1954
Feb. 26
Mar. 8

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

ARTHUR TOPHAM ..... RESPONDENT.

Revenue—Income tax—The Income Tax Act, S. of C. 1948, ss. 39(1), 40(1)(c), 129(1)—Farmers and fishermen—Right to average income—Meaning of the words "as required by this Part" in s. 39(1) of the Act—Requirements in s. 39 of the Act must be met before right to average can be exercised—Powers of Parliament to impose conditions and make them imperative—Appeal from Income Tax Appeal Board allowed.

Respondent, a farmer whose chief source of income was farming, desirous of taking advantage of the provisions of s. 39(1) of the Income Tax Act, S. of C. 1948, c. 52, filed his election to average income within the time limited by the Act in respect to the years 1946, 1947, 1948 and 1949. His income tax returns for the years 1946, 1947 and 1949 were also filed within the same time limit, but due to an oversight on the part of his agents, the return for the year 1948 was not filed until June 7, 1949. The penalties for late filing imposed by the Minister were paid by respondent. The Minister, however, in the assessment for the year 1949 denied respondent the right to average his income on the ground that by reason of the delay in filing the 1948 return he did not file returns of income for the preceding years "as required by this Part" (Part I). From the assessment the respondent appealed to the Income Tax Appeal Board which allowed the appeal and from this decision the Minister brought the present appeal.

Held: That Parliament has the power to impose the conditions under which special privileges may be granted to groups of taxpayers even if anomalies may result therefrom. Likewise, Parliament may make those conditions of such an imperative nature, that, if not complied with, the right to the special benefits will be unavailable to the taxpayer. If anomalies follow from such an enactment or if the penalties or loss of rights which follow from non-observance of the conditions be thought to be too severe, it is for Parliament to amend the law and not for the Courts to give relief.

2. That one of the requirements in s. 39(1) of the Act that must be met before the right to average can be exercised is that "and the taxpayer has filed returns of income for the preceding years as required by this Part", which means not only that the returns must have been filed, but also that they must have been filed *as required by this Part.* S. 40 of the Act itself contains the requirements (*a*) that the return *shall* be filed with the Minister in prescribed form and containing prescribed information; and (*b*) in the case of an individual who has taxable income that his return *shall* be filed "on or before April in the next year".

3. That both of these requirements are conditions which fall within the ambit of the words "as required in this Part". These words cannot be considered as merely surplusage which would be the result if one

was to adopt the submission that to merely have filed the returns of the preceding years at any time is a sufficient compliance with the provisions of s. 39(1).

4. That the appeal is allowed.

APPEAL from a decision of the Income Tax Appeal Board.

Pursuant to an order of this Court the appeal was considered by the Honourable Mr. Justice Cameron based on the evidence adduced before the Honourable Mr. Justice Angers at Vancouver and on written argument submitted by counsel.

R. V. Prenter and *E. S. MacLatchy* for appellant.

D. C. Fillmore for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (March 8, 1954) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board dated March 28, 1952 (6 T.A.B.C. 242), allowing the appeal of the respondent from an assesment to income tax for the taxation year 1949. The appeal to this Court was heard by Angers, J. who retired before rendering judgment thereon. By consent of the parties an Order was made that the appeal be re-heard by me on the evidence adduced before Angers, J., together with written argument, which has now been received.

The respondent was desirous of taking advantage of the provisions of s. 39 of the Income Tax Act and within the time limited by that section filed his Election to Average Income in respect to the years 1946, 1947, 1948 and 1949, on or before April 25, 1950. The appellant, however, in the assessment dated March 7, 1951, for the year 1949, refused to permit the respondent the right of averaging his income, his grounds for so doing being stated in the Notification by the Minister as follows:

The taxpayer is not entitled to average his income in accordance with the provisions of subsection (1) of section 39 of the Act as he did not file a return for the 1948 taxation year as required by the Act.

