[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN SLATE QUARRIES LIMITED . . . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

H. C. OF A. 1923.

SYDNEY, *Nov.* 23, 26; *Dec.* 11.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Income Tax—Assessment—"Mining operations"—Slate quarry—Open-cut workings—Income Tax Assessment Act 1915-1921 (*No.* 34 *of* 1915—*No.* 32 *of* 1921), *sec.* 17.

Sec. 17 of the *Income Tax Assessment Act* 1915-1921 makes special provisions for deductions which may be made from income derived from "mining operations (other than coal mining) carried on in Australia."

Held, that operations for the purpose of obtaining slate from the land in which it occurs may be "mining operations" within the meaning of sec. 17, notwithstanding that the substance sought to be obtained is slate, that for the purpose of obtaining the slate the method of working adopted is by open-cut or surface workings and removing the superjacent and interjacent beds of waste material, or that the property on which the operations are conducted is described by the taxpayer as "slate quarries."

CASE STATED.

On an appeal by the Australian Slate Quarries Ltd. from an assessment for income tax for the year ending 30th June 1922, *Rich* J. stated, for the opinion of the Full Court, a case which was substantially as follows:—

2. The appellant is a company which at all material times was duly incorporated in the Commonwealth of Australia and carried on there the business of obtaining slate, which business is within the objects of such company.

3. The said operations for obtaining slate were carried on by the appellant during the material period on its own property at Willunga, near Adelaide, in the State of South Australia, and the physical condition of the workings from which the slate is obtained is an open-cut or surface working wherein slate is obtained from the face or surface of the walls and floor of the said open-cut or surface working.

4. The formation of the slate deposit is such that the merchantable slate lies under an overburden of decayed slate from 20 to 100 feet in thickness, and each stratum of merchantable slate lies between thick layers or beds of inferior slate rock frequently containing cross veins which is of no commercial value, and the overburden of decayed slate and the said interlying beds or layers of waste have from time to time to be removed at considerable expense to permit of the face or surface of each stratum of merchantable slate being exposed so that it can be worked.

5. In accordance with the provisions of the *Income Tax Assessment Act* 1915-1921 the Public Officer of the appellant company lodged with the respondent a return showing the income derived by the appellant from sources in Australia during the year ending 30th June 1922, wherein the appellant claimed a deduction under sec. 17 of the said Act of £801 1s. 7d., representing money expended by the appellant in what it alleges to be developmental work according to the meaning of the said section, that is to say, work necessary to remove the beds or layers of inferior or waste slate mentioned in par. 4 hereof.

6. The assessment referred to in par. 1 hereof was duly made by the respondent on the income shown in the said return, but in such assessment the respondent did not allow the deduction mentioned in the preceding paragraph hereof.

7. The appellant company duly lodged objections with the Commissioner against the said assessment for the financial year 1921-1922.

8. The respondent wholly disallowed the objections mentioned in par. 7 hereof, and the appellant within the prescribed time asked the respondent to treat the said objections as an appeal pursuant to sec. 37 of the *Income Tax Assessment Act* 1915-1921, which was accordingly done.

9. On the hearing of the appeal before this Court, the question hereinafter mentioned arose in the appeal, and this Court, so thinking

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fit, doth state this case in writing for the opinion of the Full Court of the High Court upon the following question arising in the appeal, which in the opinion of this Court is a question of law :—

Whether on the facts stated the Court is at liberty to hold that the appellant is carrying on mining operations within the meaning of sec. 17 of the *Income Tax Assessment Act* 1915-1921 and is entitled to the deductions allowed by that section.

Markell (with him *Leaver*), for the appellant.

E. M. Mitchell, for the respondent.

Cur. adv. vult.

Dec. 11.

The following written judgments were delivered :—

KNOX C.J. The *Income Tax Assessment Act* 1915-1918 contains special provision with regard to income derived from mining operations. The question submitted for our opinion is whether, on the facts stated in the case, the Court is at liberty to hold that the appellant is carrying on mining operations.

