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INLAND NATURAL GAS COMPANY LIMITED,
GULF OIL CANADA LIMITED
and
BRITISH COLUMBIA TELEPHONE COMPANY

v.

ASSESSMENT AREAS OF PENTICTON, KAMLOOPS, KELOWNA,
PRINCE GEORGE, TRAIL, BURNABY/NEW WESTMINSTER,
VANCOUVER, CAPITAL AND COQUITLAM

Supreme Court of British Columbia (A781585)

Before MR. JUSTICE J.A. MACDONALD

Vancouver, September 25, 1978

John R. Lakes for the Appellants
R.B. Hutchison for the Respondents

Reasons for Judgment October 2, 1979

This is an appeal by way of stated case from findings of the Assessment Appeal Board made July 31. 1978.

Under the *Assessment Act*, S.B.C. 1974, c. 6. s. 24 (1): "The assessor shall determine the actual value of land and improvements." There is no quarrel with the determinations of the assessors under this subsection. In dispute are the applications by the assessors and the Assessment Appeal Board of the order in council passed pursuant to s. 24 (7) and (8). Those subsections provide:

> "(7) The Lieutenant-Governor in Council shall, on or before October 21 in each year, fix the percentage of actual value at which each class of property shall be assessed for the succeeding year, and in doing so, the Lieutenant-Governor in Council may fix the same percentage or different percentages of actual value for each class of property defined by him.
>
> (8) The Lieutenant-Governor in Council shall define the types or uses of land or improvements, or both, to be included in each class."

I quote now as much of the order in council found in British Columbia Regulation 437/77 and 496/77 as is necessary for this appeal:

"Definition of Class

Class 1-Residential (15 per cent) shall include

(a) land or improvements or both, used for residential purposes

(b) improvements on land classified as a farm . . .

(c) land having no present use and which is not specifically zoned or held for business, commercial, forestry, or industrial purposes;

(d) land used for a golf course . . .

Class 2-Utilities (30 per cent) shall include land or improvements or both, except land and improvements or both included in classes 1 and 4. of any telegraph corporation, railway corporation, pipeline corporation, or of any electric light, electric power, telephone, water, gas, or closed-circuit television company and without restricting the generality of the foregoing, shall include the British Columbia Hydro and Power Authority.

. . .

Class 4-Machinery and Equipment (30 per cent) shall include any of the improvements included in the definition of improvements as defined for purposes other than for general municipal and Provincial taxation purposes under the *Municipal Act*, *Vancouver Charter*, and *Taxation Act*. . . .

Class 5-Industrial (30 per cent) shall include land or improvements or both, used or held for the purpose of extracting, processing, manufacturing, transportation, or storage of any products and, without limiting the generality of the foregoing, includes

. . .

(b) the extraction, transportation, refining, and storage of petroleum and natural gas;

but not including those lands or improvements or both

(ii) used for the resale of finished products; or . . .

(iv) used for the purpose of providing a service to the public.

Class 6-Business and Other (25 per cent) shall include all land or improvements or both not included in classes 1 to 5 or 7.

. . .

Properties comprising more than one of the classes herein defined shall be assessed at the percentage of actual value applicable to each class."

The Assessment Appeal Board decided that all of the lands and improvements under appeal by the appellant Inland Natural Gas Co. Ltd. and British Columbia Telephone Company should be classified as Utilities, Class 2. In its reasons the Board said the following about the properties of the two companies:

"Mr. Donald Ross McPhail, Secretary of Inland Natural Gas Co. Ltd., gave evidence with respect to properties owned by the Appellant Corporation at Penticton, Kamloops and Kelowna. Mr. McPhail stated that, apart from a 786 sq. ft. portion of the property at Penticton, the remainder of the Penticton property and the entire Kamloops property had no direct utility function and were used as office buildings. Mr. McPhail noted that the property located at Kelowna had a primary utility function apart from a residence which was used for office overload space. In cross-examination of Mr. McPhail. it was noted that the residence had not been occupied as such since 1971 but, in fact, had been used on a temporary basis by part of the construction crew and more recently, had been used for overflow office space for employees of the Appellant company.

