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TUMBO ISLAND INVESTMENTS LIMITED

v.

GULF ISLANDS ASSESSMENT DISTRICT

Supreme Court of British Columbia (No. 558/65)

Before: MR. JUSTICE JOHN S. AIKINS

Victoria, November 1 and 16, 1965

W.R. McIntyre for the Appellant
L.C. Dudley for the Respondent

Reasons for Judgment (1)

The Assessment Appeal Board, at the instance of either the Provincial Assessor for Gulf Islands Assessment District or of the Assessment Commissioner for the Province (the material does not disclose which), has stated a case for the opinion of the Court pursuant to the provisions for appeal by way of stated case on a point of law only set out in section 51 of the *Assessment Equalization Act*, R.S.B.C. 1960, chapter 18.

In summary form the facts are as follows: The land in question is Lot 13, Plan 2423, on Tumbo Island, in the Gulf of Georgia, Cowichan District. The respondent is the owner of Lot 13. Lot 13 is classified as farm land in accordance with the definition of farm land given in section 2 of the *Taxation Act*, R.S.B.C. 1960, chapter 376. The assessment of Lot 13 for 1965, excluding improvements, was $26,686. Of this amount, $12,831 is attributed wholly to the value of standing timber on the property. On appeal by the owner to the Court of Revision, that Court affirmed the assessment. On further appeal to the Assessment Appeal Board, the owner was successful in having the assessment reduced by the amount of the value attributed by the Assessor to the standing timber on the property. The assessment was accordingly reduced by $12,831.

The ratio of the Board's decision is stated in paragraph 5 of the case, which is as follows:

> 5. The Board held that the timber upon the land could not be a factor in assessing the value thereof for taxation purposes in the following words:
>
> > "However, the clear evidence (Exhibit 4) indicates that timber has been assessed at $12,831. In the opinion of the Board this contravenes section 37 (6) (d) of the *Assessment Equalization Act* with respect to assessment of farm land. Since this lot must be assessed as farm land under the mandatory provisions of the Act the Board is unable to find any reason for sustaining the timber assessment on this lot."

Paragraph 6 of the case reads:

> 6. At the hearing aforesaid there was no evidence to indicate whether or not there was any farming activity on the land and there was no evidence of the general practice in

assessing lands classified as farm lands within the Province of British Columbia with or without standing timber situate thereon.

As to the first part of paragraph 6, in which the Board states that there was no evidence to indicate whether there was any farming activity on the land, in my opinion the lack of any such evidence is not of material significance because the classification of the land as farm land was not in question. As to the latter part of paragraph 6, the lack of evidence as to any general practice in assessing lands classified as farm lands with or without standing timber thereon seems to me irrelevant to the question of law involved because a practice or practices followed in assessing farm land does not assist in determining a question of law only.

The questions upon which the opinion of the Court is sought are these:

> "1. Was the Board correct in law in holding that land classified as farm land should be valued for assessment for farm purposes only and without reference to the value of timber situate upon the land?
>
> "2. Was the Board correct in law in holding 'since this lot must be assessed as farm land under the mandatory provisions of the Act, the Board is unable to find any reason for sustaining the timber assessment on this lot'?
>
> "3. Was the Board correct in law in drawing on its general knowledge and past experience to state: 'In general, timber is not assessed on farm lands at a separate value'?"

The relevant statutory provisions are section 37 (1) and section 37 (6) (d) of the *Assessment Equalization Act*. Section 37 (1) reads:

> 37. (1) The Assessor shall determine the actual value of land and improvements. In determining the actual value, the Assessor may give consideration to present use, location, original cost, cost of replacement, revenue or rental value, and the price that such land and improvements might reasonably be expected to bring if offered for sale in the open market by a solvent owner, and any other circumstances affecting the value; and without limiting the application of the foregoing considerations, where any industry, commercial undertaking, public utility enterprise, or other operation is carried on, the land and improvements so used shall be valued as the property of a going concern.

Section 37 (6) (d) is as follows:

> (6) Notwithstanding the provisions of this section, . . .
>
> (d) lands classified as "farm land" in a municipal corporation or rural area shall, while so classified, be assessed at the value which the same have for such purposes without regard to their value for any other purpose or purposes, but the assessed value of improvements on farm land shall be determined under subsection (3).

