time she owned it. In this view section 20(6)(*b*) can have no application.

The other answer is that on the evidence I am unable to conclude that the market value of the property was greater than $11,100 either at the time when permission was given to Universal Constructors Limited to take sand or at the time when that company in fact entered the property for that purpose. It is admitted that the operation commenced in November 1962 but neither the date when permission was given nor the date of commencement of the operation was precisely established and it seems clear that the discovery of the valuable deposit of gravel was not made until after the commencement of the operation. Nor is it clear on the evidence that the announcement of construction of the pulp and paper mill, which was said to have been made in the fall of 1962 and to have excited speculative interest in land in the neighborhood, occurred prior to either the giving of permission to Universal Constructors Limited or the commencement of their operations on the premises. Moreover the general evidence of renewed interest in land in the neighborhood is not supported by evidence of any sale at or about the material time indicating a market value greater than the amount taken by the Minister as the basis for his calculation.

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The appeal on this issue accordingly fails.

The other issue was presented on an agreed statement of facts filed during the course of the trial and since amended by the addition of a further paragraph and the filing of a copy of the appellant's 1962 income tax return. The return showed a net income of $3,900 for the year and exemptions equal to that amount. There was thus no taxable income shown. The computation of $3,900 as the appellant's net income included *inter alia* a deduction of $4,451.60 for capital cost allowance in respect of class 10 assets having an undepreciated capital cost of $41,163.21. In respect of these assets the appellant was entitled under Regulation 1100(*a*)(x) to a deduction in computing his income equal to such amount as he might claim in respect of the property not exceeding 30 per cent. of its undepreciated capital cost and no question arose as to the deduction so claimed and made. It has been agreed, however, that "by reason of adjustments made by the respondent in 1965 with respect to the appellant's 1962 taxation year, it appeared that the appellant would have a taxable income of approximately $3,900 for 1962" and that by a letter dated August 23, 1965, "the appellant requested the respondent to increase capital cost allowance on class 10 assets to offset the aforementioned adjustments for the year 1962".

Thereafter when giving notice of the re-assessments under appeal the Minister forwarded to the appellant a compilation entitled "Revised Capital Cost Allowance Schedule" which showed capital cost allowances in respect of assets of various classes for the years 1961 to 1964 inclusive and included a summary which *inter alia* showed capital cost allowance in respect of class 10 assets for 1962 as having been claimed at $4,451.60 and allowed at $8,357.37. It is agreed that the latter amount "reflects the amount ($4,451.60) claimed by the appellant when filing his return plus the additional amount ($3,905.77) calculated by the respondent to offset the adjustments" referred to above.

The effect of this was to leave no taxable income for 1962 and no assessment for 1962 appears to have been made, but on receiving the 1963 and 1964 reassessments the appellant objected thereto "and stated that he could not be required to take a deduction in any particular taxation year". This, if maintainable, represented a relevant

objection to the 1963 and 1964 re-assessments since the effect of using the deduction in 1962 was to reduce his entitlement to capital cost allowance in respect of the assets in question in subsequent years. It seems likely that it may also have been to his advantage to have the additional deduction available in 1963 and 1964 when his income was much higher and thus attracted tax at higher rates than would have applied in 1962 on a taxable income of about $3,900.

The appellant's position on this issue, as I understand it, is that since the Minister issued no notice of assessment for 1962 and since the appellant's notice of objection to the 1963 and 1964 re-assessments was given at a time when it was still open to the Minister to make an assessment for 1962 the appellant was entitled at that time to countermand the request of his letter of August 23, 1965 and by his notice of objection did countermand it and elect not to claim additional capital cost allowance of $3,905.77 in respect of the class 10 assets for 1962. The Minister's position on the other hand is that there was in the first instance a nil assessment for the year 1962 which notwithstanding the adjustments in respect to the appellant's 1962 taxation year made by the Minister in 1965 remained in effect by reason of the appellant's request for additional capital cost allowance to offset the adjustments, that the additional $3,905.77 had therefore been claimed by the appellant and allowed by the Minister in the 1962 taxation year and that the claim could not thereafter be cancelled.

In my view, the positions of both parties overstate to some extent the effect of what is in the agreed statement of facts with respect to assessment for the year 1962. There is simply an absence of information on that subject and from such information as does appear with respect to what transpired and the positions taken by counsel I can infer nothing as to what the Minister did at any stage with respect to the appellant's 1962 taxation year beyond the fact that he does not appear to have claimed tax in respect of it.

For my part, on such facts as are before me, I am somewhat at a loss to understand why effect was not given to the taxpayer's objection[6] since the claim itself for addi-

[6] No notification under section 58(3) with respect to the objection appears to have been given

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tional capital cost allowance had been made informally and the Minister had taken no irreversible step but I think it is impossible for the appellant to avoid at this stage the consequences of his earlier request and the Minister's action thereon. It must be borne in mind that what is before the Court is the correctness of the assessments for 1963 and 1964 and that the deductions to which the appellant is entitled for capital cost allowances for those years are, under Regulation 1100(1)(*a*), to be calculated on "the undepreciated capital cost to him as of the end of the taxation year". "Undepreciated capital cost" is defined in part as follows in section 20(5)(*e*):

> (5) In this section and regulations made under paragraph (*a*) of of subsection (1) of section 11,
>
> (*e*) "undepreciated capital cost" to a taxpayer of depreciable property of a prescribed class as of any time means the capital cost to the taxpayer of depreciable property of that class acquired before that time minus the aggregate of
>
> (i) the total depreciation allowed to the taxpayer for property of that class before that time,

There appear to be two conceivable interpretations of the word "allowed" in this definition, one as corresponding to the meaning of the same word in section 11(1)(*a*)[7] of the Act and in Regulation 1100(1)[8], and the other as having been consecrated by some act on the part of the Minister signifying his approval of the deduction that has been claimed, but in either case it appears to me that the conditions of the definition have been met and that the

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[7] 11 (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year

(*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;

[8] 1100 (1) Under paragraph (*a*) of subsection (1) of section 11 of the Act, there is hereby allowed to a taxpayer, in computing his income from a business or property, as the case may be, deductions for each taxation year equal to

(*a*) such amount as he may claim in respect of property of each of the following classes in Schedule B not exceeding in respect of property

. . .

(x) of class 10, 30%

of the undepreciated capital cost to him as of the end of the taxation year (before making any deduction under this subsection for the taxation year) of property of the class;

$3,905.77 in question was "allowed" in respect of the year 1962. The additional deduction was within the limits of what might be claimed for the year 1962 and was in fact claimed by the appellant for that year by his letter of August 23, 1965. Moreover, it does not appear that that claim was ever formally withdrawn by any communication to the Minister pertaining specifically to the 1962 taxation year. In this respect the appellant has thus been just as non-committal as the Minister has been in not notifying him formally of where he stood with respect to the 1962 taxation year. The first mentioned interpretation of "allowed" in section 20(5)(*e*) was thus completely satisfied when the appellant sent his letter of August 23, 1965. The second sense as well appears to have been satisfied at the time of the issuance by the Minister of re-assessment notices for 1963 and 1964 based on the allowance in question having been made for 1962 and containing a statement to that effect. In my view there was accordingly no right left in the taxpayer at that stage to change his mind and demand the cancellation of his earlier claim. For the purposes of the 1963 and 1964 computations the deduction had been allowed in 1962.

The appeal accordingly fails and it will be dismissed with costs.