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sub-s. (2) of s. 105A has not yet operated to bring about a change in the trading hours fixed by sub-s. (1), and it is for failure to observe the trading hours fixed by sub-s. (1) that the information has been laid.

I would hold that s. 105A (1) is valid.

KITTO J. It is clear that there is nothing in the point taken by the defendant and brought here for decision. As a mere matter of construction, the overtime provisions of the award are plainly not directed to the lawfulness of the things which an employer may direct his employee to do in the course of working overtime. They relate only to the right of the employer to have his employee on the job outside ordinary working hours, and the correlative obligation of the employee. Presumably no one would support the broad proposition that because of those provisions an employer who wants something done which would be within the scope of the employment if it were lawful but is unlawful in the sense that the general law of the land forbids it to employees and non-employees alike, need only require his employee to do it by way of overtime and it will become by virtue of his command a lawful thing for the employee to do. Yet the defendant's contention really comes to that in the end. It should be denied and the case sent back to the magistrate.

As to the part of this cause removed pursuant to s. 40 *of the Judiciary Act* 1903-1950 *by the order of this Court dated* 18*th April* 1955 *being the question set out in such order, declare that the provisions of the Federal Metal Trades Award therein mentioned did not absolve the defendant on* 10*th January* 1955 *from observing s.* 105A *of the Factories and Shops Act* 1912-1954 *of New South Wales with respect to the shop for the sale of motor spirit, motor oil and motor accessories known as Sydney Service Station and situated at No.* 9 *Flinders Street, Darlinghurst. Remit the information to the Chief Industrial Magistrate to be dealt with consistently with the foregoing declaration and according to law. Order that the defendant do pay the costs of the proceedings in this Court.*

Solicitor for the applicant-informant, *F. P. McRae*, Crown Solicitor for New South Wales.

Solicitors for the respondent-defendant, *Remington & Co.*

J. B.

N.S.W. ASSOCIATED BLUE-METAL QUARRIES LIMITED . . . } APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

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1955, SYDNEY, *April* 26; *May* 3.

Kitto J.

SYDNEY, *Nov.* 17, 18, 21,

1956, MELBOURNE, *Feb.* 23.

Dixon C.J., Williams and Taylor JJ.

Income Tax—Assessment—"Mining operations upon a mining property"—Blue-metal or bluestone quarry—Open-cut workings—Stone—Process and treatment—Taken from quarry—Expenditure of capital nature—Necessary plant, development of property or housing and welfare of employees—Deduction—Income Tax and Social Services Contribution Assessment Act 1936-1952 (*No.* 27 *of* 1936—*No.* 4 *of* 1952), *ss.* 122 (1), 122A.

A company conducted extensive operations for the winning and crushing of blue-metal or bluestone. The stone was won in an open-cast working, and was crushed upon the site. Where it had been quarried the bed of igneous rock lay under an overburden of depths varying from seven to sixty feet. Electrically driven mechanical navvies were used for the removal of the overburden and of the stone worked. During the year of income the company in connection with its workings incurred expenditure amounting to £74,058 in respect of plant and machinery; to £493 in respect of an electricity sub-station; to £901 in respect of its office and furniture; and to £356 in respect of certain amenities for workmen. A claim by the company that under s. 122 (A) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952 it was entitled to deduct the total amount of £75,813 from its assessable income was disallowed by *Kitto* J.

On appeal,

Held that the expenditure had not been incurred in connection with "mining operations upon a mining property" within the meaning of s. 122A of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952.

Deputy Federal Commissioner of Taxation (*Q.*) v. *Stronach* (1936) 55 C.L.R. 305, applied.

Decision of *Kitto* J., affirmed.

H. C. OF A. 1955-1956.

N.S.W. ASSOCIATED BLUE-METAL QUARRIES LTD. v. FEDERAL COMMISSIONER OF TAXATION.

APPEAL.

The N.S.W. Associated Blue-Metal Quarries Pty. Ltd. objected to its assessment to income tax upon its income derived in the year ended 30th June 1952, on the ground that in the making of the assessment it was entitled to, but was not given, the benefit of the application of Div. 10 of Pt. III of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952. The commissioner having disallowed the objection, he, at the request of the taxpayer, forwarded it to the High Court as an appeal.

The appeal came on for hearing before *Kitto* J. in the original jurisdiction of the High Court.

The relevant facts and statutory provisions are sufficiently set out in the judgments hereunder.

R. Fox, for the appellant.

Dr. *F. Louat* Q.C. and *E. J. Hooke*, for the respondent.

Cur. adv. vult.

May 3, 1955.

