1960
Sept. 27
1961
Aug. 4

BETWEEN:

ROSEMARY GERTRUDE HUSTON .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

AND BETWEEN:

FREDERICK B. WHITEHEAD .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT;

AND BETWEEN:

ELSE B. WHITEHEAD .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

Revenue—Income—Income Tax Act—Compensation award by War Claims Commission for World War II loss—Direction award bears simple interest—Whether sum referred to as "interest", capital or income—The Appropriation Act, No. 4, 1952, S. of C. 1952, c. 55—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6(b) and 139(1)(ag).

The appellants in 1953 made application to the War Claims Commission for compensation for property owned by them in Czechoslovakia which was partially destroyed by the German Army in World War II. The Commission recommended payment out of the War Claims Fund to each of the appellants and that such amounts should bear simple interest from January 1, 1946 at the rate of 3% per annum. On October 10, 1958 this recommendation was approved by the Treasury Board and on October 17, 1958 cheques were forwarded the appellants' counsel by the Department of Finance together with a letter stating that the cheques enclosed represented the payments recommended by the War Claims Commission together with interest to October 10, 1958.

In assessing each of the appellants for the year 1958 the Minister added to the income reported by them the amount referred to as "interest" in the Commission's award. In an appeal from the assessments

Held: That the payments take their nature not from the motives for making them, or from what they are called, but from what in substance they are.

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2. That in the case of each appellant the amounts paid was a capital grant no part of which was "interest" or "received as interest" within the meaning of s. 6(*b*) of the *Income Tax Act*.

Glenboig Union Fireclay Co. Ltd. v. Commissioners of Inland Revenue, [1921] S.C. 400; [1922] S.C. (H.L.) 112; (1922) 12 T.C. 427; *Commissioners of Inland Revenue v. Ballantine*, (1924) 8 T.C. 595; *Simpson v. Executors of Bonner Maurice*, (1929) 14 T.C. 580; 45 T.L.R. 581, referred to. *Riches v. Westminster Bank*, (1947) 28 T.C. 159 distinguished.

APPEALS under the *Income Tax Act*.

The appeals were heard before the Honourable Mr. Justice Thurlow at Toronto.

C. H. Morawetz for appellants.

G. W. Ainslie and *F. J. Cross* for respondent.

THURLOW J. now (August 4, 1961) delivered the following judgment:

These are appeals from assessments of income tax for the year 1958. In that year, each of the appellants received a payment out of the War Claims Fund established pursuant to S. of C. 1952, c. 55, s. 3, vote 696, a portion of which payment has in each case been treated as income by the Minister in making the assessment under appeal, and the issue in all three appeals is whether the portion in question was income for the purpose of the *Income Tax Act*, R.S.C. 1952, c. 148.

The appellant Else B. Whitehead is the mother of the other two appellants, and all three have at all material times been Canadian citizens. Prior to World War II, each of them had owned an interest in a factory in Czechoslovakia which had been confiscated by the German authorities following the German occupation of Czechoslovakia in 1939. At the conclusion of the war in Europe, the confiscation and subsequent transfers of the property were treated as void, and the interests of the appellants in the factory were restored. The factory had, however, been partially destroyed by the German army a few days before the war ended.

In July, 1951, an Advisory Commission on War Claims, consisting of the Right Honourable J. L. Ilsley as sole commissioner, was appointed by the Government of Canada to inquire into and make recommendations respecting a number of subjects pertaining to claims arising out of

World War II in respect of death, personal injury, maltreatment, and loss or damage to property, including in particular among other matters that of whether interest should in any cases be allowed. By his report dated February 25, 1952, the commissioner recommended that a war claims fund be established and that there be transferred into it certain funds consisting of reparations available to Canada pursuant to agreement between certain of the governments of the countries which had participated in the war against Germany and certain funds and property held by the Custodian of Enemy Property, and he made many recommendations as to the categories of claims to be paid from the fund or to be denied payment therefrom and the principles and priorities to be applied in assessing the claims and ultimately paying them. Included in his recommendations was one that interest at 3% per annum from January 1, 1946 until the date of payment be included as an element of the amount to be paid in respect of property losses other than losses at sea.