. . .

> Mr. John Walter Stewart, the property tax accountant of the Appellant, British Columbia Telephone Company, stated in evidence that the Appellant's properties located at Kamloops, Prince George, Burnabv and Trail, British Columbia, had no 'utility plant' function and as such, were used as distribution centres and as warehouses. Mr. Stewart further stated that the Appellant's property, located at 775 Richards Street, Vancouver, was initially developed by the Appellant company as a parking lot for its employees. Due to a change in market conditions, the employees of the Appellant company were able to find cheaper parking at alternative locations and accordingly, the parking lot was leased to Imperial Parking Ltd. who now operate the structure as a public parking lot. The parking lot is classified as Utilities, Class 2, and it was the contention of Mr. Stewart that it should be classified as Business and Other, Class 6. Further evidence was adduced from Mr. Stewart concerning the Appellant's property located at 706-776 Seymour Street, Vancouver, B.C. Mr. Stewart conceded that a part of this property should be classified as Utilities, Class 2, as it contained switching equipment, however, he submitted that the portion of the building which contained three commercial leases to the Royal Bank, Scotts Cafe and Olympic Sports, should be classified as Business and Other, Class 6."

The determining factor in the Board's finding that the properties of these two appellants should be classified as Utilities, Class 2 is the presence of the word "of" in the definition. Quoting only the essential words, the definition reads:

> "Class 2-Utilities (30 per cent) shall include land or improvements or both . . . *of* any . . . pipeline corporation, or . . . telephone . . . company . . ."

The Board was of the opinion that the inclusion of the word "of" was a clear indication that the determination of classification as utilities should not be made upon the manner in which the land or improvements were used but rather upon the basis of ownership. Class 2 excludes land or improvements or both included in classes 1 and 4. Class 1 is residential. The Board went on to find that as the residence at Kelowna of Inland Natural Gas Co. Ltd. was used for office overload space and not for residential purposes, it could not fall within the definition of Class 1-Residential.

I agree with the view of the Board as to the effect of the definition of Class 2-Utilities by reason of the inclusion of the word "of". But that definition is *ultra vires*. Under s. 24 (8), the Lieutenant-Governor in Council "shall define the types or uses of land or improvements, or both, to be included in each class." Mr. Hutchison argued that the definition is *intra vires* because it defines types of land or improvement. I do not agree. One does not define a type of land or improvement by naming the owner. The applicable definition of "type" which I take from the *Shorter Oxford English Dictionary* is:

> "The general form, structure, or character distinguishing a particular kind, group, or class of beings or objects;"

Ss. 8 requires the Lieutenant-Governor in Council to define the types of land or improvements. That is objects not beings. The unsoundness of the contention for the respondents is revealed by an illustration. Take the Vancouver Hotel property. If one person asked another what type of land and improvements it was he would consider that he was not getting a responsive answer if he was told that it was owned by Canadian National Railways. He would expect to hear an answer to the effect that it was a prime, downtown, urban land developed as an hotel.

The question stated to the Court on behalf of these two appellants are:

> "1. Did the Board err in principle by finding that the land and improvements of the Appellants subject to this appeal must be classified as utilities regardless of the use of such land and improvements?

2. Is the finding of the Board *ultra vires* the provisions of the *Assessment Act*?

3. Did the Board err in law by directing the Assessment Commissioner to order each Area Assessor to consider and amend by way of Supplementary Roll all classifications within their areas as are necessary to comply with the decision, when such classifications were not under appeal?

4. Is the order of the Board to the Assessment Commissioner referred to in Question No. 3 *ultra vires* its powers under the *Assessment Act*?"

