CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

JAMES BARBER McLEOD IN HIS QUALITY OF TRUSTEE OF THE LAST WILL AND TESTAMENT OF JOHN CURRY, DECEASED ..... APPELLANT;

AND

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

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Nov. 20.
Nov. 30.

Revenue—Income War Tax Act, Section 11, ss. 2—"Income accumulating"—Interpretation

Held that the word "accumulating" used with the word "income" in section 11, ss. 2 of the Income War Tax Act, 1917, and Amendments, is there used gerundially, that is as a verbal noun rather than as a verb; it is used just to earmark it as the fund for unascertained persons or persons with contingent interest and which is taxable in the hands of the Trustee.

APPEAL by the appellant herein from the decision of the Minister assessing, for the year 1928, the "income accumulating" in trust in the hands of the appellant as trustee.

The appeal was heard before the Honourable Mr. Justice Audette at Ottawa.

A. C. McMaster, K.C., for the appellant.

C. Fraser Elliott, K.C., and *W. S. Fisher* for the respondent.

The facts and questions of law raised are stated in the Reasons for Judgment.

AUDETTE J., now (November 30, 1931), delivered the following judgment.

This is an appeal, under the provisions of The Income War Tax Act, 1917, and amendments thereto, from the assessment of the appellant, for the year 1928, in respect of

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the income accumulating in trust in the hands of the appellant trustee, under the provisions of section 11 of the Act which reads as follows:—

11. The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period.

2. Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of an unmarried person.

At the opening of the hearing of this appeal both parties, by their respective counsel, filed the following admission of facts, viz:—

STATEMENT OF FACTS AGREED UPON BY COUNSEL FOR THE APPELLANT AND RESPONDENT FOR THE PURPOSE OF THE TRIAL OF THIS ACTION.

1. The Appellant, residing in the City of Toronto, in the Province of Ontario, is the sole surviving executor and trustee of the last will and testament of John Curry, late of the City of Windsor in the County of Essex, in the Province of Ontario, who died domiciled in the said City of Windsor on the 11th day of May, 1912.

2. That the said executor and trustee was and is a "person" within the meaning of the Income War Tax Act and is resident in Canada.

3. That in determining the "income" for taxation purposes of the Appellant for the calendar year 1928 accumulating in his hands for the benefit of unascertained persons or persons with contingent interests there was disallowed as an expense the following items—

Dominion Income Tax:—		
Paid Jan. 12th, 1928, balance of tax for years 1918, 1919 and 1920	$	836 15
Paid May 21st, 1928, balance 1921 assessment		446 67
Paid Nov. 9th, 1928, balance 1923 and 1925 assessments		12,836 45
Paid April 30th, 1928, 1927 tax		11,588 36
Paid Dec. 4th, 1928, balance 1927 tax		10,164 46
		$35,872 09
United States Income Tax paid on income earned in the State of Michigan for the year 1928		431 18
		$36,303 27

It is well to be noticed that while the assessment appealed from comprises the sum of $509.83 "for legal costs paid to McLeod and Bell and other solicitors," the respondent, both by the admission and its statement on defence, abandoned this amount and by paragraph 7 of the

defence admitted the amount as a proper deduction in arriving at the taxable income and to that extent the assessment is to be adjusted.

The determination of the income assessed is not in dispute, except as to the above mentioned items which the appellant claims should be deducted from the income in question before assessment thereof and which are set out, both in paragraph 12 of the appellant's statement of claim and in the above recited admission.

The question of the liability for these taxes is *res judicata* and is the result of litigation whereby the appellant was held liable therefor, by the Exchequer Court of Canada and Supreme Court of Canada in the case of *McLeod* v. *The Minister of Customs and Excise* (1). These Courts adjudicated on the principle that this was a fund within section 11 and the parties agreed as to the amount of the tax.

Now the only question to be here determined is not whether these amounts are payable, but whether or not they are a proper subject for deduction. It is contended by the appellant that these deductions should, under section 11, be made only from the fund which has been accumulated, that it is the fund accumulating which is subject to be taxed and not the fund or ascertained income received by the Trustee. That it should be the fund accumulating after being received.

The controversy turns upon the meaning of the word "*accumulating*" in subsection 2 of section 11. The total amount of the *income* is first received by the Trustee and divided into three separate parts. One part is paid to A, one part to B and the third part is set aside and is called and described as the "income accumulating."