The following written judgment was delivered :—

KITTO J. The appellant company, having been assessed to income tax upon its income derived in the year ended 30th June 1952, objected on the ground that in the making of the assessment it was entitled to, but was not given, the benefit of the application of Div. 10 of Pt. III of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952. The objection was disallowed by the commissioner and it now comes to this Court, at the appellant's request, as an " appeal ", that is to say as a proceeding in the original jurisdiction of the Court for determination of the issues raised by the disallowance.

The relevant provisions of Div. 10 must be considered in the form which they took as a result of the passing of the amending Act No. 44 of 1951 and the application of s. 16 of that Act to assessments in respect of income of the year of income which commenced on 1st July 1951 (s. 46).

Section 122 (1) provides that where a person, in connection with the carrying on by him of mining operations upon a mining property in Australia or the Territory of New Guinea for the purpose of gaining or producing assessable income, has incurred expenditure of a capital nature on necessary plant, development of the mining property or housing and welfare, an amount ascertained in accordance with the section shall be an allowable deduction in respect

of the expenditure. The succeeding sub-sections provide for a spread of the expenditure over a period of years. Section 122A, however, enables a person who has incurred expenditure specified in s. 122 (1) on plant or development to elect, in the case of expenditure falling within certain descriptions, that expenditure to which the election applies shall be an allowable deduction from the assessable income of the year of income in which the expenditure was incurred. The appellant in fact elected to have the section applied " in respect of all mining plant and expenditure on development acquired or incurred during the year ended 30th June 1952 ".

In that year, the appellant held shares in a number of subsidiary companies, most of which were concerned in the extraction of blue-metal from the earth or from river sand and the marketing thereof. It conducted itself only one activity, consisting in the obtaining of blue-metal by means of open workings on land at Prospect in the State of New South Wales. It owned the freehold of part of the land and was lessee of the remainder. Pursuant to its election under s. 122A, it claimed as an allowable deduction, in the assessment now under appeal, an amount of £75,813 made up as follows: £74,058 expended on the acquisition of certain plant and machinery for the working of its enterprise at Prospect, £356 expended on an amenities block at Prospect for the use of its workmen engaged there, £493 expended on an electricity sub-station at Prospect for the supply of power for its workings, £851 expended on its office there and £55 in buying furniture for the office.

On the hearing of the appeal the commissioner put the appellant to formal proof of the expenditure of these amounts in the relevant year and of their correspondence with the descriptions contained in s. 122. Evidence in this connection was given by the appellant's secretary and public officer and by its quarry manager, and I accept their evidence. I find that the total sum of £75,813 was expenditure of a capital nature, on necessary plant and development of the appellant's property at Prospect, incurred by the appellant in connection with the carrying on by it of its operations on that property for the extraction of blue-metal for the purpose of gaining or producing assessable income. The only outstanding question is whether those operations fill the description " mining operations upon a mining property " within the meaning of s. 122.

This is a mixed question of law and fact: see the cases cited by *Rich* J. in *Federal Commissioner of Taxation* v. *Broken Hill South Ltd.* (1). First it is necessary to decide as a matter of law whether the Act uses the expression " mining operations " and " mining

(1) (1941) 65 C.L.R. 150, at p. 154.

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property " in any other sense than that which they have in ordinary speech. As to this, it is enough in the present case to say that the expressions are not defined in the Act, that they have no technical legal signification, and that neither in the provisions of Div. 10, nor in any of the other provisions of the Act in which these or similar expressions occur (ss. 23 (*m*), (*o*), (*p*), 23A, 44 and 78 (1) (*b*)), is there to be found any indication that the Parliament intended any other meaning than that which the words ordinarily have in this country and at this time. The common understanding of the words has therefore to be determined, and that is a question of fact : see the cases cited by *Starke* J. in the *Broken Hill South Case* (1). The next question must be whether the material before the Court reasonably admits of different conclusions as to whether the appellant's operations fall within the ordinary meaning of the words as so determined ; and that is a question of law : *ibid* ; see also per *Isaacs* and *Rich* JJ. in *Australian Slate Quarries Ltd.* v. *Federal Commissioner of Taxation* (2). If different conclusions are reasonably possible, it is necessary to decide which is the correct conclusion ; and that is a question of fact : see per *Williams* J. in the *Broken Hill South Case* (3).