Following this report, Parliament by the *Appropriation Act, No. 4, 1952,* S. of C. 1952, c. 55, s. 3, vote 696, granted a nominal sum

> To authorize
>
> (*a*) the Custodian of Enemy Property to transfer to the Minister of Finance such property, including the proceeds and earnings of property, that is vested in the Custodian in respect of World War II as the Governor in Council prescribes,
>
> (*b*) the Minister of Finance to hold, sell or otherwise administer property received by him from the Custodian under paragraph (*a*) or from other sources by way of reparations by former enemies (except Italy) in respect of World War II, and
>
> (*c*) the Minister of Finance to establish a special account in the Consolidated Revenue Fund to be known as the War Claims Fund, to which shall be credited all money received by him from the Custodian under paragraph (*a*) or from other sources by way of reparations by former enemies (except Italy) in respect of World War II, the proceeds of sale of property under paragraph (*b*), the earnings of property specified in paragraph (*b*) and amounts recovered from persons who have received overpayments in respect of claims arising out of World War II;
>
> and, notwithstanding section 35 of the *Financial Administration Act,* to provide for payments out of the War Claims Fund in the current and subsequent fiscal years, in accordance with regulations of the Governor in Council, to persons who claim compensation in respect of World War II for the payment out of the War Claims Fund in the current and subsequent fiscal years of expenses incurred in investigating and reporting on claims of those persons and for the repayment out of the War Claims Fund to Vote 128 (miscellaneous minor and unforeseen expenses) of all amounts

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that have been paid out of that Vote pursuant to The War Claims Interim Compensation Rules established by Order in Council, P.C. 667 of February 4, 1952.

Pursuant to this authority, the Governor in Council by Order in Council P. C. 4267 of October 9, 1952 established War Claims Regulations providing that the recommendations contained in the report of the Advisory Commission on War Claims, modified to the extent specified in the Schedule to the regulations, should constitute the rules governing payment out of the War Claims Fund of compensation in respect of war claims and that payment might be made out of the Fund with the approval of the Treasury Board to a person in respect of a war claim of an amount that, in the opinion of the War Claims Commissioner to be appointed pursuant to the Regulations, that person was eligible to receive under the war claims rules. By regulation 5, it was provided that "No right to payment is conferred by these regulations." In the schedule to the regulations, paragraph 5, entitled "Interest", provided:

Simple interest at three per centum per annum may be paid on the following classes of awards:

(*a*) For property losses on the high seas from the date of the loss;

(*b*) For personal injury or death on the high seas from the date of the loss;

(*c*) For disbursements for medical and similar expenses from the date of the disbursement; and

(*d*) For all other claims, excluding awards for maltreatment, from January 1, 1946.

These regulations were revoked and replaced by new regulations by Order in Council P. C. 1954-1809, but the provisions above mentioned remained unchanged in the new regulations.

Claims put forward by the appellants in respect of the damage to their interests in the Czechoslovakian factory were heard by the Deputy War Claims Commissioner, who on May 30, 1957 made a recommendation which was later reviewed and on August 23, 1958 approved by the Chief War Claims Commissioner. The latter recommended that there be paid to the claimants the following amounts as compensation for damage to properties in Czechoslovakia:

(*a*) To Mrs. Elsie B. Whitehead, $27,824.00, such payment to be in Orders of Priority Nos. 3(a) to 5 inclusive;

(*b*) To Mrs. Rosemary Huston, $37,098.00;

(*c*) To Frederick Whitehead, $37,098.00;

each of the two last payments to be in Orders of Priority Nos. 3(a) to 6(a) inclusive.

Each of the foregoing payments should bear simple interest from 1st January 1946 at 3% per annum.

On October 27, 1958, cheques were forwarded by the Department of Finance to the counsel who had appeared for the claimants in favour of Mrs. Else B. Whitehead in the sum of $38,487.83, in favour of Frederick Whitehead in the sum of $51,316.18, and in favour of Mrs. Rosemary Huston in the sum of $51,316.18, together with a letter stating that the cheques represented payment of the amounts recommended by the War Claims Commission, together with interest to October 10, 1958, the date on which payment was approved by the Treasury Board.

In making the assessments under appeal, the Minister added to the income reported by the appellants the amounts referred to as "interest", and he assessed tax accordingly.