It follows from what I have said that the answers to questions 1 and 2 are "yes". Going on to questions 3 and 4, the Board, in its reasons, observed that there are many similar classification appeals throughout the Province and so it ordered the Assessment Commissioner to have each area assessor consider and amend, by way of supplementary roll, all of such classifications within their areas as were necessary in order to be consistent with their decision. Mr. Hutchison agreed that the Board did not have the power under the *Assessment Act* to make such an order affecting classifications not under appeal. Therefore the answers to questions 3 and 4 are also "yes".

I move on to the appeal of Gulf Oil Canada Ltd. The stated case sets out the following as to this appellant's properties and the use made of them:

"10. The land and improvements of the Appellant Gulf Oil Canada Ltd. in the City of Port Moody is zoned industrial and consists of a total of 361.7 acres and the Appellant's refinery is situate on 126.6 of the said acres which the Appellant concedes is properly classified as industrial. The remaining 235.1 acres has no industrial function. For the purpose of this appeal, the assessed value of all the said lands and improvements is not in issue but the classification of the 235.1 acres which have no industrial function is in issue.

11. The Appellant's land and improvements in the District of Burnaby, Burnaby/New Westminster Area, consist of a marketing terminal and the evidence heard at the appeal establishes that this terminal is used primarily for storage, distribution, and sale of petroleum products and that the Appellant also purchases some bulk aviation gas, solvents and some bunker fuel, diesel fuel, stove oil and tubes and greases which are re-sold by the Appellant at the Burnaby marketing terminal. All petroleum products are delivered or sold through this terminal to other terminals, to service stations, to bulk plants, and also customers in bulk quantities.

There is also about 34 acres of the Appellant's lands in the Burnaby/New Westminster Assessment Area which is contiguous to its marketing terminal and is zoned 'agricultural reserve' and the only evidence heard by the Board is that it was not being used for any refining, industrial or commercial purpose whatsoever.

12. The Appellant's land and improvements in the City of Victoria, Capital Assessment Area, is stocked through the Burnaby marketing terminal and is also used as a marketing terminal for the purpose of storing, distributing and selling petroleum products refined by the Appellant to bulk plants and also to sell such products to service stations and to customers who purchase petroleum products in bulk quantities. The lands and improvements owned by the Appellant in the Trail Assessment Area, Peace River Assessment Area, North Shore Squamish Assessment Area. Cowichan Valley Assessment Area and Saanich Assessment Area are all stocked through the marketing terminals and are used as bulk plants for the purpose of storing and distributing petroleum products for the sale of the same to service stations and customers who purchase petroleum products in bulk quantities. The difference between a marketing terminal and a bulk plant is that a marketing terminal has a greater volume and wider

variety of products than a bulk plant. None of the assessed values of the Appellant's lands and improvements referred to in Paragraph 11 and this paragraph is in issue in this appeal but the classification of the said lands and improvements as industrial is in issue.

13. The evidence presented to the Board established that there is no refining process or industrial process at any of the marketing terminals or bulk plants that is the subject of this appeal but that the petroleum products processed at the refinery in Port Moody are delivered firstly to the marketing terminal in Burnaby and then to customers or to other terminals and bulk plants referred to in Paragraph 12 and that the said petroleum products are then sold to the Appellant's, customers including customers who purchase petroleum products on or off site in bulk as well as service stations."

The Board expressed its decision respecting the Gulf Oil Canada Ltd. appeal this way:

"In determining the classification of the land and improvements under appeal, the Board finds as a fact that the said land and improvements are primarily used or held for the purpose of the storage of petroleum products of the Appellant corporation. In reaching this conclusion, the Board is cognizant of the fact that the primary function of the bulk plants and marketing terminals is for the storage and distribution of petroleum products to service stations and major customers of the Appellant corporation. The Board further finds that the general public is not permitted to make purchases from the marketing terminals or bulk stations and as such, it cannot be said that the properties under appeal would fall within Class 5 (iv) as being used for the purpose of providing a service to the public. Accordingly, the Board holds that the subject land and improvements under appeal shall be classified as Class 5, Industrial, with the exception of that portion of the land and improvements which are used for the resale of finished products and fall within the exemption section being paragraph (ii) of Class 5, which excludes land or improvements or both which are used for the resale of finished products. The Board finds as a fact that the Appellant corporation purchases some lubricants, aviation gas, solvents and some bunker fuel. The Board further finds that these products are resold by the Appellant corporation and accordingly, fall within the above noted exemption section."