The meaning of the expression " mining operations " in ordinary parlance has been considered by this Court in two cases under Commonwealth taxing Acts, *Australian Slate Quarries Ltd.* v. *Federal Commissioner of Taxation* (4) and *Deputy Federal Commissioner of Taxation* (*Q.*) v. *Stronach* (5). *Isaacs* and *Rich* JJ. in the former case (6) thought that the expression as " universally understood in Australia " in a context which does not treat " mining " and " quarrying " as antithetical embraced all operations whether by hand or by machinery, and whether confined to excavating the surface as in alluvial claims or extended to excavations below the surface, by which any valuable deposit, other than ordinary soil, is extracted from the earth. This wide view has not accorded with the understanding of other judges of this Court, and I am bound to say, with respect, that it does not accord with mine. It is clear enough that " mining " is not nowadays confined in its meaning to the winning of minerals by means of underground working, for although that is its primary meaning an extended sense has long been given to it in connection with some substances. The extraction of coal by open-cut working, for example, is commonly referred to as open-cut coal-mining. On the other hand it seems safe to say

(1) (1941) 65 C.L.R., at p. 155.
(2) (1923) 33 C.L.R. 416, at p. 419.
(3) (1941) 65 C.L.R., at p. 160.
(4) (1923) 33 C.L.R. 416.
(5) (1936) 55 C.L.R. 305.
(6) (1923) 33 C.L.R., at p. 420.

that the getting of some other substances, such as freestone and granite, in blocks for building purposes, would never be spoken of as mining. In *Stronach's Case* (1) the Court declined to hold that such blocks were derived from operations in mining. The distinction which is commonly observed is, I think, that which *Dixon* J. indicated in the latter case (2). While "mining" is nowadays given an extended meaning in relation to the winning of substances which have come to be thought of as generally obtained by underground working, so as to include the extraction of such substances even by means of surface excavations, yet such an extended meaning is not ordinarily given to the word in relation to other substances. For them the word "quarrying" is usually employed, though this again is by way of extension since the primary significance of the noun "quarry" is a pit for the cutting of blocks of stone such as those in question in *Stronach's Case* (1). It would, I think, be unusual to apply the word "mine" to open diggings for the obtaining of stone of a kind which does not call up, by association, the idea of mining in the sense of sinking a shaft and tunnelling in pursuit of a desired substance. The point was brought out by Lord *Herschell* in *Lord Provost and Magistrates of Glasgow* v. *Farie* (3) (though he was dissenting on the construction of the Act there in question), when he said: "The word 'mines' is, I think, in a secondary sense, very frequently applied to a place where minerals commonly worked underground are being wrought, though in the particular case the working is from the surface. For example, where iron is got by surface workings they are spoken of as iron mines, and so, too, with coal which crops out at the surface. No one, I think, ever heard of a coal or iron quarry" (4). This passage is reflected in *Halsbury's Laws of England*, 2nd ed., vol. 22, par. 1155, p. 527.

There is no evidence before me to suggest, and I have no reason to think, that blue-metal is ever obtained by underground workings, either in this country or elsewhere. The method employed at the appellant's works at Prospect appears to be that which is typical if not invariable in the industry. First, bores are put down in order to test the depth of the overburden, that is to say the material lying above the stone which is to be worked. An area suitable for working having been decided upon as a result of these tests, the overburden is removed from it. The stone thus exposed is bored by means of pneumatic drills, and explosives are placed in the holes and fired. The broken stone thus obtained is loaded by means of

(1) (1936) 55 C.L.R. 305.
(2) (1936) 55 C.L.R., at p. 313.
(3) (1888) 13 App. Cas. 657.
(4) (1888) 13 App. Cas., at p. 684.

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electrically operated navvies into waggons and conveyed to screens and crushers. When the pit becomes deep, as it has at Prospect, part only of the crushing process is done on the floor of the pit, and the stone is then lifted by another conveyor to a higher level or to the surface for further screening and crushing. It is then loaded into lorries and taken away to fill orders from purchasers. The scene of the workings becomes an excavation of large and increasing area, open to the sky. At Prospect the depth of overburden in the area worked varies from seven feet to sixty feet, and the total depth of the excavation from thirty feet to one hundred and fifty feet. At other places, such as Dunmore, at Shellharbour, the overburden may be only sufficiently thick to carry light shrubs and occasional trees.

Blue-metal may consist of basalt or dolerite or a mixture of both. In either form it is an igneous rock. It is not very plentiful in New South Wales, but there are deposits in a number of districts, and so far as appears the method of its extraction conforms everywhere with that employed by the appellant at Prospect, except that one of the appellant's subsidiary companies obtains blue-metal by scooping it from the bed and dry flats of the Nepean River, and at Bombo, near Kiama, the working consists of cutting into the side of a hill which is almost bare of overburden. The open-cut method of extracting minerals from the earth is well-known, not only, as I have already mentioned, for coal, but also for copper, iron ore and scheelite. But the fact, for it seems to be a fact, that the word "mining" is in common use with respect to the getting by this method of some or all of these minerals, commonly associated as they are with mining in its narrower sense, affords the appellant no assistance. Here we have to do with a substance which is not known as an object of underground mining; and an open pit from which it is got is ordinarily called a quarry and not a mine.