The question to be determined is whether these amounts were income for the purposes of the *Income Tax Act*. Section 3 of that Act declares that the income of a taxpayer for the purposes of Part I is his income for the year from all sources and, without restricting the generality of the foregoing, includes income for the year from all (*a*) businesses, (*b*) property, and (*c*) offices and employments. Section 4 provides that, subject to the other provisions of Part I, income for a taxation year from a business or property is the profit therefrom for the year. And s. 6 provides that "without restricting the generality of s. 3 there shall be included in computing the income of a taxpayer for a taxation year . . . (*b*) amounts received in the year or receivable in the year (depending upon the method regularly followed by the taxpayer in computing his profit) as interest or on account or in lieu of payment of, or in satisfaction of interest."

The position taken by the Minister in support of the assessments was that the sums in question were interest and were income within the meaning of these provisions and the reasoning of the English courts in *Riches v. Westminster Bank*[1] was relied on as showing the income

[1] (1947) 28 T.C. 159.

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character of the payments in question. The appellants' position was that to call a sum interest does not make it interest or income within the meaning of the *Income Tax Act*, that what is to be determined in each case is the true character of the receipt and that the payments here in question, though called interest and calculated or measured as interest, were not interest in fact but were simply grants.

That the payments in question were not income from a business or from an office or employment within the meaning of the statutory provision above referred to is, I think, perfectly clear. And though it is perhaps not quite so clear, I am also of the opinion that the sums in question cannot properly be classed as income from property within the meaning of the same provision. "Property" is defined in s. 139(1)(*ag*) as meaning "property of any kind whatsoever whether real or personal or corporeal or incorporeal and without restricting the generality of the foregoing, includes a right of any kind whatsoever, a share or a chose in action." As I see it, the sums in question are not income from property because, notwithstanding the exceedingly broad scope of the statutory definition, the appellants during the period from January 1, 1946 to October 10, 1958 in respect of which the alleged "interest" was computed, in my opinion, had no property or legal or equitable right of any kind in the amount on which the alleged "interest" was computed. Nor, unless the payments were in fact "interest", do I see any other basis on which the sums in question could be regarded as income within the meaning of s. 3. The question to be determined is thus reduced to that of whether the "interest" payments in question are amounts required by s. 6(*b*) to be brought into the computation of the income of the appellants.

In approaching this question, it may be observed that, if amounts can be or become interest within the meaning of s. 6(*b*) merely by reason of what they are called, how they are computed and what they are intended to represent, there is no difficulty here, for the amounts were called interest, they were calculated at a yearly rate on a "principal" sum for a particular period of time, and they were obviously intended by Chief Justice Ilsley, and I think by every subsequent authority who dealt with the matter, to compensate the appellants in respect of their

not having had the "principal" amount from January 1, 1946 until October 10, 1958. Moreover, if the intention of the payer or even that of the payer and receiver were conclusive, I would have little difficulty in reaching the conclusion that the sums in question were paid and received as interest.

These features, however, to my mind are not only not conclusive but are liable to confuse and obscure the real issue. That issue is whether these amounts from the point of view of the appellants were "received as interest" within the meaning of s. 6(*b*). The name attached by the parties to payments, the way the amounts are calculated, and what they represent may often be of great importance in resolving such an issue, but the issue is one of substance and depends not on these features alone but on the other features of the case, as well. For just as a sum which is in truth interest, though called by some other name, will fall within the meaning of the section, so a sum which in truth is not interest, in my opinion, will not be "received as interest" within the meaning of the section, even though it may have the name and some of the other attributes of interest. To take the example suggested by counsel, it is, I think, plain that a legacy would not be "received as interest" within the meaning of s. 6(*b*) merely because the testator in his will had chosen to call it interest and had directed that its amount be computed by reference to a rate on a particular amount for the period between the making of the will and the testator's death.

Another example is *Glenboig Union Fireclay Co. Ltd. v. Commissioners of Inland Revenue*.[1] In that case, a sum to which the taxpayer was entitled in respect of the loss of one of its assets was computed by reference to the profit which might have been realized by the taxpayer in using the asset. The asset had, however, been one of a capital nature, and the taxpayer's entitlement being to compensation in respect of its loss, the amount awarded was held also to be capital, rather than profit or income. The fact that the amount was calculated by reference to the profits that might have been made and in a sense represented profits which the taxpayer had lost the opportunity to earn did not turn the receipt into one of an income nature.