On this question it appears to me that the only matter for our consideration is whether the facts so stated are inconsistent with a finding that the operations carried on by the appellant are mining operations.

The only facts stated which are relevant to the determination of this question are (1) that the subject of the operations is slate, (2) that the method of working adopted is by open-cut or surface workings, the overburden and interlying beds of waste material being removed for the purpose of obtaining the slate, and (3) that the property on which these operations are conducted is described by the appellant as slate "quarries." In my opinion, these facts, whether considered separately or in combination, are not inconsistent with a conclusion that the operations carried on by the appellant are mining operations. Slate is, both in ordinary parlance and according to the definitions contained in State Mining Acts, a mineral. Operations undertaken for the purpose of obtaining a mineral may be fairly described as

mining operations. It is a matter of common knowledge that in Australia the open-cut or surface method is commonly adopted in connection with mining for ores containing silver and other metals; and I do not think it can be doubted that operations conducted for the purpose of obtaining such ore from the earth are mining operations although carried on by the open-cut method. Nor does the fact that the property of the appellant is described as a slate "quarry" necessarily preclude the Court from holding that the operations of the appellant are mining operations. When the words "quarry" and "mine" are not used in antithesis I think that which is described as a quarry may in certain circumstances also be described as a mine, although an underground mine could not properly be described as a quarry (see per Lord *Watson* in *Lord Provost of Glasgow* v. *Farie* (1)). A mine is not the less a mine because its owner calls it a quarry. The question whether the appellant carried on mining operations within the meaning of the *Income Tax Assessment Act* is one for the decision of the Justice who hears the appeal, but, in my opinion, the facts stated in the case do not preclude him from holding that it did.

For these reasons I think the question should be answered "Yes."

ISAACS AND RICH JJ. The question whether the company is carrying on "mining operations" so as to be entitled to the benefit of sec. 17 (*bb*) of the *Income Tax Assessment Act* 1915-1921 is in one sense a question of fact (*R.* v. *Dunsford* (2)). But whether the Court can properly so find on the evidence stated is undoubtedly a question of law. And that is the question stated here. The question is by no means free from controversy, as is seen both from the numerous analogous reported cases, many of them leading to differences of opinion in the House of Lords, and from the able legal arguments we have had in this case. The question of fact must be determined according to some legal standard; and the point raised by the parties here is what is the proper legal standard.

One matter may be disposed of at once. Except where a relevant statute antithetically discriminates between a "mine" and a "quarry" (as in *Jones* v. *Cwmorthen Slate Co* (3)), the same property

(1) (1888) 13 App. Cas., 657, at p. 677. (2) (1835) 2 A. & E., 568.
(3) (1879) 4 Ex. D., 97; 5 Ex. D., 93.

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Isaacs J. Rich J.

may consistently fall within both categories. In *R.* v. *Dunsford* (1) Lord *Denham* C.J. said of the finding of the Sessions in the case before him : " They have indeed found that the work is a quarry, but they have not negatived its being a mine." It was held by the whole Court in that case that whether any excavation in the earth be a mine or not depends upon the mode in which it is worked, and not on the substance obtained from it. Lexicographers, as Dr. Johnson, Latham, and Jacob, include " quarries " in " mines." See *Farie's Case* (2) and *Midland Railway Co.* v. *Robinson* (3). At the place last cited Lord *Herschell* adds his approval. In the present case the only importance as to the substance obtained is that it is not coal, and therefore the place is not within statutory exception. " Mining operations " in sec. 17 is an expression which, being unqualified by anything apart from the coal-mining exception, must be given its usual meaning as understood in Australia. The expression " mining property " means nothing more than the property on which mining is carried on. The word " mining " is the same in both expressions, and is the governing term. " Mining operations " is, in the first place, a well-known legislative phrase ; as may be seen by referring, for instance, to the New South Wales *Mining Act* (No. 49 of 1906), secs. 42, 47, 57, 60, 61, 68 ; the Victorian *Mines Act* 1915, secs. 3 (definition of " mine "), 4, 63 and 75, the South Australian *Mining Act* 1893, sec. 107. The last-mentioned section is a remarkably illuminating provision. It refers (*inter alia*) to work necessary to trace any lode, vein or gutter from any " property " held under " claim " or " mining lease," and adds : " Provided that such work shall not interfere with the ' mining operations ' of " the " owner or lessee." So that " mining operations " there include mining on a " claim " which has been pegged out, as well as on a lease granted. The expression " mining operations " is apt to include all that is done in the way of mining as that is universally understood in Australia. The phrase " mining operations " embraces all operations whether by hand or by machinery and whether confined to excavating the surface, as in alluvial claims or extended to excavations, hundreds or even thousands of feet below the surface, by which any valuable deposit, other than the

