[HIGH COURT OF AUSTRALIA.]

PARKER . . . . . APPELLANT;
APPELLANT,

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.
RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1953.

PERTH, *Oct.* 21, 22.

SYDNEY, *Dec.* 1.

Dixon C.J., Webb and Taylor JJ.

Income Tax (Cth.)—Exemption—"Income derived by a person from the working of a mining property . . . principally for the purpose of obtaining gold"—Dumps of tailings on mining property—Tailings purchased by taxpayer for treatment—Income arising from recovery of gold from tailings—Income Tax Assessment Act 1936-1943, s. 23 (o).

The taxpayer was the holder of a gold-mining lease and, for the surface of the same area, a machinery area lease. On this area the taxpayer operated a crushing plant with which he crushed a small amount of ore won from his own mining lease as well as ore won from other mines, in two of which he had a part interest. After the extraction of the gold by crushing, the residues were run off in the form of slimes or tailings. The taxpayer purchased these tailings collecting them into dumps on the surface of his machinery area and treated them with cyanide and thereby extracted residual gold from them. The taxpayer claimed exemption in respect of income derived from the residual gold as being income derived from the "working of a mining property . . . . principally for the purpose of obtaining gold" under s. 23 (o) of the *Income Tax Assessment Act* 1936-1943.

Held: Winning gold from such tailings by treating them by a cyanide process did not constitute "the working of a mining property . . . for the purpose of obtaining gold" and accordingly income derived therefrom was taxable.

The phrase "the working of a mining property" looks to the exploitation of a mining lease or other form of interest in the soil.

Federal Commissioner of Taxation v. *Henderson* (1943) 68 C.L.R. 29 distinguished.

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APPEAL from the Supreme Court of Western Australia.

This was an appeal by Thomas John Parker from the decision of the Supreme Court of Western Australia (*Dwyer* C.J.) on an objection to the assessment to income tax of income derived by him during the year ended 30th June 1943. The notice of objection claimed that the sum of £1,285 should not be included in Parker's assessable income for the year in question upon the ground that such sum was exempt under s. 23 (o) of the *Income Tax Assessment Act* 1936-1943 as being income derived by him from " the working of a mining property . . . principally for the purpose of obtaining gold ". The appellant was the holder of a gold-mining lease and, for the surface of the same area of land, of a machinery area lease. Erected on this land was a crushing plant and other machinery designed for the extraction of gold from slimes or tailings. The appellant treated, by crushing, ore won from his own gold-mining lease, ore won from a gold-mining lease in which he held a partnership interest and ore won from other mines in which he had no interest. After the extraction of gold from the ore by crushing, the residues were run off in the form of slimes or tailings. The appellant purchased slimes or tailings from the ore he crushed on behalf of third parties and collected all such slimes or tailings on the surface of the machinery area. On this area he subsequently extracted gold from them on his own account, using a treatment known in the industry as the " cyanide process ".

The appeal was conducted on the basis that the whole of the amount of the income in question, namely £1,285, was derived from the sale of gold extracted by the appellant from purchased tailings. *Dwyer* C.J. held that the phrase " working a mining property . . . principally for the purpose of obtaining gold " referred to the obtaining of gold-bearing material from the mine by excavation or something of that nature and accordingly held that the sum of £1,285, was not derived from the working of a mining property.

From this decision the appellant appealed to the High Court.

B. Carson, for the appellant. The taxpayer's treatment of tailings was similar to the " cyanide process " described by *Williams* J. in *Federal Commissioner of Taxation* v. *Henderson* (1). The treatment of tailings is not part of the treatment of the ore. The tailings are created by crushing ore and then come into existence for the first time. The tailings at all times belonged to the appellant and at all times were on his gold-mining lease and machinery area lease. The taxpayer by extracting gold from tailings was " working

(1) (1943) 68 C.L.R. 29, at pp. 33, 34, 35 and 39.

a mining property ". This case is governed by the decision in *Federal Commissioner for Taxation* v. *Henderson* (1). The expression " carrying on mining operations for gold " and " working a mining property " are synonymous. [He referred to s. 23A and 23C of the *Income Tax Assessment Act* 1936-1943.] It is conceded by the commissioner here that in so far as the appellant is treating tailings derived from ore which he excavated, he is " working a mining property ". It can make no difference that the ore from which the tailings were derived was won by a third party. It is conceded that definitions contained in State legislation cannot control the meaning of similar expressions found in Federal legislation but such definitions have a strong persuasive force especially when the Federal statute is dealing with an industry long controlled and regulated by State legislation. The machinery area lease together with the tailings would be a " mine " for purposes of State legislation and the treatment of such tailings would constitute the working of a mine or mining (he referred to the *Mineral Lands Act* 1892 (W.A.), the *Mines Regulation Act* 1895 (W.A.), the *Mining Act* 1904-1952 (W.A.) and to the *Mining Ordinance Act* 1939 (N.T.)).