The word "accumulating" is here used gerundially, that is as a verbal noun rather than as a verb; it is used just to earmark it as the fund for unascertained persons or persons with contingent interest and which is taxable in the hands of the Trustee. And the tax becomes due upon the same just as soon as it is so ascertained in respect of the three amounts and the Crown has, under the Act, the right to take, as the tax, its share of these ascertained amounts.

(1) (1925) Ex. C.R. 105; (1926) S.C.R. 456.

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What is taxable is the ascertained amount of the income which comes into the hands of the Trustee for the purpose of accumulation. It is the income which is taxed and not the accumulation. The expression "income accumulating" is used only as a means of describing and designating that part of the income from the total and upon which the Trustee is liable to be taxed. And the application or use of the income is of no concern in determining the tax liability upon the same.

The exemption of $1,500, as an unmarried person, is also ascertained at the time the income is ascertained and not upon the amount that will accumulate in the future.

It is the income of a person which is taxed, the tax is a personal tax, not upon the property, and the moment the amount of the income is earmarked and set aside for accumulation and goes into the hands of the person, the Trustee here, he becomes liable for the tax. It is the person who either owns or in whose hands it is legally, that is liable for the tax. He becomes the person assessable in respect of the income.

The mode of distribution of a person's or of an estate's income, as provided by the will in the present case, cannot affect the liability to taxation and cannot present or suggest any legal difficulty as to the incidence of the tax upon a particular portion of the ascertained income. The tax becomes payable the moment it is ascertained and is payable out and as part of that income, before it becomes a question of accumulating or not. *Dillon* v. *Corporation of Haverford west* (1); *Tennant* v. *Smith* (2); *Harris* v. *Corporation of Burgh Irvine* (3).

When an income has been ascertained, the use or destination of that income or of any part thereof, is immaterial. It is not the accumulation that is taxed, but that part of the ascertained income identified under that description of *income accumulative*. These words are a mere description of a part of the ascertained income which finds its way into the hands of the Trustee, under the provisions of the will.

The amount of this ascertained income cannot become the subject of deduction and exemption under the Act. This tax, now payable under a judgment of the Courts,

(1) (1891) 3 T.C. 31, at p. 36. (2) (1892) 3 T.C. 158, at p. 165.
(3) (1900) 4 T.C. 221, at p. 232.

cannot become the subject of a reduction of the income of the next period,—it was not used wholly, exclusively and necessarily—or in any manner, for the purpose of earning the income (sec. 6). The tax is taken from the income itself and it is a share to the Crown of such income.

The income and the tax are confined to one year. The tax is the sharing of profits for one year and it is immaterial to consider what may or may not happen in the year or years following the year of assessment. *Attorney-General* v. *Metropolitan Water Board* (1).

A person may have an income one year and none the following years. The Crown is entitled to its share of the income, the profits and gain of the first year, although the tax is paid the following year.

The fallacy of the appellant's contention lies in an attempt to place upon these words "*income accumulating*" the narrowest possible construction to which they could be subjected and to ignore the plain grammatical meaning of these words as already above explained. The tax is ascertained the moment the income is ascertained, as it is a share of that income. Acquiescing in the appellant's contention —that is paying a tax for which the appellant has been found liable by the Courts—and be allowed to deduct that tax from the following years income, would let in a condition which would defeat the very purpose of the Act and lead to results absolutely foreign to the spirit and meaning of our Taxing Act. The tax must be either payable or not, and, if payable, not to be afterward returned or refunded.

Now, with respect to the amount of $431.18 paid to the United States on income earned in the State of Michigan,—in view of my decision in the case of *Roenisch* v. *Minister of National Revenue* (2)—it will be sufficient to say, for the reasons therein mentioned and among others, that the amount was not paid for the purpose of earning the income and should not be deducted. The exemption from taxation is a case of exception which must be strictly construed.

These amounts sought to be deducted have nothing to do with the income of 1928; these amounts of taxes must be taken out of the income earned in their respective years.

The appeal is dismissed with costs.

Judgment accordingly.

(1) (1927) 13 T.C. 294, at p. 311. (2) (1931) Ex. C.R. 1