
JOHN B. HOLDEN, ES QUALITE.....APPELLANT;

AND

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

1931

Oct. 14.
Oct. 20.

Revenue—Trust fund—Taxation—Income—Non-residents—Interpretation of Statute—Beneficiaries ascertained

One McM. died in 1914, and by a clause (E) of his will, after certain charges have been paid, it was provided that the balance should be divided in three parts to pay the support, maintenance and education of three children, and, moreover, that the amount necessary for such maintenance, etc., was left to the discretion of the Trustee and the balance thereof to be invested in the name of each of the respective children to whom such residue is by the will given and bequeathed. Such balance so re-invested, so given and bequeathed is what is now sought to be taxed. The beneficiaries under the will, at all times

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material, resided out of Canada, except one who took up residence in Montreal in 1926. The surviving Trustee (appellant) resides in Canada.

Held that the fund sought to be taxed herein is absolutely vested in well-known beneficiaries without any contingent interest and that such beneficiaries being admitted not to be residents in Canada, they are not liable to be taxed, excepting as to the one beneficiary who took up residence in Canada and then only from the date at which he took up such residence.

2. If in one section of a statute imposing taxation there are express words which in their plain or literal meaning disclose an exemption from taxation of the income of non-residents in Canada, and there are also words of ambiguous import in another section of the same statute which might be construed as displacing the exemption—these latter words are not sufficient to rebut the intention to exempt non-residents as expressed in the former section.

APPEAL by the appellant herein from the assessment made by the Crown for the years 1917 to 1928 inclusive.

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

N. W. Rowell, K.C., and *P. C. Finlay* for the appellant.

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

The facts are stated in the Reasons for Judgment.

AUDETTE J., now (October 20, 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 years 1917 to 1928, both inclusive, on the income, received by the Trustee of the above mentioned estate, undistributed and not used in the maintenance of the children under Clause (*e*) in paragraph (9) of the Admission of Facts filed herein.

At the opening of the hearing of this appeal both parties, by their respective counsel, filed the following Admission of Facts which reads as follows, viz:—

STATEMENT OF FACTS AGREED UPON BY THE APPELLANT AND RESPONDENT FOR THE PURPOSES OF THE TRIAL OF THIS ACTION

1. The appellant is the sole surviving Executor and Trustee of the Last Will and Testament of Duncan McMartin bearing date the 24th day of April, 1914.

2. That the said Duncan McMartin died on the 2nd day of May, 1914, at the City of Toronto, in the Province of Ontario, but was domiciled in the City of Montreal, Province of Quebec.

3. After sundry bequests which are not involved in this appeal, the said deceased gave directions by his said Last Will and Testament for the sale and conversion of his residuary estate, the investment of the balance of the proceeds of such sale and conversion and as to the disposition to be made of the income derived from such investments, or the income or profits from the unrealized portions of the said Estate, which directions are to be found in Paragraph 9 of the said last Will and Testament which is as follows:

> 9. I give, devise and bequeath all the rest, residue and remainder of my estate both real and personal to my executors and trustees hereinafter named upon the following trusts, namely:—
>
> (*a*) To sell and convert the same into money (except my shares in Canadian Mining & Finance Company Limited) as soon after my death as they in their absolute discretion deem it advisable.
>
> (*b*) To pay out of the proceeds of such sale and conversion the legacies given by this my Will including the said legacy to my wife of one hundred and fifty thousand dollars ($150,000) should same become payable.
>
> (*c*) To invest and keep invested the balance of the proceeds of such sale and conversion in such investments as trustees are by the Laws of the Province of Ontario permitted to invest trust funds.
>
> (*d*) To pay out of the income derived from such investments or the income or profits from the unrealized portions of my estate, the said annuity of twenty-five thousand dollars ($25,000) a year to my wife.
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> (*e*) To divide the balance of the income from such investments or the income or profits derived from the unrealized portions of my estate, into three equal parts and to pay or apply one of such parts, or so much thereof as my executors and trustees in their discretion deem advisable, in or towards the support, maintenance and education of each of my children until they respectively attain the age of twenty-five years, or until the period fixed for the distribution of the capital of my estate which ever event shall last happen, provided that any portion of any child's share not required for his or her support, maintenance and education shall be re-invested by my said Executors and Trustees and form part of the residue of my estate given and bequeathed to such child.
>
> (*f*) After the death or re-marriage of my wife, whichever event shall first happen, to divide the residue of my estate equally between such of my three children as shall attain the age of twenty-five years, as and when they respectively attain that age, provided that if any of said children shall have died before the period of distribution arrives, leaving a child or children, such children shall take the share in my estate which his or her parent would have taken had he or she survived the period of distribution, if more than one in equal shares.

4. On the 1st day of January, 1917, there were then living, Iva McMartin, widow of the said Duncan McMartin, deceased, and Allen A. McMartin, Melba McMartin and Duncan McMartin, children of the said deceased, all of whom resided in the City of New York and had so re-

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sided for some time prior to the 1st day of January, 1917. The said deceased left no other child, or any child or children of any deceased child, him surviving.