[1] (1922) 12 T.C. 427.

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Similarly, in *Commissioners of Inland Revenue v. Ballantine*[1] a sum described as interest which was included in an award of "additional costs, loss and damages" was held to be simply part of the damages and not chargeable to tax.

In *Simpson v. Executors of Bonner Maurice*[2], an amount described and calculated as interest was awarded by a tribunal which was authorized under the Treaty of Versailles to award "compensation in respect of damage or injury inflicted upon" the property of the deceased. It was held that the amount was not interest or income. Rowlatt J., whose judgment was affirmed by the Court of Appeal, said at p. 593:

> The Treaty gave compensation, and the tribunal which assessed the principal sum has assessed it as interest. I think this sum first came into existence by the award, and no previous history or anterior character can be attributed to it. It is exactly like damages for detention of a chattel, and unless it can be said that damages for detention of a chattel can be called rent or hire for the chattel during the period of detention, I do not think this compensation can be called interest.

The situation in *Riches v. Westminster Bank* (*supra*) was quite different from that in the example, as well as from those in the cases cited and that in the present case. In the *Riches* case, what was held taxable was an amount awarded by a court pursuant to a statute authorizing the award of *interest*. It was awarded in respect of a sum which the plaintiff had had a legal right to receive many years earlier, and it was awarded as interest in respect of the intervening period. That the amount so awarded was of an income nature was on the whole reasonably clear, and the main question decided was not whether it had such a character but whether the fact that an award of interest in such circumstances was an award in the nature of damages for the detention of the principal sum was not compatible with it being regarded as income exigible to tax. The House of Lords held that there was not necessarily any incompatibility between the two conceptions. Viscount Simon put the matter thus at p. 187:

> The Appellant contends that the additional sum of £10,028, though awarded under a power to add interest to the amount of the debt, and though called interest in the judgment, is not really interest such as attracts Income Tax, but is damages. The short answer to this is that there is no essential incompatibility between the two conceptions. The real

[1] (1924) 8 T.C. 595.

[2] (1929) 14 T.C. 580.

question, for the purpose of deciding whether the Income Tax Acts apply, is whether the added sum is capital or income, not whether the sum is damages or interest.

Lord Simonds also said at p. 194:

> Here the argument is that, call it interest or what you will, it is damages and, if it is damages, then it is not "interest in the proper sense" or "interest proper", expressions heard many times by your Lordships.
>
> This argument appears to me fallacious. It assumes an incompatibility between the ideas of interest and damages for which I see no justification. It confuses the character of the sum paid with the authority under which it is paid. Its essential character may be the same, whether it is paid under the compulsion of a contract, a statute or a judgment of the Court. In the first case it may be called "interest" and in the second and third cases "damages in the nature of interest", or even "damages". But the real question is still what is its intrinsic character, and in the consideration of this question a description due to the authority under which it is paid may well mislead.

At the foot of p. 195, Lord Simonds also said:

> My Lords, having discussed in a general way the nature of a sum of money awarded as interest under section 28 of the Civil Procedure Act, I turn to the cases decided under the Income Tax Act to see whether they assist the appellant. I find in them just what I expected to find. The question in each case is whether the receipt is of an income or a capital nature; that is the test for Income Tax purposes, not whether it is called "interest" or "damages."

In the result, the House of Lords held, as had the High Court and the Court of Appeal, that the amount there in question was "interest of money" within the meaning of para. 1(*b*) of Schedule D of the *Income Tax Act, 1918*.

In the present case, as I see it, no question arises as to whether the amounts in question were damages or compensation, for they may be neither and yet not be taxable. The sole issue is whether the amounts were interest, but in resolving this issue the test to be applied is the same as that stated by Lord Simonds, namely, whether the amounts in question are of an income or a capital nature. The facts are that the appellant's property had been partially destroyed in 1945, a misfortune for which, so far as has been made to appear, they had no right to legal redress against anyone, and, in any event, none against the Government of Canada. *Vide Civilian War Claimants Association Ltd. v. The King.*[1] Despite what was going on in the meantime, that continued to be the legal position until October 10, 1958, when the Treasury Board approved

[1] [1932] A.C. 14.