I do not go so far as to say that a view favourable to the appellant in this case could not reasonably be held. But in the end the conclusion must depend on one's own understanding of the sense in which words are currently used, and, although Dr. Johnson in his day defined a "quarry" as a "stone mine" (see (1)), it seems to me an unnatural and inapt use of language to apply the term "mining operations" to the getting of stone such as blue-metal by open excavation, and to call the land on which those activities are conducted "a mining property".

Accordingly I hold that Div. 10 has no application in this case, and I must dismiss the appeal.

(1) (1889) 15 App. Cas., at p. 31.

From that decision the taxpayer appealed to the Full Court of the High Court.

N. H. Bowen Q.C. (with him *R. W. Fox*), for the appellant. Mining for slate in an open cut is mining operations upon a mining property (*Australian Slate Quarries Ltd.* v. *Federal Commissioner of Taxation* (1)). The facts of this case come within the expression " mining operations ". Although the statutory provision there under consideration (s. 17 of the *Income Tax Assessment Act* 1915-1921) has been amended many times there has never been a change of emphasis or change in definition : see s. 122, *Income Tax and Social Services Contribution Assessment Act* 1936-1952. Mining operations do not necessarily require subterranean operations (*Deputy Federal Commissioner of Taxation* (*Q.*) v. *Stronach* (2)). Nor need the resultant product be mineral ; it may be something of any particular or special commercial value, and the type of operation undertaken may be of a general mining character. The obtaining of material aggregate, or blue-metal, by open cut or quarries is mining operations (*Australian Slate Quarries Ltd.* v. *Federal Commissioner of Taxation* (3)). That case is a statement by five justices of this Court as to the conceptions of mining operations in Australia and how far they would extend to open-cut methods. Extraction in this context would involve the separation of something that has to be got out of soil in a position, either by blasting, which is the common mining method, or by mechanical means necessitating mining operations : see generally *Lord Provost and Magistrates of Glasgow* v. *Farie* (4) ; *R.* v. *Dunsford* (5) ; *Midland Railway Co.* v. *Robinson* (6) and *Bell* v. *Wilson* (7). A scooping-up would not be an extraction from the soil. The expression " mining operations " while the decision in *Australian Slate Quarries Ltd.* v. *Federal Commissioner of Taxation* (1) still stood shows that (i) the policy was as that stated ; (ii) that mining is a test—both as to mining operations and mining property ; (iii) that what is referred to is that one would not be precluded because it was open-cut ; and (iv) mining means excavation of anything apart from the soil which is of some value. That exposition of the section having been given, the section was repeated year after year. Regard should be had to the nature or mode of operation rather than to the final product. The object of s. 122 (1) is to give the capital expenditure

(1) (1923) 33 C.L.R. 416.
(2) (1936) 55 C.L.R. 305.
(3) (1923) 33 C.L.R., at pp. 418, 426.
(4) (1888) 13 App. Cas. 657.
(5) (1835) 2 Ad. & El. 568 [111 E.R. 219].
(6) (1889) 15 App. Cas. 19.
(7) (1865) 2 Dr. & Sm. 395 [62 E.R. 671] ; (1866) 1 Ch. App. 303.

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spread over the estimated life of the mine. The formula for doing it has varied from time to time, but sub-s. (1) originally appeared in the form that it was restricted to capital expenditure—expenditure of capital, and it now reads " expenditure of a capital nature ". It was originally restricted to necessary plant and development and to it has now been added housing and welfare. In its former form it was the subject of a decision in *Mount Isa Mines Ltd.* v. *Federal Commissioner of Taxation* (1) which deals with the key word " mining " in the expression " mining property ". Expenditure on housing and welfare, as here, is an allowable deduction for the encouragement of the mining industry (*Federal Commissioner of Taxation* v. *Broken Hill South Ltd.* (2)). The Act recognizes what happens to a mine when it finishes, that is becomes uneconomical to work or remove and becomes a deserted township or " ghost town ". Section 122 (1) operates to give an equitable allowance. The test that is imposed as to whether it should be given or not is whether the person is gaining or producing assessable income or doing it for the purpose of gaining income and is carrying on mining operations on a mining property. The expression " mining operations " means subterranean or open-cut methods of mining as applied to anything economically desirable to be won from the earth. Since the decision in the *Slate Quarries' Case* (3) the development of open-cut mines has been literally enormous. The prices of equipment and the implements used are now essentially features of mining operations. Clay mining was dealt with in *Dominion Fire Brick & Clay Products Ltd.* v. *Labour Relations Board* (4). In *Jaques* v. *Federal Commissioner of Taxation* (5) the question before the Court was whether a company was mainly a mining company or mainly a manufacturing company.

[TAYLOR J. referred to *Errington* v. *Metropolitan District Railway Co.* (6) ; *Tucker* v. *Linger* (7) and *Newton, Chambers & Co. Ltd.* v. *Hall* (8).]