O. J. Negus Q.C. (with him *P. Connaughton*), for the respondent. The appellant's activities could fairly be described as being work carried out on a mining property but did not constitute the working of a mining property. The appellant here was not even carrying out " mining operations " as that expression was explained in *Federal Commissioner for Taxation* v. *Henderson* (1). The appellant was acquiring and treating concentrates removed from the place where they had been obtained or won by mining; see *Federal Commissioner for Taxation* v. *Henderson* (2), per *Latham* C.J., and per *Starke* J. (3).

B. Carson, in reply.

Cur. adv. vult.

Dec. 1.

The following written judgments were delivered :—

DIXON C.J. This appeal depends on the scope of the exemption from income tax conferred by s. 23 (o) of the *Income Tax Assessment Act* 1936-1943. The provision has been amended since the year of assessment. The income for which the taxpayer, who is the appellant, claims the benefit of the exemption was derived during

(1) (1943) 68 C.L.R. 29.
(2) (1943) 68 C.L.R. 29, at p. 45.
(3) (1943) 68 C.L.R., at p. 50.

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the year ended 30th June 1943 and was included in his assessment for the financial year ended 30th June 1944. The notice of objection claimed that the assessable income should be reduced by £1,285 as income derived by the appellant from the working of a mining property in Australia principally for the purpose of obtaining gold. The objection pursues the language of the exemption given by s. 23 (o) the terms of which were at that time as follows :—"(o) the income derived by a person from the working of a mining property in Australia or in the Territory of New Guinea principally for the purpose of obtaining gold, or gold and copper, provided that in this case the value of the output of gold is not less than forty per centum of the total value of the output of the mine ".

The sum of £1,285 is not correctly described as assessable income, for in arriving at the figure deductions have been allowed. But for the purposes of the appeal it is enough to say that the assessable income in dispute was for the most part derived from the recovery of gold from tailings by cyanide treatment and for the rest consisted of the reward earned by crushing ore from other mines. *Dwyer* C.J., from whose decision this appeal comes, held that this income was not derived from the working of a mining property. Certain income considered to be included or reflected in the amount of £1,285 from the crushing of ore he ordered to be deleted. Otherwise his Honour's order dismissed the appellant's appeal from the commissioner's assessment.

It appears that the appellant was the holder of a gold-mining lease and, for the surface of the same block or area, a machinery area lease. There was a crushing plant upon the area. It was probably established primarily for the crushing of ore won from the mine comprised in the area. But at the time in question the quantity so won was small and the plant crushed ore from other mines including two in which the appellant had a share or interest. After the extraction of gold the residues were run off in the form of slimes or tailings. Under the terms or conditions upon which the appellant crushed the ore and extracted the gold he obtained the tailings. That is he purchased them. The dumps of tailings upon the surface of the machinery area were therefore his property. It is from the treatment by cyanide of these dumps that the appellant derived the income for which he claims, and the commissioner denies, exemption.

The question is whether winning gold from dumps of tailings, situated in the manner stated, by treating them by a cyanide process, falls within the description " working a mining property principally for the purpose of obtaining gold ". *Dwyer* C.J. held

that it did not because the phrase referred to the obtaining of gold-bearing material from a mine, by excavation or something of that nature. For that reason income earned, whether in the form of an allowance of gold or a monetary charge, as a reward for crushing ore brought from other mines and income derived from the treatment of the dumps of tailings could not be described as derived from the working of mining property.

The appellant contends that a wider application should be given to the language of s. 23 (o). The words " mining property " are not restricted, he says, to mines in a primary or limited sense and no particular significance should be attached to the word working. He urged that the dumps were upon the surface of the mining lease and within the boundaries of the machinery area. So was the crushing plant. To treat the dumps or to crush ore was to work the mining property. The treatment of tailings, so the appellant said, was properly described as " mining operations ", as had been held in *Federal Commissioner of Taxation* v. *Henderson* (1). There was no distinction intended by the Act in its use of this phrase and in the use of the expression " the working of a mining property ". Further, in State legislation the word " mine " was employed with the most extended meaning under various statutory definitions. It included any land used for mining purposes or where a mining operation was carried on.

No doubt these accumulated considerations mount up and give the appellant's argument a persuasive force. But the words of the exemption do not seem to me to be really capable of bearing the strain it places upon them.