5. That Iva McMartin, widow of the said Duncan McMartin, deceased, re-married on or about the 4th day of March, 1925, and received on or about that date the sum to which she became entitled on such re-marriage and thereafter ceased to have any further interest in the residuary estate or in the income or profits therefrom.

6. The said Allen McMartin continued to reside in the City of New York or elsewhere in the United States of America until January, 1926, at which date he took up his residence in the City of Montreal, Province of Quebec and has since resided there. The said Melba McMartin and Duncan McMartin have continued to reside in the City of New York or elsewhere in the United States of America and are still residing there.

7. That the said Allen A. McMartin attained the age of twenty-five years on the 4th day of November, 1928, and the said Melba McMartin (now Melba McMartin Orr) attained the age of twenty-five years on the 3rd day of March, 1930, and the said Duncan McMartin attained the age of twenty-one years on the 17th day of February, 1930.

8. That the said Allen A. McMartin was married on or about the 29th day of August, 1923, and there is no issue of such marriage; the said Melba McMartin was married to Leander Lee on the 20th day of September, 1922, and Melba Lee born May 23, 1923, is the only issue of such marriage; the said Melba McMartin and Leander Lee were divorced and the said Melba McMartin was again married to T. W. Orr on the 28th day of October, 1929, and there is no issue of such marriage; the said Duncan McMartin was married on or about the 1st day of July, 1931, and there is no issue of such marriage.

9. By Notice of Assessment dated the 1st day of March, 1930, the Appellant was assessed for Income Tax upon the undistributed income not used in the maintenance of the children under clause (*e*) in paragraph 9 of the Will, from the said residuary estate as follows:—

Year	Taxable Income	Tax
1917	$ 6,508.94	$ 40.18
1918	45,378.57	3,469.16
1919	57,766.57	8,152.87
1920	90,167.28	20,394.78
1921	166,896.28	62,508.50
1922	205,433.09	85,438.34
1923	173,036.85	66,119.16
1924	222,788.25	96,372.10
1925	271,469.55	97,321.29
1926	352,884.04	121,063.95
1927	436,480.86	139,366.65
1928	392,875.10	122,649.04

10. The Notices of Assessment referred to in the preceding paragraph were the first and only notices served upon the Appellant in respect of the income from the undistributed portion of the residuary estate, although the returns required to be made by executors and trustees had been regularly filed from year to year in accordance with the provisions of the Income Tax Act. Notices of Appeal dated the 28th day of March, 1930, against the assessment for each of the said years were duly served

upon the Minister, which Assessments were affirmed by the Minister by Notice dated the 11th day of November, 1930. Notice of Dissatisfaction dated the 31st day of December, 1930, was given by the Appellant and the Reply of the Minister dated the 7th day of January, 1931, was given denying the facts alleged and confirming the said Assessment. All of the said Notices and/or proceedings being in accordance with the Provision of the Income War Tax, 1917, Chapter 28, Section 1.

11. That attached hereto is a true copy of the Letters Probate of the Last Will and Testament of the said Duncan McMartin deceased.

The respondent, by his statement in defence, avers and claims, among other things, (*a*) that the Trustee Holden is a person and resides in Canada; (*b*) that the trustee, under the provisions of the Act, is liable in respect of the incomes in question; and (*c*) that the trustee is liable for Income Tax in respect of the income thereof "accumulating in trust for the benefit of unascertained person or persons with contingent interests . . . as if such income were the income of an unmarried person" in accordance with section 4, chapter 49, 10-11 Geo. V, and section 16, subsection 1 thereof. This section is now section 11, chapter 97, R.S.C., 1927.

As I had already occasion to say in the case of *The Royal Trust Company* v. *The Minister of National Revenue* (1), reversed on appeal to the Supreme Court of Canada (2), the respondent, in his contention, seems to overlook the provision of section 4 which enacts, as a condition precedent to any taxation being levied, that the person so taxed must be a resident of Canada (See now sections 9 and 11, R.S.C., 1927, which came into force on the 1st February, 1928).

The definition of the word "person" in the Act of 1917 (see now subsection (H) of section 2, R.S.C., 1927, ch. 97) reads as follows:

> "Person" means any individual or person and any syndicate, *trust,* association or other body and any body corporate . . . .

While, in the view I take of the case, the interpretation of the word "Trust" has no practical bearing, although raised by Counsel, I wish to say that this word "Trust" used as it is in that section does not mean a trust such as that constituted by the will in question.

The word "Trust" defined in that section must be read under the rule of interpretation, generally known as *ejus-*

(1) (1930) Ex. C.R. 172. (2) (1931) 3 D.L.R. 474.

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dem generis rule, or the rule *noscitur a sociis*. That is, when several words are followed, as here, by a general expression (such as " or other body and any corporate body) that expression is not limited to the last particular unit of the group; but applies to them all. *Great Western Railway Co.* v. *Swindon* (1); Craies, on Statute Law, 3rd Ed. 162.

