Privy Council Appeal No. 147 of 1924.

The Broken Hill Proprietary Company, Limited - - - *Appellants*

v.

The Municipal Council of Broken Hill - - - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH NOVEMBER, 1925.

Present at the Hearing:
THE LORD CHANCELLOR.
LORD CARSON.
LORD BLANESBURGH.
MR. JUSTICE DUFF.

[*Delivered by* LORD CARSON.]

The appellants are the occupiers of a mine of lead and silver within the municipality of Broken Hill. The respondents are the rating authority of the municipality. The question in this appeal arises on the construction of the Local Government Act, 1919, New South Wales (No. 41 of 1919), and relates to the ascertainment of the "unimproved capital value" of the mine of the appellants for rating purposes under Section 153 (3) (identical with Clause 12 of Schedule 3 to the said Act). The said section reads as follows:—

> "In the case of a mine other than a coal or shale mine the unimproved capital value thereof ascertained by valuation based on output shall be a sum equal to twenty per centum of the average annual saleable value to the mine owner of the ore or mineral won from the mine or of the product derived from such ore or mineral during the three years next preceding the year in which the valuation is made, or during such part of that time as the mine has been worked, such value to be determined as such ore, mineral or product leaves the area within which such mine is situate."

The Act of 1919 repealed and replaced the Local Government Act, New South Wales, of 1906 (No. 56 of 1906). The provisions of Section 153 (already quoted) and Clause 12 of the Schedule of the Act are in substitution for those of Section 132 of the Act of 1906 and are substantially to the same effect, with this difference, that the words " or during such part of that time as the mine has been worked," are not in Section 132 of the Act of 1906 and appear for the first time in Section 153 and Clause 12 of the Schedule of the Act of 1919.

In the year 1923 the respondents assessed the appellants in respect of the Broken Hill mine. The value was based on the output during the years 1919, 1920 and 1921. It appears that during these years ore to the total value of £274,792 2*s*. 9*d*. had been produced, and the mine had been worked for a total of 205 days only during the three years by reason at one time of strikes and at another time owing to the low price of material rendering the production of ore unprofitable. All through, however, maintenance work was continued, such as keeping the surface works in repair, pumping the mine, and keeping the underground workings in order. The question that arose between the appellants and respondents, and which this Board is now called upon to decide, is whether under the terms of Section 153 and Clause 12 of the 3rd Schedule to the Act of 1919, already set forth, the average value of the ore won during the three years 1919, 1920 and 1921, should be arrived at by dividing the value of all the ore won during the said three years (*i.e.*, £274,792 2*s*. 9*d*.) by three, as the appellants contended and now contend, or by dividing the said value by a fraction represented by the number of days worked during the said three years over the number of days in a year, viz., $\frac{205}{365}$ or, in other words, that the sum of £274,792 2*s*. 9*d*. should be multiplied by 205 and divided by 365.

The case was first heard before Mr. Justice Pike, the Judge of the Land and Valuation Court, who, following a decision in a previous year (which will hereafter be referred to) of the High Court of Australia, decided in favour of the contention of the respondents, but stated a case for the opinion of the Supreme Court of New South Wales, who on the 25th June, 1924, sustained the judgment of Mr. Justice Pike, holding that the case was covered by the High Court decision. From that judgment the present appeal comes before this Board, and the appeal involves, therefore, a consideration of the decision of the High Court on which the judgment appealed from was based.

In that case the appellants had been assessed by the respondents in respect of its Broken Hill mine under the Act of 1919 on the unimproved capital value calculated on the output of the mine for the years 1917, 1918 and 1919. It appeared that during the said three years the mine had been worked during the whole of the years 1917 and 1918 and for a period amounting to 160 days only in the year 1919. To ascertain the unimproved capital value the respondents divided the total saleable value of the output

during the said three years by $2\frac{69}{365}$ in order to arrive at the annual average saleable value.