It would seem from *Lord Provost and Magistrates of Glasgow* v. *Farie* (9) that those cases are a misleading line of authority, but in so far as they emphasize that regard should be had to the mode, irrespective of product, the appellant relies upon them. Diamond drilling and the clearing of the overburden are, in modern times, essentially mining operations. There is the boring process by a drill which is essentially a piece of mining equipment. The

(1) (1954) 92 C.L.R. 483.
(2) (1941) 65 C.L.R. 150, at p. 153.
(3) (1923) 33 C.L.R. 416.
(4) (1946) 4 D.L.R. 130, at pp. 135, 136.
(5) (1924) 34 C.L.R. 328, at p. 361.
(6) (1882) 19 Ch. D. 559.
(7) (1883) 8 App. Cas. 508.
(8) (1907) 2 K.B. 446.
(9) (1888) 13 App. Cas. 657.

boring of holes and the blasting of the thing which it is desired to excavate from the soil is essentially a modern method of extracting it, and the removal by mechanical navvies is essentially a mining operation in modern times, and the conveying of it to the crushers and the crushing of it on the site is also an essential part of the mining operations. In some respects the blasting process is essentially connected with mining, but mining is now carried on without blasting. Section 122 (1) is not concerned with whether what is won is a mineral. Mining involves the extraction from the earth of some substance of commercial value which usually is or contains minerals, not being the ordinary earth itself, and not being a substance found generally over the earth's surface, by a process of or in the nature of drilling, blasting or mechanical operation. Section 122A indicates the whole policy and the recognition of the difficulties of the use of equipment of this kind in the provision for employees who have to work it. Section 23 (*p*) is another "encouragement" provision. Section 44 (2) (*c*) and (*d*) indicate that the legislature took into account what it regarded as exceptional merit in the industry. In s. 78 (1) (*b*) the legislature used special phraseology in referring to base metals and rare minerals. Section 23A was inserted specifically, in effect, as an addition, not as a general principle. Other important provisions are ss. 23 (*o*), 43 (2) and 44 (2). The processes or procedure of mining are discussed in the *Elements of Mining* by *George J. Young*, 4th ed. (1946). The question of whether certain granite and freestone were goods manufactured in Australia and involving the question of whether they were primary products derived directly from operations carried on in Australia in mining was considered in *Deputy Federal Commissioner of Taxation* (*Q.*) v. *Stronach* (1). The subject operations are essentially mining operations, therefore the section applies. The view which has been taken in England as to the meaning of the word "mines" is to be found in *Lord Provost and Magistrates of Glasgow* v. *Farie* (2). In a slightly different context the word was given a wider meaning in *Midland Railway Co.* v. *Robinson* (3); see also *Errington* v. *Metropolitan District Railway Co.* (4) and *Great Western Railway Co.* v. *Bennett* (5). These problems were considered in the *Slate Quarries' Case* (6) where it was said that so far as the English cases were concerned, in effect, they were not a safe guide and one had to have regard

(1) (1936) 55 C.L.R. 305, at pp. 306, 310-313.
(2) (1888) 13 App. Cas., at pp. 676, 678, 683, 687.
(3) (1889) 15 App. Cas. 19, at pp. 23, 26, 33-35.
(4) (1882) 19 Ch. D. 559.
(5) (1867) L.R. 2 H.L. 27.
(6) (1923) 33 C.L.R. 416.

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to what the position was in Australia. The basic question is: What is mining in Australia? That meaning could be restricted to underground working or to underground working and open-cut, or it could be subterranean or open-cut mining operations. The general policy of the *Mining Act* 1906-1952 (N.S.W.) requires "mining" to be given the widest meaning. The term is ambiguous; therefore the widest meaning is the one that ought to be given to it.

Dr. *F. Louat* Q.C. (with him *G. P. Donovan*), for the respondent. What is really before this Court on this appeal is not a question of law; it is two questions of fact (*Federal Commissioner of Taxation* v. *Broken Hill South Ltd.* (1)). The questions are, first, what is the general sense of the word "mining" and its associated process? and, secondly, do these operations come within it? An examination of *Stronach's Case* (2) shows that the fact that there were squared blocks of granite freestone being got out played no part at all in the *ratio decidendi* of the case. It is fair to assume that the framing of the various sections, such as ss. 23 (*p*), 23A, 44, 122 and 122A, and the extent of the concessions which the legislature would have thought itself to be given by the alleviation of the burden that it has made in these sections, has been conceived and calculated on the footing of the law as already declared. It is made very clear in the *Slate Quarries' Case* (3) that it was merely a decision that there was material on which the trial judge was at liberty to make certain findings. Of the various processes mentioned on behalf of the appellant only crushing is at all characteristic of mining, but the crushing in this case is for the purpose of making conveniently smaller what is taken out. Boring by drill and blasting are simply features of the world-recognized method of breaking up masses of rock, e.g. as for the construction of a tunnel. So also is the removal by mechanical navvies. There is nothing in the appellant's enterprise taken together which is in the synthesis characteristically the mining operation. The definition which is supported by authority is in two parts, namely: (i) recovery of relatively scarce minerals (that is, not found in profusion), including coal, coal being anomalous, having qualities more specialized and valuable than those of, for example, stones, soil or clay, whether recovery is by underground working or other methods, and (ii) recovery of any economically useful mineral, including coal, by underground working. Instances of relatively