(1) 1835) 2 A. & E., at p. 573. (2) (1888) 13 App. Cas., at p. 666.
(3) (1889) 15 App. Cas., 19, at p. 31.

ordinary soil is extracted or extractable from the earth. It may be that the framers of sec. 17 of the Act had prominently in mind the more usual mining operations requiring costly developmental work before getting payable returns. A Court, however, can judge of the legislative intention only by the language employed; and where in a taxing Act general terms are used they must, in the absence of restraining context, be given their general meaning. The exception of coal mining does not cut down that meaning. "Mining" other than coal mining is generally hazardous and speculative. Great gains are possible; much unprofitable outlay is not infrequent. Coal mining is of a wholly different character: once found, coal is practically assured. The discrimination patently rests upon this difference, and not upon methods of working the soil. The subject of "mining" as a great national industry is dealt with in special statutes in every State of Australia, and reference to enactments shows how wide is the connotation of the expressions "mine" and "mining purposes." It is the established policy of Australia to give special facilities and encouragement to what is known as the "mining industry," and is understood to include the extraction of all kinds of mineral deposits, not the mere soil itself, which constitute part of the natural wealth of the country. The operations described in the case stated are, in our opinion, undoubtedly at least susceptible of being considered in fact "mining operations" within the meaning of sec. 17, and, being other than coal mining, the provisions as to deduction in that section would in that case be applicable. It only remains to be added that cases like *Farie's Case* (1) and *Symington* v. *Caledonian Railway Co.* (2) are quite inapplicable. They depend partly on an understanding of words created by social conditions and judicial decisions entirely different from the circumstances in which the Commonwealth Parliament legislated. In those cases the learned Lords were pressed by considerations entirely absent here, and, if those cases are to be taken as a guide to us at all, it is to lead us to determine this question by the light of our own local conditions only.

The answer to the question stated should be in the affirmative.

HIGGINS J. The taxpayer is a company extracting slate from quarries at Willunga in South Australia; and it claims a right to

(1) (1888) 13 App. Cas., 657. (2) (1912) A.C., 87.

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deduct from its total income, for the purpose of income tax, so much of the income of the financial year as is expended in that year for development.

The question as finally stated by my brother *Rich*, who is trying the appeal from the Commissioner, is this—" Whether *on the facts stated* the Court is *at liberty to hold* that the appellant is carrying on mining operations within the meaning of sec. 17 of the *Income Tax Assessment Act* 1915-1921 and is entitled to the deductions allowed by that section." There is no doubt on the facts stated in the case that the company is entitled to the deductions if it is carrying on mining operations within the meaning of the section ; for it is stated in par. 5 that the expenditure was in " developmental work according to the meaning of the said section." Therefore, the only question remaining for the trial Judge is whether the company is carrying on mining operations within the meaning of the section.