The appellants appealed from the valuation to a Judge of the District Court, who upheld the valuation of the respondents. On an appeal by the present appellants to the Supreme Court of New South Wales, that Court, consisting of the Chief Justice (Sir William Cullen) and two other Judges, unanimously reversed the decision of Mr. Justice Bevan, holding that the valuation must be made by taking the total actual output for the three years and dividing it by three and not by two and a fraction. The reasons for the decision were the same as the reasons for the decision in *North Broken Hill, Ltd.* v. *Broken Hill Municipal Council*, which is reported in 21 N.S.W. R., 758.

The respondents then appealed from this decision to the High Court of Australia, where by a majority of three judges to one, the appeal was allowed and the decision of the District Judge restored. Chief Justice Knox, who dissented, adopted the view taken by the Judges of the Supreme Court (See 30, C.L.R., at p. 400).

Their Lordships are of opinion that the decision of the Supreme Court and of Chief Justice Knox was right and that upon the true construction of Section 153 and Clause 12 of the 3rd Schedule, the average annual value of the ore won during the three years ought to be arrived at by dividing the value of the said ore by three.

It is to be noted, as pointed out by Sir William Cullen, C.J., in his judgment in the Supreme Court, that the respondents are given several alternative methods of ascertaining the unimproved capital value by Section 153, and amongst these was the one which they adopted, viz., " by valuation based on output in accordance with this section." " That," as the Chief Justice says, " I conclude, from the wording of the section, to be actual output, not some potential or hypothetical output arrived at by a calculation of what might have been produced, but was not actually produced from the mine." There is nothing in the section from which it could be inferred that anything but actual output was intended, but, on the contrary, it seems to be impossible to construe such words as :—

> " the saleable value to the mineowner of the ore or mineral won from the mine . . . such value to be determined as such ore, mineral or product leaves the area within which such mine is situate "

as referring to any estimated or hypothetical output. There may, no doubt, be cases when it would be impossible to find an average output, as, for instance, when a mine had only been worked for a portion of a year, but it must not be forgotten that the respondents have other methods of valuation open to them if such difficulties arise.

It was urged before this Board that the introduction into Section 153 of the words " during such part of that time as the

mine has been worked," ought to be construed as providing for such a case as the present, and thereby supporting the contention of the respondents. Their Lordships cannot accept that view having regard to the other terms of the section already referred to, and it is not unimportant to observe that notwithstanding the introduction of those words, the Act of 1919 still retains the words at the end of the 3rd subsection of Section 153, viz. :—

> "such value to be determined as such ore or mineral or product leaves the area within which such mine is situate,"

and which are taken from subsection 2(*b*) of the 132nd Section of the Act of 1906.

Having regard to the language of the section it is unnecessary to lay down any construction or limitation of the words in question, but their Lordships see no reason for disagreeing with the view of the Chief Justice. when he says—" The words ' or during such part of that time as the mine has been worked ' obviously guard against the difficulty which would have arisen in the case of mines which had not commenced to be worked three years prior to the year in which the rate is to be struck."

It was also contended before this Board on behalf of the respondents that having regard to the said decision of the High Court of Australia the question raised by this appeal is *res judicata* as between the appellants and the respondents, and the appellants are estopped from contending that such decision of the High Court of Australia is wrong. It has been pointed out that no such question was raised or pleaded either before the District Court or the Supreme Court in New South Wales, nor has there been any adjudication or finding upon it. There is, however, no substance in this contention. The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question. viz., the valuation for a different year and the liability for that year. It is not *eadem questio*, and therefore the principle of *res judicata* cannot apply.

Their Lordships are of opinion that this appeal should be allowed with costs here and in both the Courts in New South Wales, and that a declaration should be made that upon the true construction of subsection 3 of Section 153 of the Act of 1919 in ascertaining the unimproved capital value of the mine the saleable value of all the ore won from the mine during the years 1919, 1920 and 1921 should be divided by three.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

THE BROKEN HILL PROPRIETARY COMPANY, LIMITED

v.

THE MUNICIPAL COUNCIL OF BROKEN HILL.

DELIVERED BY LORD CARSON.

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