The word " working " has, I think, a definite meaning in its application to " mining property ". It describes the working of the thing itself—not the revolution of the machinery upon it nor the chemical treatment of residues brought upon it. We are not dealing with a case where from the raising of the ore to the extraction by every available means of the maximum gold content a series of processes is pursued in the working of the mining property in order to win the gold from the soil. Here the tailings are accumulated as a residual by-product substantially from the ore from other mines going through the crushing plant. They are acquired in effect by purchase, except as to the small part representing ore from the mine beneath. They are foreign to the " mining property " though resting upon it. The machinery area as such is not the " mining property " that is " worked ". No doubt some of the reasoning in *Henderson's Case* (1) may be appropriated to the use of the

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appellant to assist his argument. But it cannot be done without distortion of the reasoning. For the expression "mining operations" is not the same as "the working of a mining property". The former is plainly wider and the latter is directed to a different point. Mining operations means operations pertaining to mining and operations is a very large expression. The phrase "the working of a mining property" looks to the exploitation of a mining lease or other form of interest in the soil. The argument from the definitions employed in State statutes overlooks the consideration that without a statutory definition the words would not bear the extended meaning and that draftsmen frame definitions for their own convenience without regard either to the natural or the possible meanings of the words defined.

The various provisions of the *Income Tax Assessment Act* 1936-1943 relating to mining were introduced on different occasions and do not pursue a policy worked out with precision. They must be construed as they are expressed. The appellant must take the exemption made by s. 23 (o) as he finds it and it is insufficient for his purpose. The appeal should be dismissed.

Webb J. I would dismiss this appeal for the reasons given by the Chief Justice and *Taylor* J.

Taylor J. The question for determination in this appeal is whether a sum of £1,285, being the amount of the appellant's income from personal exertion upon which he was assessed to income tax for the year ended 30th June 1944, was derived by him "from the working of a mining property . . . principally for the purpose of obtaining gold" and, therefore, exempt from income tax pursuant to s. 23 (o) of the *Income Tax Assessment Act* 1936-1943.

Having been so assessed the appellant lodged a notice of objection which was disallowed and thereafter, at his request and in accordance with s. 187 of the Act, the objection was treated as an appeal and forwarded to the Supreme Court of Western Australia. Upon the hearing before that court evidence was given concerning the activities from which the appellant's income was derived. The facts show that the appellant was the holder of a gold-mining lease and also of a lease of what is called a machinery area. The latter area consisted, approximately, of the surface area of the land in respect of which the mining lease was granted. Erected on the machinery area at all relevant times was a plant designed to treat both crude ore and "tailings" for the recovery of gold. That portion of the plant used for the treatment of crude ore was operated

by the appellant for the treatment of ore from land comprised in his own mining lease and also for the treatment of ore from other mining properties. The ore so treated falls into three categories—(1) ore from the land comprised in the appellant's mining lease and which amounted to 25 tons approximately during the income year in question; (2) (i) ore won from land comprised in another mining lease known as "King of Kings" and which, apparently, was worked by a partnership in which the appellant had a half interest. The quantity of ore from this source treated during the income year in question was 437 tons; and (ii) ore won from the "Pakeha" mine which was worked by another partnership in which the appellant had a one-quarter interest. Ore treated from this mine during the relevant year amounted to 112 tons; and (3) ore won from other mines in which the appellant had no interest. This amounted to 888 tons during the year in question.

For the crushing of all ore other than the quantity of 25 tons referred to in paragraph (1) above and for the extraction of gold therefrom a charge was made by the appellant, and, in addition, he was, by custom, entitled to retain a percentage of the gold so recovered. According to the plaintiff's accounts a loss was made on these operations but in producing this result there was charged against receipts an amount for depreciation which was not wholly allowed in assessing him to tax. Nevertheless, however, the case has been conducted throughout on the basis that the whole amount of the income in question, namely £1,298, was derived from the secondary operations conducted by means of the plant on the machinery area, that is, the treatment of "tailings" or the residue remaining after the initial crushing and extraction of gold by a screening process.

The evidence shows that after the completion of the initial process the "tailings" from customers' ore were purchased by the appellant, that the practice was to place such tailings on a dump or dumps on the machinery area and there allowed to dry out for a period of two or three months preparatory to further treatment. The further process consisted of treatment of the tailings in a cyanide solution and the subsequent recovery of the residual gold by means of a process of precipitation. It was common ground that this treatment of the tailings or dumps was similar to the "cyanide process" concerning which evidence was given in *Federal Commissioner of Taxation* v. *Henderson* (1) and which was described in some detail in the judgment of *Williams* J. in that case.