The questions posed on behalf of this appellant are:

"1. Did the Board err in principle by finding that except only for the land and improvements used for re-sale, of finished products that the land and improvements of the Appellant subject to this appeal shall be classified as industrial?

2. Is this finding of the Board incorrect in principle and against the law as being the assessment based on value to the owner?

3. Is the finding of the Board *ultra vires* the provisions of the *Assessment Act*.?

4. Did the Board err in law by directing the Assessment Commissioner to order each Area Assessor to consider and amend by way of Supplementary Roll all classifications within their areas as are necessary to comply with the decision?

5. Is the order of the Board to the Assessment Commissioner referred to in Question 4 *ultra vires* its powers under the *Assessment Act*?"

As follows from what I said earlier, the answers to questions 4 and 5 are "yes".

I begin with consideration of the 235.1 acres at the Port Moody property which is zoned industrial but has no industrial function and the 34 acres in Burnaby, contiguous to the marketing terminal, zoned "agricultural reserve" and not in use for any refining, industrial or commercial purpose. In its determination the Board said more about the 235.1 acres at Port Moody. 125 of those acres

are used as a buffer zone and the remaining 110.1 are outside the fenced acreage and adjacent to the Barnet Highway.

These properties are not being used for industrial purposes. Therefore they can only be brought into class 5 upon a determination that they, using the word of the definition, are "held" for such purpose.

This is Mr. Hutchison's argument in support of the Board's determination. The definition of Class 5-Industrial includes land, "used or held" for the purpose of extracting, processing, manufacturing, etc. Used and held are employed disjunctively. If the evidence is that land is held for future expansion, then it can all be classified as industrial. And that is so even if, like the 34 acres, it is presently zoned for agriculture. In this case the Board found as a fact that all the land was an integral part of the industrial complex of Gulf Oil Canada Ltd. Accordingly there was no error in principle.

Mr. Lakes' contention is that there was no evidence to support the Board's classification of anything beyond the 126.6 acres as industrial. There was no evidence of intention to ever use the rest of the land. What the Board did, in effect, was to classify on the basis of ownership. The words "used" and "held" are not totally disjunctive. Counsel illustrated in this way. If cows are kept on the 34 acres, how can it be said that the land is used for agriculture but held for industry? Use ought to prevail over holding.

The Board would have erred in principle if it classified these lands as Class 5-Industrial in the absence of any supporting evidence. After reading the evidence of Mr. A. R. Nicolson, who testified on behalf of Gulf Oil Canada Ltd., I am unable to find that it did so.

That leaves for consideration the Burnaby marketing terminal, the other marketing terminals, and the bulk plants. It is the contention of this appellant that these should have been classified Class 6-Business and Other, as no industrial function was carried out on these properties. As appears from what I have already quoted, the ground of the Board's determination was that the properties were *primarily* (my italics) used or held for the purpose of storage of the appellant's petroleum products. And it went on to expressly state the conclusion that the primary function of the bulk plants and marketing terminals was for the storage and distribution of petroleum products to service stations and major customers of Gulf Oil Canada Ltd. In my judgment these findings of fact, along with the definition of Class 5-Industrial which in stating the purpose includes the words "storage of any product" and "storage of petroleum" is sufficient, legally, to sustain the determination. Accordingly, I answer questions 1, 2 and 3 with "no".