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The facts are not in dispute. The respondent is a farmer whose chief source of income is farming. His income tax returns for the years 1946, 1947 and 1949 were duly filed within the time limited for so doing as was also his application to average income. His income tax return for the year 1948 should have been filed by April 30, 1949 (s. 33 of the Income War Tax Act and s. 40 of the Income Tax Act), but in fact was not filed until June 7, 1949. The return for that year had been prepared on the respondent's instructions by a firm of chartered accountants and was signed by the respondent prior to April 30, 1949, instructions being given to the firm of accountants to file it in the proper district taxation office at Vancouver. Unfortunately, it was misplaced in the files of that firm and was not discovered until some time after April 30; it was then immediately forwarded to the district office and filed on June 7. The penalties for late filing were imposed by the Minister pursuant to s. 77 of the Income War Tax Act and paid by the respondent. For each of the years 1946 to 1949 the respondent had taxable income. It is agreed, also, that following the signing of the income tax return for 1948 the respondent up to April 30, 1949, was under no disability and was capable of looking after his own affairs.

The applicable part of s. 39 is as follows:

> 39. (1) Where a taxpayer's chief source of income has been farming or fishing during a taxation year (in this section referred to as the "year of averaging") and the four immediately preceding years (in this section referred to as the "preceding years") and the taxpayer has filed returns of income for the preceding years as required by this Part, if the taxpayer, before the day on or before which he was required to file his return of income for the year of averaging, files with the Minister an election in prescribed form, the tax payable under this Part for the year of averaging is an amount determined by the following rules . . .

By the provisions of s. 129(1) of the Income Tax Act, the period of averaging the income in the year 1949 was limited to the "year of averaging" and the three years immediately preceding.

From the facts which I have stated, it is clear that the respondent had brought himself within all of the requirements of s. 39(1) except in regard to one disputed matter. The appellant says that by reason of the delay in filing the 1948 return, the respondent has not filed returns of income for the preceding years "as required by this Part" (Part 1)

and is not, therefore, entitled to average his income. The sole question for determination, therefore, is the meaning to be put upon the words "as required by this Part".

Counsel for the appellant submits that in enacting s. 39, Parliament laid down certain conditions, all of which a taxpayer must meet before he becomes entitled to the special right to average his income, and that filing of the income tax return for each of the "preceding years" within the time limited was one of such requirements. He says that the requirement is not merely directory, but imperative, and that even a late filing of one day in one year would be fatal to the application to average.

Counsel for the appellant further submits that s. 39 confers on farmers and fishermen an extraordinary benefit which is not available to other taxpayers—namely, the right to average the income over a period of years. He says, therefore, that it must be construed with the same strictness as an exempting section. He relies on *Lumbers* v. *The Minister of National Revenue* (1), where the President of the Court said:

> It is a well established rule that the exemption provisions of a taxing act must be construed strictly. In *Wylie* v. *City of Montreal*, (1885) 12 Can. S.C.R. 384 at 386, Sir W. J. Ritchie C.J. said:
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> > 'I am quite willing to admit that the intention to exempt must be expressed in clear unambiguous language; that taxation is the rule and exemption the exception, and therefore to be strictly construed;'
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> The rule may be expressed in a somewhat different way with specific reference to the Income War Tax Act. Just as receipts of money in the hands of a taxpayer are not taxable income unless the Income War Tax Act has clearly made them such, so also, in respect of what would otherwise be taxable income in his hands a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions of some exempting section of the Income War Tax Act: he must show that every constituent element necessary to the exemption is present in his case and that every condition required by the exempting section has been complied with.

Counsel for the respondent does not contend that a taxpayer who had taxable income in the taxation year 1948—as had the respondent—was not required to file his return by April 30, 1949, under the provisions of s. 40(1) of the Income Tax Act, which section formed a portion of Part I. He submits, however, that by use of the words "as required

(1) [1943] Ex. C.R. 202 at 211.

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by this Part" Parliament intended only that the returns for the "preceding years" should be in the prescribed form and contain the prescribed information, and that if the returns were filed at any time prior to the date of filing the election to average, the requirements of the section would have been met. He points out that in the corresponding section in the Income War Tax Act (s. 9(5)), Parliament used the words "Where . . . the taxpayer has filed, under section 33 of this Act, returns of income during the said two preceding years *within the time limited therefor*", thereby indicating that the time of filing was then clearly one of the conditions that must be met. He submits that as the words which I have underlined were not carried forward into the Income Tax Act and as the words in question are merely "as required" and not "as and when required", or words to that effect, Parliament could not in the later Act have intended to make prompt filing a condition precedent to obtaining the benefit of the section. Further, he says that as his client has paid the penalty laid down for late filing, he should not now be subjected to a further and more drastic penalty—that of being deprived completely of his right to average for the preceding years and also for the succeeding four years (s. 39(3) as it then was), unless the intention that such a result would follow is clearly expressed.