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Upon the authority of that case it was contended that the operation of that process in the circumstances related in this case clearly constituted the carrying on of mining operations for gold. One of the questions which arose in *Henderson's Case* (1) was whether the company, in which the taxpayer was a substantial shareholder, was, within the meaning of s. 78 (1) of the *Income Tax Assessment Act* 1936-1938, "a mining company . . . carrying on mining operations . . . for gold". The operations which were disclosed by the evidence were in all respects similar to those which constituted what I have called the secondary operations of the appellant and there is no doubt that the decision in that case is clear authority for the proposition that those operations may correctly be classified as mining operations. This conclusion by itself, however, does not advance the appellant's case very far for the relevant words of s. 23 (o), under which he claims his exemption, operate to exempt, not income derived from mining operations, but "income derived by a person from the working of a mining property . . . for the purpose of obtaining gold". The significance of the distinction which the latter form of words readily suggests was very properly conceded by counsel for the appellant but he contended that the line of reasoning which led to the conclusion in *Henderson's Case* (1) affords strong support to the appellant's case. The appellant, it is said, is carrying on mining operations for the purpose of obtaining gold and these operations, it is contended, are, in fact, being carried on in the course of the working of a mining property. The contention is that either the machinery area upon which the plant stands or the dumps of tailings accumulated thereon, may properly be regarded as constituting a mining property. Or, it is added, the mining area may be regarded as constituted by a combination of both of these elements. The machinery area, itself, is, for the purpose of some State legislation to which we were referred, defined as "a mine". The *Mineral Lands Act* 1892 (W.A.), defines a mine as a "*place*, pit, shaft, drive, level, or other excavation, lead, vein, lode, or reef, *in* or by *which any mining operation is carried on*" and a substantially similar definition is given to the word "mine" by the *Mines Regulation Act* 1895 (W.A.). Again, we were referred to the *Mining Ordinance* 1939 of the Northern Territory, and the *Mining Act* 1904-1952 (W.A.) each of which defines "mine" to mean "any land held, occupied or used for mining purposes". A not dissimilar definition is also contained in the *Mining Regulation Act* 1946. But as *Latham* C.J.

(1) (1943) 68 C.L.R. 29.

said in *Henderson's Case* (1) " definitions enacted for the purpose of a State statute cannot control the interpretation of a Federal statute " (2) although those definitions may " show that it would not be inconsistent with the use of those terms in State legislation to hold that the sluicing and treatment of tailings were mining operations ", or, I might add, that a property upon which those operations are carried on is a " mine ". It seems to me, however, that the operations described in *Henderson's Case* (1) were regarded as mining operations because " in mining parlance the process of extracting the gold from the dumps is called re-treatment, and that re-treatment is one among a number of operations which can be described generically as mining operations ". (See per *Williams* J. (3)). But it does not necessarily follow that the same operations could not be carried out in circumstances which might preclude the application of this description and, indeed, *Latham* C.J. pointed out that this was so. He said :—" The evidence of a mining expert, Mr. V. T. Edquist, showed that, according to the ordinary use of the term, gold mining includes not only excavation of material by digging, or mechanical methods, or hydraulic methods, but also treatment by a battery or otherwise, and by a chemical process, when carried out at the place where the gold-bearing material was obtained. The witness agreed that if material such as concentrates or tailings had been removed from the place where it was produced and treated at some other place (for example, if it were removed from Broken Hill to Port Pirie) the treatment at the latter place would not be described as a mining operation, though the same process at the place of origin would be described as part of the mining operations " (4). *Starke* J., however, does not appear to have shared this view when he said :—" Large dumps of mined material were stacked on the surface of the ground, and this material was conveyed by means of hydraulic power to a plant where it was treated by a cyanide process and the gold contained in it recovered. Had this operation been carried out in series when the gold-bearing material was mined and brought to the surface, there can be little doubt, though not conceded in argument, that the operation would have been properly described as a mining operation. And there is no reason why such an operation should not fall within the indefinite description " mining operations " because it is carried out at a later date and by another operator. The dumps were worked by methods in common use amongst mining men for the recovery of gold, and the gold was recovered

(1) (1943) 68 C.L.R. 29.
(2) (1943) 68 C.L.R., at p. 44.
(3) (1943) 68 C.L.R., at p. 39.
(4) (1943) 68 C.L.R., at p. 45.