I now summarize the argument for the appellant. It is contended that section 37 (6) (d) is an imperative direction to Assessors and compels them to assess land classified as farm land at the value which the land has for farming purposes only, without having regard to value for any other purpose or purposes. This contention is undoubtedly correct. It is then argued that the statutory provision cannot be properly construed as a direction to Assessors assessing farm land with standing timber to wholly exclude standing timber from consideration as an element of value, either enhancing or detracting from the value of the land, but that on a proper construction the statutory provision does no more than preclude Assessors from treating standing timber on farm land as either increasing or decreasing the value of the land for any purpose other than a farming purpose.

Counsel for the appellant submits that if land classified as farm land carries a stand of growing timber, then that fact may, paraphrasing section 37 (1), be "another circumstance affecting value" which the Assessor may properly take into account in determining actual value, subject to the qualification that the Assessor is precluded by section 37 (6) (d) from attributing any value to such timber except in so far as the timber enhances the value of the land for a farming purpose or farming purposes. Generally timber is considered as having value not for a farming purpose, but for commercial purposes, that is, logging the timber and using the timber so logged for the manufacture of lumber or for the manufacture of paper. However, counsel for the appellant points out, and in my view rightly, that a stand of timber on farm land may well have value for farm purposes, such as providing a readily available and inexpensive supply of timber for fence-posts or fence-rails, furnishing a windbreak or shelter for cattle, or, one might add, as having value for farm purposes in preventing soil erosion. On the other hand, counsel points out that standing timber on farm land may detract from the value of the land for farming purposes because it may be necessary for the owner at expense to clear some or all of the timber so that the land may be cultivated. The presence of standing timber on farm land may, on the one hand, enhance the value of the land for farming purposes or, on the other hand, may detract from the value of the land for farming purposes.

The argument continues in this form. The Board's conclusion (stated in paragraph 5 of the stated case) in holding that the "timber upon the land could not be a factor in assessing the value thereof for taxation purposes" is wrong in law because the Board's conclusion as stated in terms admits of no exception and, as a matter of law, the presence of standing timber on farm land may be a circumstance which adds to or detracts from the value of the land for farm purposes. Whether, in any particular instance, standing timber on farm land increases or decreases the value of the land for farming purposes is a question of fact. On this basis it is submitted that Question No. 1 should be answered in the negative.

I now turn to Question No. 1: The Board was right, in my opinion, in holding that "land classified as farm land should be valued for assessment for farm purposes only." Taken thus far there is no error. The Board has, however, added a qualification in the question by adding these words, "without reference to the value of the timber situate upon the land."

Looking at the first question by itself, without reference to paragraph 5 of the stated case, I would have no hesitation in saying, predicated upon construing the question as meaning that the Board held that farm land is to be assessed without reference to the value of timber thereon for any purposes (which would, of course, include farming purposes), that that question must be answered in the negative. To say in absolute terms that no consideration may be given to the value of timber on farm land is, in my view, to err in law. Whether a stand of timber on farm land increases or decreases the value of the land for farming purposes is a question of fact which an assessor as a matter of law may properly consider, although an assessor, in assessing farm land, may not, in my opinion, take into account the value of standing timber thereon for any purpose other than a farming purpose.

On looking at paragraph 5 of the stated case, I am left in some doubt as to whether the Board in fact made such an unqualified pronouncement as that indicated in the first question. I note that in paragraph 5 of the stated case the Board says that it held "that the timber upon the land could not be a factor in assessing the value thereof for taxation purposes." Up to this point the view taken by the Board would appear to be that timber is to be wholly ignored in assessing farm land. However, the Board in the stated case and in the reasons which it gave for the conclusion which it reached, goes on to mention Exhibit 4 and to state that, in the opinion of the Board, the valuation or assessment of $12,831 for timber set out in Exhibit 4 contravenes section 37 (6) (d) of the Act with respect to assessment of farm land. This leads me to the conclusion that what the Board may have had in mind was that the assessment on the evidence before the Board was made contrary to the provisions of section 37 (6) (d) because it was based on valuing the timber on the farm land in question for a purpose other than a farming purpose, and hence the Board was of the opinion that such valuation could not "be a factor in assessing the value" of the land.