I must admit that upon first reading the respondent's argument, I was considerably impressed by these submissions. They were accepted by Mr. Fisher who heard the appeal. He pointed out that a farmer or fisherman who wished to average his income and who had not filed income tax returns for one or more of the preceding years because he had no taxable income in those years (and was therefore not required to file his returns for such years by April 30 of the following year—unless requested to do so by the Minister), could come within the provisions of s. 39(1) by filing returns for those years on or before the time when he filed his election to average. (I should point out that the Minister in his argument submitted in this case has admitted that that is so). Mr. Fisher was of the opinion that if in such a case a taxpayer were allowed to average his income, it would make an absurdity of the law to deny the

right of averaging in a case such as the instant one in which returns had been made for all the preceding years, only one of which was filed later than the required date.

With considerable reluctance, I have come to the conclusion that the submission made on behalf of the respondent cannot be accepted. There can be no doubt that Parliament has the power to impose the conditions under which special privileges may be granted to groups of taxpayers even if anomalies may result therefrom. Likewise, Parliament may make those conditions of such an imperative nature, that, if not complied with, the right to the special benefits will be unavailable to the taxpayer. If anomalies follow from such an enactment or if the penalties or loss of rights which follow from non-observance of the conditions be thought to be too severe, it is for Parliament to amend the law and not for the Courts to give relief.

My conclusion has been arrived at in the main by considering the provisions of s. 39(1) (*supra*) and by s. 40, the relevant parts of which are as follows:

40. (1) A return of the income for each taxation year in the case of a corporation and for each taxation year for which a tax is payable in the case of an individual shall, without notice or demand therefor, be filed with the Minister in prescribed form and containing prescribed information,

(*a*) in the case of a corporation, by or on behalf of the corporation within 6 months from the end of the year,

(*b*) in the case of a person who has died without making the return, by his legal representatives, within 6 months from the day of death,

(*c*) in the case of any other person, on or before April 30, in the next year, by that person or, if he is unable for any reason to file the return, by his guardian, curator, tutor, committee or other legal representative, or

(*d*) in a case where no person described by paragraph (*a*), (*b*) or (*c*) has filed the return, by such person as is required by notice in writing from the Minister to file the return, within such reasonable time as the notice specifies.

40. (2) Every person, whether or not he is liable to pay tax under this Part for a taxation year and whether or not he has filed a return under subsection (1), shall, upon receipt at any time of a demand therefor in writing from the Minister or any person thereunto authorized by the Minister, file forthwith with the Minister a return of his income for the year in prescribed form and containing prescribed information.

As I have noted above, one of the requirements that must be met before the right to average can be exercised is that "and the taxpayer has filed returns of income for the preceding years as required by this Part". In my view, that

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means not only that the returns must have been filed, but also that they must have been filed *as required by this Part.* Now s. 40 which immediately follows contains within itself the requirements (*a*) that the return *shall* be filed with the Minister in prescribed form and containing prescribed information; and (*b*) that in the case of an individual who has taxable income that his return *shall* be filed "on or before April 30 in the next year". Both of these matters, in my opinion, are requirements which fall within the ambit of the words "as required in this Part". I am quite unable to reach the conclusion that one of the requirements in s. 40(1), namely, that relating to the form and content of the returns—falls within the term "as required by this Part" (as it admittedly does), and the other requirement contained in the same section, and which is made equally as imperative as the first requirement, can be said to be excluded from the ambit of those words. These words cannot be considered as merely surplusage, which would be the result if I were to adopt the submission of the respondent that to merely have filed the returns of the preceding years at any time is a sufficient compliance with the provisions of the section.

For these reasons and applying the principles laid down in the *Lumbers* case (*supra*), I must allow the appeal. The same result was arrived at by Angers, J. in *Minister of National Revenue* v. *Nielsen* (1), in which he affirmed the decision of the Income Tax Appeal Board (5 T.A.B.C. 321).

The appeal will therefore be allowed, the decision of the Tax Appeal Board set aside and the assessment made upon the respondent will be affirmed.

The appellant is also entitled to be paid his costs.

Judgment accordingly.

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(1) 53 D.T.C. 1029.