(1) (1941) 65 C.L.R. 150.
(2) (1936) 55 C.L.R. 305.
(3) (1923) 33 C.L.R. 416.

scarce minerals are rutile and zircon during the 1939-1945 war. Some value must be given to either the scarceness or the intrinsic significance of what it is that is being mined before one can admit a mere surface working to be treated as a mine. In common parlance what is in effect an excavation is not regarded as a mine nor the work involved a mining operation. The mere removal of some overburden is not mining.

[DIXON C.J. referred to *Lord Provost and Magistrates of Glasgow* v. *Farie* (1).]

Assistance may be obtained from the anthology of judicial dicta on this matter in *Burrows* on *Words and Phrases Judicially Defined* (1944), vol. 3. Quarries, where they are discussed at all, are treated as being in antithesis to mines: see *Cleveland* (*Dowager Duchess*) v. *Meyrick* (2); *Midland Railway Co.* v. *Robinson* (3); *Midland Railway Co.* v. *Haunchwood Brick & Tile Co.* (4); *Attorney-General* v. *Welch Granite Co.* (5) and *South Staffordshire Mines Drainage Commissioners* v. *Elwell & Sons* (6). The amendment made in 1954 by the addition of s. 88B to the *Income Tax and Social Services Contribution Assessment Act* containing a definition of "mining operations" shows that the legislature's attention to be directly fixed upon the matter of the conception of mining operations, and the definition thereof: A mining property is a property with a mine on it. Mining operations look to the nature of the methods which are being used. But mining property must have a relevance to what has been got. It is possible to find mining operations, that is characteristic collectively of mining, being carried on but yet not carried on for a mining purpose, which is bound up with the idea of mining property. As many of the authorities say, it is a matter of finding out what the words mean in current usage.

N. H. Bowen Q.C., in reply. The width of the definition of the field of the miner and the engineer is shown in *Young's Elements of Mining* (1946) which also deals with the matter generally. A mine may include a quarry (*Lord Provost and Magistrates of Glasgow* v. *Farie* (7)). The definition inserted in the *Income Tax and Social Services Contribution Assessment Act* by s. 88B was so inserted two years after the relevant year in this case, therefore it has no bearing on the matter and should not be referred to. Definitions of

(1) (1888) 13 App. Cas., at p. 687.
(2) (1867) 37 L.J. (Ch.) 125.
(3) (1889) 15 App. Cas. 19.
(4) (1882) 20 Ch. D. 552, at p. 555.
(5) (1887) 35 W.R. 617.
(6) (1927) 97 L.J. (K.B.) 13, at pp. 15, 20.
(7) (1888) 13 App. Cas., at p. 677.

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"quarry" and "mine" are usefully recorded in *Earl of Rosse* v. *Wainman* (1) and *Bell* v. *Wilson* (2). The subject matter dealt with in the *Slate Quarries' Case* (3) was different from the subject matter dealt with in *Stronach's Case* (4).

Cur. adv. vult.

THE COURT delivered the following written judgment:—

This appeal concerns the meaning and application of the words "mining operations upon a mining property" occurring in s. 122 (1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952. These words form part of a condition on which the application of that section and of s. 122A depends. The condition runs thus: "Where a person, in connection with the carrying on by him of mining operations upon a mining property in Australia or the Territory of New Guinea . . .". A taxpayer who fulfils this condition and has incurred expenditure of a capital nature on necessary plant, development of the mining property or housing and welfare for employees engaged in connection with the mining operations is entitled to a deduction in respect of the expenditure from his assessable income.

The deduction is ascertained by apportioning what is called the residual capital expenditure over the remaining estimated life of the mining property. A somewhat elaborate formula is provided for calculating the residual capital expenditure. It is needless, however, to go into this; for its exact nature does not affect the matter.

The enactment gives an election to a taxpayer who has incurred expenditure specified in s. 122 (1) on plant or development. He may elect that the provisions of s. 122A shall apply to the expenditure he has made and this the appellant did in the present case. Expenditure to which such an election applies becomes an allowable deduction from the assessable income of the year in which the expenditure was incurred. But to qualify for this deduction the taxpayer must fulfil the condition quoted from s. 122 (1). The question upon which the appeal depends is whether the appellant did so.