During the course of the hearing the question arose as to whether I could and, if I could, for what purposes I might look at the transcript of evidence given before the Board and filed pursuant to the statutory direction contained in section 51 (5) of the Act. I was referred to *Crown Zellerbach Canada Limited and Crown Zellerbach Building Materials Limited* v. *Assessment Districts of Comox, Cowichan, and Nanaimo*. The reasons for judgment of the Court of Appeal are reported at page 166 of the British Columbia Stated Cases dealing with the *Assessment Equalization Act*. On the question of what use may be made of the transcript of evidence, I was referred to the reasons for judgment of Mr. Justice Davey at page 173. I cite His Lordship's judgment at that page and going on to page 174:-

> It is desirable at this stage to determine what use may be made of the evidence the Board is required to return with a stated case. The questions raised must be of law only, and the facts found by the Board ought to be stated in the case; see cases cited on the form of a stated case by Masten, J.A., in *Re City of Hamilton and Birge* (1924) 55 O.L.R. 448 at page 451. In my opinion section 51 (5) of the *Assessment Equalization Act* does not require a transcript of all the evidence to be filed, but only that part of the evidence "dealing with the question of law raised in the appeal." Where the question of law is whether there is any evidence to support a primary finding of fact, the purpose of the transcript is obvious, but it is not so apparent where the question of law assumes other forms and must be decided on the facts found by the Board. But since the Act requires a transcript of the evidence dealing with the question of law to be filed, it must be for some purpose, and the only one that I can see, keeping in mind that the Court has no jurisdiction to find facts, is that the transcript may be examined to interpret and explain the statement of facts contained in and the questions of !aw raised by the stated case. However, I do not find that explanation entirely satisfactory, for surely if any doubt should arise about the meaning of the stated case, it ought to be sent back to the Board for clarification. But on occasion that may not be done, as it was not done here, and resort to the transcript for explanation of interpretation may be helpful. Unsatisfactory as that interpretation of section 51 (5) may be, it seems to be the only one that is tenable, and I propose to act upon it and refer to the transcript to interpret and explain the stated case, but not for the purpose of making findings of fact.

I now leave Question No. 1 temporarily to go on to a consideration of the second question. I do so because, in my opinion, the stated case must be sent back to the Board for amendment as to this question. I quote Question No. 2 again:

> "2. Was the Board correct in law in holding 'since this lot must be assessed as farm land under the mandatory provisions of the Act, the Board is unable to find any reason for sustaining the timber assessment on this lot'?"

The difficulty I find with Question No. 2 is simply this: the Board has asserted in the question and states in paragraph 5 of the case that it was unable to find any "reason" for sustaining the timber assessment on the lot. My difficulty arises largely because of the use of the word "reason." I am not at all clear whether the Board, when it said that it was unable to find any "reason," meant that there was no evidence to support the assessment (which would raise a question of law), or whether the Board meant that the evidence advanced to support the assessment was wholly directed toward establishing that the timber had the value asserted for a purpose other than a farming purpose, and that hence, in view of section 37 (6) (d), there was no proper reason in law to support the assessment, the valuation of the timber being based on its use for a purpose other than farming. Exhibit 4, which is referred to in paragraph 5 of the case, does not assist because it does not state the factors taken into account in reaching the timber value of $12,831. In order to find out how that valuation was worked out. I would have to make some sort of an analysis of the evidence given before the Board. I could attempt this task with a view to interpreting and trying to find the proper explanation of the case as stated and of the second question raised. However, in view of what was said by Mr. Justice Davey in the *Crown Zellerbach Canada Limited* case, *supra,* because I entertain doubt as to the meaning of the question and the meaning of the case, I think

the proper course is to send the case back to the Board for amendment. I do not think I should in any way attempt to fetter the Board by making any directions as to what amendments should be made, but I may, I think, properly say that there should be clarification of what the Board meant when it said that it was unable to find any reason for sustaining the timber assessment on Lot 13, and if the Board was satisfied as to how the Assessor arrived at his valuation of the timber in question-that is, as to whether the timber was valued for farming purposes or for purposes wholly other than farming, or a mixture of the two-a statement of the facts found would be of assistance.

I now revert to the first question. On looking at the reasons given by the Board for allowing the appeal, I can see no finding in terms corresponding with what the Board says that it held in the opening part of paragraph 5 of the case. On further consideration of paragraph 5 of the case, I am left in some doubt as to whether the Board is to be taken to have stated a principle of general application to all farm land or whether what the Board meant was that the timber on the particular land, the subject-matter of the appeal, could not be a factor in assessing the value of the land because, as stated in the latter part of paragraph 5, the Board found that the valuation of the timber contravened the provisions of section 37 (6) (d). If the latter is the correct interpretation of what the Board held, then the Board's conclusion was not based on a principle of general application that in no case could timber be a factor in assessing the value of farm land, but was founded on the narrow ground that, in the case of the particular land in question, the valuation of the timber could not be taken into account because it had been valued by the Assessor in some way which contravened section 37 (6) (d). If one has regard to the first question isolated from the rest of the stated case, it is perfectly clear, but on reading the first question with paragraph 5 of the stated case, together with the reasons given by the Board for allowing the appeal, I find that I am left in some doubt as to whether the first question accurately reflects the conclusion reached by the Board. It seems to me that I must look at the first question in conjunction with the rest of the stated case and not simply consider it in isolation, and on doing so I find that I am in some doubt about the meaning of the case. Because I have some doubt as to the meaning of the case, I have reached the conclusion that the case must be sent back to the Board for amendment as to the first question, as well as being sent back for amendment as to the second question.