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by an ordinary mining method or process " (1). It is, at least, implicit in the manner in which these views are stated that the operator of a " cyanide process ", working quite independently of the anterior mining operations and those persons engaged therein, is not engaged in working the mining property from which the ore in its crude condition originally came. The contrary view is not open and the appellant did not seek to advance it. But can it be said that in those circumstances the operator is working a mining property of his own—quite different and distinct from the property from which the crude ore was originally won—for the purpose of obtaining gold ? Is the conclusion reasonably open that the appellant's machinery area is a mine for the purposes of the *Income Tax Assessment Act* 1936-1943, because it is so designated by State legislation enacted for a very different purpose or because mining operations are there carried on ? In my opinion that conclusion is not open. The expression " the working of a mining property . . . for the purpose of obtaining gold ", it seems to me, denotes the exploitation of the soil for the purpose of the recovery of gold. This is not equivalent to the operation of a plant established for the treatment of tailings brought from mining properties, though, of course, that operation might well constitute, in appropriate circumstances, one incident in the working of a mining property. No doubt all processes designed for the purposes of recovering gold may be employed in the working of a mining property as I understand that expression ; but it is equally true that some of those processes may be employed commercially quite independently of the working of a mining property and the fact that they are so employed on a machinery area, which for some purposes has been designated as a " mine ", does not carry the matter any further. Nor, in my opinion, can the dumps of tailings be regarded themselves as a mining property. They are not in any real sense part of the appellant's mining area or machinery area ; they, in a real sense, constitute merely the raw material used in the commercial operation of the appellant's plant.

So far no reference has been made to the provisions of the Act, other than s. 23 (o), which relate to " the carrying on of mining operations " or " the working of a mining property ". The appellant, however, sought to establish by reference to other provisions of the Act that these two expressions were used interchangeably and, for the purpose of dealing with this argument, it is necessary to refer to a few of the provisions of the Act. In the first place, counsel for the appellant referred to s. 23A which was inserted in

(1) (1943) 68 C.L.R., at p. 50.

the Act in 1942. This section provided a special deduction in respect of income derived from the production or sale of base metals or rare minerals where the taxpayer carried on mining operations for the production of any of such metals or minerals as might be specified by regulation as required for war purposes. A perusal of the section, however, indicates that the deduction for which provision is made is of a very special character and in my view no help in this case can be obtained from a consideration of its provisions. Reference was also made to s. 23c which was inserted in the Act in 1951. This section exempts from income tax income derived by a company from the sale of gold produced in Australia or in the Territory of New Guinea where certain prescribed conditions exist. The exemption does not apply unless all the shareholders of the company carry on mining operations in Australia or in the Territory of New Guinea wholly or partly for the purpose of obtaining gold, nor unless the company is on the last day of the year of income a company approved by the Treasurer for the purposes of the section and the gold was purchased by the company from the Commonwealth Bank and the gold has been exported or is to be exported with the consent of that bank. Sub-section (2) of this section extends the exemption to dividends paid to any person wholly and exclusively out of income which is exempt by virtue of the operation of the section. This exemption is effected by providing that such dividends shall be deemed to be income derived by the shareholder from the sale of gold obtained from "*the working of the mining property* . . . on which that person is carrying on or has carried on mining operations". It is clear, of course, that the exemption provided by s. 23 (o) operated in favour of companies and that no further legislation was necessary to extend the exemption conferred thereby to companies. Nor was it necessary in order to extend the exemption to dividends received by a shareholder from a company which itself enjoyed the exemption prescribed by s. 23 (o). Provision for that circumstance already existed in s. 44 (c). The position is, as I see it, that s. 23c was intended to introduce an exemption, subject to specified conditions, of a more far-reaching character than that provided for in s. 23 (o), and, this being so, no assistance is afforded to the appellant by a consideration of its provisions. The fact that sub-s. (2) of s. 23c employed the language of s. 23 (o) for the purpose of extending to the recipients of dividends the exemption granted by sub-s. (1) does not, in my view, throw any light on the matter. Indeed if the appellant's argument were right there would have been little, if indeed any, need for the introduction of s. 23c for, if the expression

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"the carrying on of mining operations" were interchangeable with the expression "the working of a mining property" income derived by a company from the sale of gold produced as the result of mining operations carried on by the company in Australia or in the Territory of New Guinea would be exempt under the provisions of s. 23 (o) and such exemption would not be subject to the conditions specified in s. 23c. In all the circumstances I do not think that consideration of these provisions of the Act assist the appellant's case.

For the reasons given I am of the opinion that the appellant's income was not, except insofar as it is attributable to the tailings traceable to the 25 tons of ore from his own mining lease, derived from the working of a mining property and accordingly I am of the opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *Bryan Carson*, Kalgoorlie.

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth.

F. T. P. B.