Apparently the appellant combines the functions of an operating company and a holding company. It holds shares in a number of

(1) (1845) 14 M. & S. 859, at pp. 867, 868 [153 E.R. 724].
(2) (1865) 2 Dr. & Sm. 395 [62 E.R. 671]; (1866) 1 Ch. App. 303, at pp. 308, 309.
(3) (1923) 33 C.L.R. 416.
(4) (1936) 55 C.L.R. 305.

subsidiary companies whose businesses consist in obtaining from the soil blue-metal or, in some cases, silica or gravel. But for itself the company conducts extensive operations for the winning and crushing of blue-metal. It is upon these operations, which are conducted at Prospect in New South Wales, that the claim of the appellant company to a deduction under ss. 122 and 122A depends.

Blue-metal or bluestone is the common name applied to basalts or dolerites: see *Morris Austral English* s.v. "*Bluestone*". The stone is won in an open-cast working, rightly called a quarry, and it is crushed upon the site. At the place where it has been quarried the bed of igneous rock lay under an overburden of varying depths from seven to sixty feet. Electrically driven mechanical navvies are used for the removal of the overburden and of the stone worked. Before a quarry of this kind is opened the depth of the overburden and the character of the stone beneath are ascertained by boring by means of drills of the kind used for the purposes of mining. The rock face is broken down by drilling and by the use of explosives. The stone is thrown down on the floor of the quarry where it is picked up mechanically and loaded into waggons for delivery to the crushing plant. At some places the face of stone extends upwards nearly ninety feet from the floor of the quarry and, where the overburden is deep, the surface may be sixty feet above that. The stone goes through a succession of three crushings which progressively reduce the size of the product. It is raised from one crusher to another by conveyer belts. The first crusher is on the floor of the quarry. At the present time road making and concrete building and construction create great demands for crushed bluestone.

In connection with the workings at Prospect the appellant company during the year of income incurred expenditure amounting to £74,058 in respect of plant and machinery; to £493 in respect of an electricity sub-station; to £901 in respect of its office and furniture, and to £356 in respect of certain amenities for workmen; making in all a sum of £75,813. That sum forms the deduction claimed. The commissioner refused to allow the deduction.

The case made for the appellant in support of the claim is in substance that the machines and processes employed to win the bluestone and to crush it are indistinguishable from those which characterize mining; that with the great progress made in earth moving equipment and kindred mechanical operations open-cast working has replaced and tends increasingly to replace subterranean working, wherever possible; that just as open-cast working has

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the same purpose and uses much of the same equipment as subterranean working, so the operations possess the common characteristic of involving a wasting asset in which the expenditure upon plant must be written off progressively year by year; that in short the only ground for saying that the expenditure was not upon mining operations on a mining property must be found in the fact that the workings are open-cast and from a tax point of view it is a ground having no relevance.

Kitto J., who heard the company's appeal from the assessment, considered that the expenditure had not been incurred in connection with mining operations carried on upon a mining property and dismissed the appeal. The basal reason for this conclusion is made clear by the following passage from his Honour's judgment. "While 'mining' is nowadays given an extended meaning in relation to the winning of substances which have come to be thought of as generally obtained by underground working, so as to include the extraction of such substances even by means of surface excavations, yet such an extended meaning is not ordinarily given to the word in relation to other substances. For them the word 'quarrying' is usually employed, though this again is by way of extension since the primary significance of the noun 'quarry' is a pit for the cutting of blocks of stone such as those in question in *Stronach's Case* (1). It would, I think, be unusual to apply the word 'mine' to open diggings for the obtaining of stone of a kind which does not call up, by association, the idea of mining in the sense of sinking a shaft and tunnelling in pursuit of a desired substance" (2). In the view so expressed we agree.

The meaning of the words "mine" and "mining" like the word "minerals" is by no means fixed and is readily controlled by context and subject matter. Few words have occasioned the courts more difficulty than "minerals" but in some degree that is because in legal instruments it is seldom, if ever, used in its accurate or scientific sense and yet the word possesses no secondary meaning at once accepted and definite. No doubt the word "mine" has also proved a source of difficulty, but the difficulties have been fewer and perhaps less persistent. The word seems always to have been somewhat indefinite in its application. Judicially, however, its primary meaning unaffected by context is taken to refer to underground workings and not open-cast workings or quarrying. "Mining", said *Kindersley* V.C., "is when you begin only on the surface, and, by sinking shafts or driving lateral drifts, you are working so that you make a pit or tunnel leaving a roof overhead":

(1) (1936) 55 C.L.R. 305.

(2) *Infra*, at p. 513.

Darvill v. *Roper* (1). The same learned judge in *Bell* v. *Wilson* (2) said: "I cannot entertain the smallest doubt that a mine and a quarry are not the same. It would perhaps require some labour to define precisely what each is; but we know this, that a mine, properly speaking, is that mode of working for minerals by diving under the earth, and then working horizontally or laterally; whereas a quarry is where the working is *sub dio*" (3).