I now proceed to consider the third question. The sense of the question seems to me to be this: may the Board use its knowledge and past experience in assessment matters in determining a question of law-namely, whether in assessing farm land the Assessor may value the timber separately and add it in to make the over-all assessed value? The question must be answered in the negative. It must be so answered because I am unable to see how the Board's experience in assessment cases, great as it is, or knowledge of assessment practice, can have any bearing on the question posed. What Assessors have done or have not done about timber on farm land is not determinative of what as a matter of law should be done. To say, in a case such as this in which the Assessor apparently valued the land and valued the timber and added the two together to reach the assessed value, that the Assessor erred in law because other Assessors do not do it in the same way simply avoids the question, which must be decided on its own merits. I would, therefore, answer the third question in the negative. There is no need to ask the Board to amend the case as to the third question.

For these reasons, pursuant to section 51 (6) of the *Assessment Equalization Act*, I direct that the stated case be sent back to the Board for amendment.

It is unnecessary to make any direction as to costs at this stage.

Reasons for Judgment (2)

This appeal came on for hearing before me at Victoria on the 1st of November of this year. I gave written reasons for judgment on November 4th directing that the stated case submitted by the Assessment Appeal Board be sent back to the Board for amendment as to Questions Nos. 1 and 2. By my reasons for judgment I disposed of the third and last question upon which the opinion of this Court was sought.

The Assessment Appeal Board has now submitted an amended case, and the first two questions, as amended, are as follows:-

> "1. Was the Board correct in law in holding that land classified as farm land should be valued for assessment for farm purposes only and without reference to the value of the timber situate upon the land for logging purposes?
>
> "2. Was the Board correct in law in holding that the value of timber for logging purposes cannot be assessed separately and added to the value of the land as farm land?"

These reasons are written as supplementary to my reasons for judgment dated November 4th, and the latter must be read before reading what follows because I have not, for the sake of brevity, repeated the essential facts necessary to an understanding of this appeal or the relevant statutory provisions, nor have I restated the arguments submitted to me initially or the conclusions reached thereon which are pertinent to the final disposition of this appeal.

Both Questions Nos. 1 and 2 of the case as amended must be answered in the affirmative.

Although I think my reasons of November 4th will make it reasonably clear why I am of the opinion that both questions must be answered in the affirmative, I think it advisable nevertheless to amplify the reasons already given and to consider certain arguments put to me on the further hearing of this appeal.

I wish to make it clear that in answering Questions Nos. 1 and 2 in the affirmative I do so only on the basis of the facts set out in the case stated by the Board. On the case stated by the Board, two considerations emerge as having governing importance. These are:-

> (1) The timber on the land in question was assessed separately and wholly at its value for logging purposes; that is, at its stumpage value in 1964 if sold to a logger or mill.
>
> (2) There was no evidence before the Board of any actual farming being carried out on the land in question or, and I here quote from paragraph 6 of the stated case, "of the extent to which the value of the farm land may have been enhanced by the presence of the timber." I think the sense of the case requires that the latter finding be construed in this way: that there was no evidence of the extent to which the value of the land *as farm land* may have been enhanced by the presence of timber; that is, as to whether or not the timber affected the value of the land for any farming purpose.

I have therefore concluded that the Board was correct in reducing the assessment of the land by the amount of value attributed to the timber because the timber was valued wholly for logging purposes without any relationship whatsoever to farming purposes. The Assessor in valuing the timber for a purpose other than farming made the assessment contrary to the restrictions set out in section 37 (6) (d) of the *Assessment Equalization Act*, which I have quoted in full in my reasons of November 4th.

