

The King - - - - - *Appellant*

v.

The Caledonian Collieries, Limited - - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 12TH JUNE 1928.

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*Present at the Hearing :*

THE LORD CHANCELLOR.

VISCOUNT HALDANE.

LORD BUCKMASTER.

LORD WRENBURY.

LORD WARRINGTON OF CLYFFE.

[*Delivered by* LORD WARRINGTON OF CLYFFE.]

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The question raised by this appeal is whether the Mine Owners Tax Act, 1923, of the Province of Alberta, which imposes upon mine owners as therein defined a percentage tax upon the gross revenues of their coal mines is *ultra vires* the Province as an attempt to impose indirect taxation.

The appeal, brought by special leave of His Majesty in Council, is from an order dated the 1st February, 1927, of the Supreme Court of Canada, whereby that Court, consisting of Anglin, C.J., and Duff, Mignault, Newcombe and Rinfret, JJ., unanimously allowed an appeal from the Appellate Division of the Supreme Court of Alberta in favour of the present appellant on the ground that in their opinion the tax in question is not a direct tax and therefore one which it was not within the competence of the Province to impose.

The Act in question was passed by the Legislature of Alberta on the 21st April, 1923. It contained the following material provisions :—

“Section 3. Every mine owner shall from the last day of May, 1918, be subject to a tax upon the gross revenue received by him from his mine.

“Section 4. The said tax shall not be more than 2 per cent. of the said revenue and as determined by the Lieut.-Governor in Council under the provisions of this Act.

“Section 6. On or before the last day of each month each mine owner shall forward to the Minister a sum of money equal to 2 per cent. of the gross revenue received by him from his mine during the next preceding month.”

The Act repealed a previous Act of the Province—the Mine Owners Tax Act, 1918—which also imposed a tax upon gross revenue, taking the form in that Act of 5 c. per ton of the coal removed from the mine premises. The validity of this tax had been disputed by the mine owners, who had in many cases refused to pay it.

On the 14th August, 1925, the Lieut.-Governor by and with the advice of the Executive Council ordered that the tax in question should be 2 per cent. of the gross revenue received by the mine owner from his mine.

The respondent company is a mine owner within the definition of that term contained in the Act in question. They began business in November, 1923.

They refused to pay the tax, and on the 21st August, 1925, the action, in which the order under appeal was made, was commenced for the purposes of recovering the amount of the tax alleged to be due from them.

Is the taxation in question “direct taxation within the Province” within the meaning of section 92 of the British North America Act, 1867 ?

The question whether a tax is direct or indirect has on many occasions been the subject of decision by this Board, but it is unnecessary to refer to any of these decisions except that of *The Bank of Toronto v. Lambe*, 12 A.C. 575, in which Lord Hobhouse, in delivering the judgment of the Board, made some useful observations as to the mode in which the question should be approached. The passage has often been cited, but it is worth while citing it again :—

“First, is the tax a direct tax? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or, rather, necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, viz., what the words mean as used in this statute; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words ‘direct’ and ‘indirect’ according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct

and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment. Doubtless such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it, and of every direct tax that it affects persons other than the first payers, and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The Legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies."

What then is the general tendency of the tax now in question ?

First it is necessary to ascertain the real nature of the tax.

It is not disputed that, though the tax is called a tax on "gross revenue," such gross revenue is in reality the aggregate of sums received from sales of coal, and is indistinguishable from a tax upon every sum received from the sale of coal.

The respondents are producers of coal, a commodity the subject of commercial transactions. Their Lordships can have no doubt that the general tendency of a tax upon the sums received from the sale of the commodity which they produce and in which they deal is that they would seek to recover it in the price charged to a purchaser. Under particular circumstances the recovery of the tax may, it is true, be economically undesirable or practically impossible, but the general tendency of the tax remains.

It is said on behalf of the appellant that at the time a sale is made the tax has not become payable and therefore cannot be passed on. Their Lordships cannot accept this contention; the tax will have to be paid, and there would be no more difficulty in adding to the selling price the amount of the tax in anticipation than there would be if it had been actually paid.

Their Lordships therefore agree with the views expressed by the Judges of the Supreme Court that the tax in question is not a direct tax.

Some attempt was made in argument to support the tax on the ground that it is analogous to an income tax, which has always been regarded as the typical example of a direct tax; but there are marked distinctions between a tax on gross revenue and a tax on income, which for taxation purposes means gains and profits. There may be considerable gross revenues, but no income taxable by an income tax in the accepted sense.

For these reasons their Lordships are of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

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v.

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DELIVERED BY

LORD WARRINGTON OF GYFFE.

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