The Vice-Chancellor gave this as one of two grounds for deciding that, under an exception from land conveyed of "all mines and seams of coal and other mines metals and minerals", the quarrying of freestone or sandstone was not legitimate. The ground was upheld by *Turner* L.J. and *Knight-Bruce* L.J. on appeal (4) notwithstanding that, differing from the Vice-Chancellor, their Lordships considered that freestone was a mineral within the meaning of the exemption. The judgment of *Turner* L.J. contains a reference to some etymology of the word "mine" which may be dubious; cf. *Skeats Etymological Dictionary* and *The Oxford English Dictionary* *s.v.* "mine" and *Lewis* and *Short Latin Dictionary* *s.v.* "mino". But that was only by way of support for the conclusion that mines are underground workings. An observation contained in the judgment gives point to the conclusion:—"The case then is, in this singular position, that the defendants were entitled to the stone working it by underground mines but were not entitled to work it from the surface" (5). It is indeed but an application of the test which *Tenterden* L.C.J. in *R.* v. *Brettell* (6) said was fixed by *R.* v. *Sedgley* (7): "That case establishes that, in order to determine whether an excavation in the earth constitute a mine or not, we are to look to the mode in which the article is obtained, and not to its chemical or geological character" (8).

In *Lord Provost and Magistrates of Glasgow* v. *Farie* (9) Lord *Macnaghten* said: "The meaning of the word 'mines' is not, I think, open to doubt. In its primary signification it means underground excavations or underground workings" (10). But there are certain metals, minerals and substances which have been traditionally recovered by underground workings. They have thus become associated in idea with the concept of a mine and the association

(1) (1855) 3 Dr. 294, at p. 299 [61 E.R. 915, at p. 918].
(2) (1865) 2 Dr. & Sm. 395 [62 E.R. 671].
(3) (1865) 2 Dr. & Sm. 395, at p. 399 [62 E.R. 671, at p. 673].
(4) (1866) L.R. 1 Ch. 303.
(5) (1866) L.R. 1 Ch., at p. 309.
(6) (1832) 3 B. & Ad. 424 [110 E.R. 152].
(7) (1831) 2 B. & Ad. 65, at p. 74 [109 E.R. 1068, at p. 1071].
(8) (1832) 3 B. & Ad., at p. 426 [110 E.R., at p. 153].
(9) (1888) 13 App. Cas. 657.
(10) (1888) 13 App. Cas., at p. 687.

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of ideas has made it inevitable that whatever the form of the excavation that is made for the purpose of winning them, whether underground or open-cast, it will be called a mine and the operations will be called mining. This may be an extension of the primary meaning of mining, but it must we think be recognized that, where the context or subject matter does not otherwise require, it forms today one of the natural applications of the words "mine" and "mining". In this sense it is part of the prima facie meaning. It is true that Lord *Herschell* said in *Lord Provost and Magistrates of Glasgow* v. *Farie* (1): "The word 'mines' is, I think, in a *secondary* sense, very frequently applied to a place where minerals commonly worked underground are being wrought, though in the particular case the working is from the surface" (2). But his Lordship did not mean by the use of the word "secondary" to imply that the meaning did not naturally attach to the word in the absence of a contrary indication.

To Lord *Watson* it appeared to be beyond question that for a very long time the word "mines" has been used in ordinary language to signify either the mineral substances that are excavated or mined or the excavations, whether subterranean or not, from which metallic ores and fossil substances are dug. "It does not occur to me", his Lordship said, "that an open excavation of auriferous quartz would be generally described as a gold quarry; I think most people would naturally call it a gold mine": *Lord Provost and Magistrates of Glasgow* v. *Farie* (3). In the same case Lord *Watson* emphasized the flexibility of the words "mines" and "minerals" which he said "are not definite terms: they are susceptible of limitation or expansion, according to the intention with which they are used" (4). "But however the word may be used", said Lord *Macnaghten*, "when we speak of mines in this country, there is always some reference more or less direct to underground working" (5).

Now in the present case the material worked, bluestone, is completely outside the scope of the metals minerals or substances the winning of which is associated in thought or tradition with underground workings. Bluestone quarries are familiar sights in many parts of Australia and the expression is equally familiar in speech. No one speaks of a bluestone mine. The phrase would sound odd and incongruous. Even more odd would it be if a bluestone quarry were called a mining property.

(1) (1888) 13 App. Cas. 657.
(2) (1888) 13 App. Cas., at p. 684.
(3) (1888) 13 App. Cas., at p. 677.
(4) (1888) 13 App. Cas., at p. 675.
(5) (1888) 13 App. Cas., at p. 687.