Counsel for the appellant expressed concern that if Questions Nos. 1 and 2 were answered in the affirmative, that such a decision might constitute authority for the proposition that under no circumstances could the stumpage value of timber on farm land be considered as a factor in determining the actual value of farm land as required by section 37 (1) of the Act. My having answered Questions Nos. 1 and 2 in the present appeal in the affirmative is not to be taken as approving any principle that the value of timber on a stumpage basis-that is, on the basis of what could be obtained for it if sold to a logger on mill - cannot under any circumstances be a factor entering into the determination of the actual value of farm land. It seems to me that the amount of money that might be obtained from a stand of timber on farm land if sold to a logger might well be taken into account in valuing farm land for farm purposes if the removal of the timber could be related to a farming purpose. This can perhaps best be put by way of an illustration discussed

during argument. Suppose the case of a farm consisting in part of 10 acres of merchantable timber. The 10-acre tract is suitable for farming purposes if cleared. It seems to me that such a 10-acre tract may well be more valuable as farm land for farming purposes than, say, 10 acres of scrub timber with no merchantable value at all because the owner could clear the former for farm purposes and could hope to recover part of his cost of clearing, getting the stumps out, and preparing the land for ,cultivation or for pasture by selling the merchantable timber. It is unnecessary for me to decide whether, in the illustration given, the stumpage value of timber if sold might properly be taken into account in determining the actual value of farm land for farm purposes only, and I give the illustration simply to make it abundantly clear that in affirmatively answering Questions Nos. 1 and 2, which are put in broad terms, I should not be taken as having held that under no circumstances whatsoever may the commercial value of timber be taken into account in determining the actual value for farm purposes only of land classified as farm land.

Suffice it to say that on the facts of the present appeal in which the assessment in question is made up in part of the valuation of timber for a commercial purpose with no relation whatever to any farming purpose the assessment in so far as the timber is concerned contravenes section 37 (6) (d) of the *Assessment Equalization Act*.

Certain further arguments advanced by counsel for the appellant require consideration. Firstly, it is contended that on the hearing before the Assessment Appeal Board the burden of proof to show that the assessment was wrong rested upon the owner, who was the appellant before the Board, and that in absence of any evidence to show what the proper valuation of the timber should have been for farm purposes, the Board should have allowed the assessment to stand. The answer to this contention I think to be this. On the findings of fact set out in the stated case it is apparent that the Assessor valued the timber in contravention of the prohibition contained in section 37 (6) (d) of the Act. On all the evidence before the Board (regardless of whether given for the owner or for the Assessor) it was established that the part of the whole assessment attributable to the timber could not, as a matter of law, be sustained. Once the necessary facts were established before the Board to show that the Assessor had proceeded in contravention of section 37 (6) (d) in valuing the timber and adding it to the value of the land in order to arrive at the assessment, the Board, in my opinion, was bound to reduce the assessment by the amount of the improper valuation put upon the timber. In my opinion the rule as to burden of proof does not go so far as to require that the owner-appellant establish what value should have been placed on the timber by the Assessor if he had proceeded in accordance with the restrictions imposed by section 37 (6) (d) or that on the proper application of section 37 (6) (d) the timber had no value at all before the Assessment Appeal Board could properly reduce the total assessment by the amount attributable to the timber valued by the Assessor for a purpose other than a farming purpose in contravention of section 37 (6) (d).

It is contended, secondly, that the Board in wholly eliminating the timber as contributing any value to the land proceeded on a wrong principle because in arriving at an assessment all factors or circumstances affecting value must be taken into consideration-*Assessment Equalization Act*, section 37 (1). The sense of this submission, as I understood it, is that even if the Board was right in reducing the assessment by the amount thereof attributable to the timber because that amount was determined by the Assessor contrary to the provisions of section 37 (6) (d) the Board should nevertheless have attributed some value to the timber for a farming purpose in compliance with section 37 (6) (d). As to this submission, it is sufficient to say that in my opinion neither of the two questions to be answered raises this issue.

The final point argued by counsel for the appellant was that the Board, by reducing the total assessment by the amount thereof attributable to timber, has in effect held that timber on farm land is not assessable-that is, that it is not a factor or circumstance to be taken into account in assessing farm land-and that such a decision is beyond the power of the Board on the authority of *Toronto* v. *Olympia Edward Recreation Co. Ltd.* (1955) 3 D.L.R. 641, (1955) S.C.R. 454. The submission in brief is that an assessment appeal tribunal is without authority of any kind to determine a question of legal liability to assessment. I do not, however, think it necessary to

follow this line or argument further because in my view the stated case does not involve any finding by the Board that timber may not be valued as an element going to make up the actual value of farm land, but involves nothing more than the conclusion that, in the case of farm land, timber may not be treated as an element of value on the basis of its value for a purpose other than a farming purpose in conformity with the statutory restrictions on valuing farm land contained in section 37 (6) (d) of the Act.

For these reasons I have answered Questions Nos. 1 and 2 in the affirmative. The respondent is entitled to costs to be taxed.