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the payments, which were made to them shortly afterwards. No principal sum was payable in the meantime, nor was interest accruing on any principal sum, nor were the appellants being kept out of any sum to which they were entitled. In truth, during the whole of the intervening period they had no right to compensation for their loss, and there was neither interest accruing to them nor loss of revenue being sustained in respect to which they would be entitled to interest by way of damages or compensation.

In this connection, it may be noted that, while the House of Lords in *Riches v. Westminster Bank* overruled *Re National Bank of Wales*[1], it did not overrule *Commissioner of Inland Revenue v. Ballantine* or *Simpson v. Executors of Bonner Maurice, (supra)*both of which appear to me to be stronger cases in this respect than the present for attributing an income nature to the sums in question, since in these cases the taxpayer's right to the sum to which "interest" was added arose prior to or at the commencement of the period in respect to which the "interest" was computed. No case of which I am aware goes so far as to hold such an amount, call it interest or damages or compensation or any other name, to be interest or income when there was neither interest accruing in fact on the "principal" amount during the material period nor any right to the "principal" amount vested in the taxpayer during that period.

Moreover, notwithstanding the history of partial destruction of the appellant's property and the reasons which moved Parliament to set up the War Claims Fund and to "authorize" payments from it "in accordance with regulations" "to persons who claim compensation in respect of World War II" the payments so made appear to me to have been simply grants to individuals. They may be described as compensation for losses, they may be referred to in part as interest, they were undoubtedly made to these individuals because they suffered loss from the war and did not have their property intact at the end of the war, but to my mind the payments, like the legacy in the example and like the compensation awarded in *Glenboig Union*

[1] [1899] 2 Ch. 629.

Fireclay Ltd. v. Commissioner of Inland Revenue, take their nature not from the motives for making them or from what they are called, but from what in substance they are, in the example a legacy, in the *Glenboig* case statutory compensation for loss of a capital asset, in the present case grants. No doubt, under the War Claims Regulations, the amount of the grant in each case was to be in part measured or determined by reference to an interest calculation, and it may also be accepted that the reason for so measuring and granting such part was to offset an income loss, but the amount so arrived at was non-existent, it was nothing but a calculation and had no character at all until approved by the Treasury Board and, when so approved, it came into being "without previous history or anterior character" and was, in my opinion, simply the amount of a capital sum granted to the claimant. In my view, no part of the sum granted was of an income nature, and the amounts in question were, therefore, not "interest" or "received as interest" within the meaning of s. 6(*b*) of the *Income Tax Act.*

It was submitted in the course of argument that the fact that the payments were gratuitous payments by the Government of Canada would not render them inexigible to tax if they were in their nature income payments, and *Goldman v. Minister of National Revenue*[1] and *Severne v. Dadswell*[2] were cited as examples, the *Goldman* case as an example of a gratuitous payment being held to be income from an office and *Severne v. Dadswell* as an example of a gratuitous payment being held assessable as profit arising from a trade. In view of the conclusion which I have reached on the main question, it is unnecessary to consider this submission in detail, but it appears to me that the cases cited were simply applications of particular taxing enactments to particular facts and that no principle affecting the present situation is to be derived from them.

Finally, it was argued that, when a statute provides for the payment of interest, the word "interest" should be interpreted as having its natural meaning. The word

[1] [1953] 1 S.C.R. 211. [2] [1954] 3 All E.R. 243.

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"interest" does not, however, appear in *The Appropriation Act*, pursuant to which the payments were made. That Act simply authorized "payments" to particular persons in accordance with regulations to be made. The regulations made pursuant to this authority do refer to "interest", but that, to my mind, falls far short of a statutory enactment that the sums to be paid are interest.

The appeals will be allowed and the assessments varied accordingly in the case of Else B. Whitehead and Frederick Whitehead and vacated in the case of Rosemary Huston. The appellants are entitled to the costs of the appeals, the costs of the trial to be apportioned one third to each appellant.

Judgment accordingly.