Sec. 17 says : " In connection with income derived from mining operations (other than coal mining) carried on in Australia the following provisions shall apply." In effect, the return of the taxpayer is to show the total income ; and there is then to be a deduction as prescribed in (*b*) or in (*bb*). The taxpayer, having the option, selects (*bb*).

Looking, now, at the facts stated, which are meagre, it appears that the merchantable slate lies under an overburden of decayed slate from 20 to 100 feet in thickness, and each stratum of merchantable slate lies between thick layers of inferior slate rock and the overburden of decayed slate and the interlying layers of waste have from time to time to be removed at considerable expense to permit of the face of each stratum of merchantable slate being exposed so that it can be worked.

Our function as a Full Court is limited, under sec. 38 (3), to the hearing and determination of what, in the opinion of the trial Judge, is a question of law ; and the construction of the Act is a question of law.

Many cases have been cited to us, decided in England under Acts having other purposes and other phraseology, as to the meaning of " mine," " mining operations," &c. It appears that eminent Judges have differed as to the meaning of those Acts. As *Loreburn* L.C. says

finally, in *North British Railway Co.* v. *Budhill Coal & Sandstone Co.* (1) :—" It is not possible to extract any uniform standard. . . . No one principle has been accepted, and every principle seems to have its friends. . . . The dicta . . . are contradictory. Your Lordships find the matter at large, so far as this House is concerned." Ultimately, the question for us must be, what is the meaning of " mining operations " (other than coal mining) in this *Income Tax Assessment Act*, when all its parts and purposes have been considered. It is dangerous even to rely much on the language used in Acts of some of our own States, especially when it is used in express definitions given for the purposes of these Acts.

The exception made of coal mining from " mining operations " in this section is curious, and it may be significant. I do not think that we can take judicial notice of the fact, alleged during the argument, that some of our coal mines are worked without any underground passage or drive. The only reasonable explanation that I have heard suggested for the exception of coal mining is that in coal mining the element of chance and speculative effort is largely excluded ; and the development of the mine generally involves the extraction of the commodity sought. Perhaps the same reasoning would apply to the extraction of slate. But here it is one of the facts stated in the case that the expenditure in question was for development.

I do not think that I should be justified in saying that under no circumstances can there be " mining operations " unless there is an underground passage or drive, or that the fact of slate being the object of the quest, or the fact of slate being extracted from any overburden of decayed slate, prevents the operations from being " mining operations." In other words, all the facts stated in the case are consistent with a finding that the company is carrying on mining operations. Looking back to the precise question asked, I should say that " *on the facts stated* " the trial judge is at liberty to hold that the company is carrying on mining operations within the meaning of sec. 17.

But it must be clearly understood that this answer would not be conclusive as to other slate quarries, on other evidence, or even as to this slate quarry on facts which are not here stated. If there

(1) (1910) A.C., 116, at p. 125.

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Starke J.

should be an appeal from the decision of the trial Judge on these objections to assessment, this Full Court should freely review the decision, and hear any criticism of the decision on such grounds as that facts (proved or admitted) are not stated in the case though material to the decision, or that the learned Judge has misapprehended the effect of the evidence.

STARKE J. Special provisions are made in the *Income Tax Assessment Act* 1915-1918 in connection with income derived from mining operations (see sec. 17). The expression "mining operation" is popular and not technical (cf. *North British Railway Co.* v. *Budhill Coal & Sandstone Co.* (1), and its exhaustive definition would be as unwise as it would be difficult. In a general way, excavating the earth for the purpose of obtaining metals, metallic ores, or minerals is ordinarily and popularly described in Australia as a mining operation. The material obtained in the present case from the earth is slate, worked on the open-cut or surface system. The case contains singularly little information as to the use of this system in mining operations in Australia, and it would have been better, in my opinion, if the matter had received further investigation than the facts stated in the case suggest. And, while it is common knowledge that open-cut or surface workings are a form of mining in Australia, I have, nevertheless, had some hesitation, not as to that fact, but as to the propriety of acting upon it, unless the question were investigated either by the Court or the parties and the result stated in the case. Applying this knowledge to the facts which are stated in the case, it cannot be said that the open-cut or surface system of working precludes the operation of the appellant from being a mining operation within the meaning of the Act.

Next, if we consider the substance obtained, slate, that is commonly included in the mineral resources of a country, and indeed the Mining Acts of the various States make it clear that a mining operation, for the purposes of those Acts, includes the searching for or obtaining gold or any other mineral from the earth by any mode or method (Victoria, *Mines Act* 1915; Queensland, *Mining Acts* 1898-1910; Western Australia, *Mining Act* 1904; New South Wales, *Mining Act*

(1) (1910) A.C., 116.

1906). There is no doubt that slate falls within the provisions of those Acts. Consequently, the nature of the material does not preclude the operation of the appellant from being a mining operation.

Finally, it was said that the works or operations of the appellant were " quarrying operations " as opposed to " mining operations." In this connection also, the case is singularly bare of facts : there is nothing to indicate the nature and extent of quarrying operations in Australia, or to point out the distinction, if any, between such operations and mining operations. But, again using common knowledge, we may describe a quarry as an excavation from which useful rock or other material is taken for building, engineering, and other purposes, and generally worked on the open-cut system. The word " quarry," as Lord *Watson* said in *Farie's Case* (1), is inapplicable to underground workings, but the word " ' mining ' may without impropriety be used to denote some quarries." If the method of working and the substance worked do not necessarily exclude the appellant's operation from the category of mining operations, then the words " quarry " and " quarrying operations " are not used in opposition to the words " mine " and " mining operations," but rather as a particular instance of a larger description. Consequently, calling the appellant's works a " quarry " and describing its operations as " quarrying " operations will not preclude those operations from falling under the phrase " mining operations " contained in the *Income Tax Assessment Act*.

The question submitted may therefore be answered in the affirmative.

Questions answered in the affirmative.

The appeal subsequently coming on for further hearing, RICH J. delivered the following written judgment :—

In this appeal I stated a case for the opinion of the Full High Court under the provisions of sec. 38 of the *Income Tax Assessment Act* 1915-1921, and submitted the question whether on the facts stated the Court is at liberty to hold that the appellant is carrying on mining operations within the meaning of sec. 17 of the *Income Tax Assessment Act* 1915-1921 and is entitled to the deductions allowed by that section. To that question an affirmative answer was given.

(1) (1888) 13 App. Cas., at p. 677.

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Having regard to this answer, and the parties admitting that they have placed before me all the evidentiary facts they desire to bring before me, I find that as a fact the appellant was at the material time carrying on mining operations within the meaning of sec. 17, and hold that it is entitled to the deductions allowed by that section.

Deductions and appeal allowed with costs.

Solicitors for the appellant, *Faithfull, Maddock & Oakes.*

Solicitor for the respondent, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

THE EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY LIMITED . . . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

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MELBOURNE, *Oct.* 29.

SYDNEY, *Dec.* 13.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Powers, Rich and Starke JJ.

Land Tax (Commonwealth)—Assessment—Exemption—Agreement by Government of Colony to exempt from taxation—Agreement to recoup taxation paid—Construction of contract—Circuity of action—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 69, 85 (IV.)—*Land Tax Assessment Act* 1910-1916 (*No.* 22 *of* 1910—*No.* 33 *of* 1916), *secs.* 3, 10-13, 44, 46—*Anglo-Australian Telegraph Act* 1870 (*S.A.*) (*No.* 11 *of* 1870), *secs.* 1, 2.

An agreement was made in 1871 between the Government of the Province of South Australia and a company to whose rights the appellant succeeded, whereby the company was empowered to lay down at Port Darwin the land end of a submarine telegraph cable and to take possession of a certain area of land for the purpose of landing, maintaining and protecting the cable and setting