This rule of construction was thus enumerated by Lord Campbell in *R.* v. *Edmundson* (2): " I accede to the principle laid down in all the cases which have been cited, that, when there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified."

The word " Trust " used in section 2 should be interpreted to mean a corporate or other body, a trust association or merger, combination of companies or interest created for the purpose of carrying on Trust business.

In a trust created by a will, the trustee is bound to hold the property for the benefit of another, the *cestui que* trust.

Now, the respondent further contends that the tax in question in this case is leviable under subsection 6 of section 3 of The Income War Tax Act, 1917, as amended by section 4 of 10-11 Geo. V, chapter 49, which reads as follows (see now section 11, R.S.C., 1927):

> 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.

What is sought to be subjected to taxation in this case is not the actual property of the trustee; but it is the income of the beneficiary of a trust. While, if such income were liable to taxation, it would be payable in the hands of the trustee, yet, on the other hand, the trustee cannot be made liable therefor if the beneficiary, for any reason, is not taxable under the Act.

In the present case—with the exception of one beneficiary who resides in Canada since 1926—it may be said

(1) (1884) 9 A.C. 787. (2) (1859) 28 L.J.M.C. 213.

that they are not resident in Canada, a condition which, as I read the Act, is made a condition precedent to any taxation thereunder.

Section 4 of the Act, as amended, provides that the taxation shall be levied only upon persons residing in Canada. Section 9, chapter 97, R.S.C., 1927, re-enacts the same provision in a more comprehensive manner and may be referred to for the present purpose. This legislation would seem to have been inspired by the well known doctrine that movable property, under the Civil Law, is governed by the laws of the domicile of the owner. *Mobilia sequntur personam* and that Parliament has no extraterritorial power of Taxation. See also *London & South American Investment Trust v. British Tobacco Company (Australia) Ltd.* (1).

The corpus of the trust in this case, as well as the income derived therefrom, are not the property of a resident in Canada. A foreigner who is a shareholder of a Canadian company receives his dividend, but is not subject to taxation of the same if he does not reside in Canada. It is admitted by par. 4 of the above recited admission that all the beneficiaries reside in the City of New York, U.S., excepting Allen McMartin who resides in Montreal since 1926 and who would be subject to the taxation from that date.

Under section 11, the trustee, who acts in a fiduciary capacity, is merely the channel through which the income of a beneficiary residing in Canada is duly taxed. This section does not purport to establish a taxation against any new person. The subject matter mentioned in sections 9 and 11 does not come into operation unless a person residing in Canada has first been found. There cannot be taxation unless this imperative provision of residence in Canada is first ascertained.

Before a condemnation to pay a tax is made, a clear and unambiguous enactment must first be found. The *onus* is upon the Crown to show that the defendant comes clearly within the taxing provision, and that the Court should not go beyond the literal meaning of the words used in their plain and ordinary sense. Can. Ency. Digest, Vol. 10, pp. 267-268.

(1) (1927) 1 Ch. D. 107.

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There are in this Taxing Act (sec. 9) words amounting to negative words prohibiting the taxation of the income of persons who do not reside in Canada. This enactment therefore makes it inconsistent with any contention that a non-resident's income may be taxed under sec. 11. This section 9 determines and defines where the incident of taxation rests or falls.

If in one section of a statute imposing taxation there are express words which in their plain or literal meaning disclose an exemption from taxation of the income of non-residents in Canada, and there are also words of ambiguous import in another section of the same statute which might be construed as displacing the exemption—these latter words are not sufficient to rebut the intention to exempt non-residents as expressed in the former section.

If a charge is imposed upon a person, it must be so imposed in clear and express terms and not left to implication.

In the present case the general clause of the Act (section 9) makes it a condition precedent to taxation to be a resident in Canada. There cannot be taxation unless this imperative provision of residence in Canada is first ascertained. The test of liability is residence in Canada, that prevails all through the Act.

The case of *Williams* v. *Singer* (1) is not apposite in that there is special legislation in England covering a case like the present one which does not exist in Canada. That case is decided upon a statute which reads as follows: "For and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, etc. . . ."

This legislation is possible in England because the tax is there payable at the source. Failing the Parliament of Canada passing such legislation, such tax is not payable by a non-resident of Canada.

In the case of *Kent* v. *The King* (2), it was held that:

Section 155 of the Taxation Act, R.S.B.C. (1911) c. 222, as re-enacted by sec. 25 of c. 89 (1918) has not the effect of making taxable an income of non-residents, as well as the income of residents derived from the work-

(1) 7 Report of Tax Cases, 399. (2) (1924) S.C.R. 388.

ing of mines. The words therein as provided in Part I have reference not only to the manner and machinery of taxation of income, but also as to the persons to be taxed; and by Part I, the non-residents are expressly not assessable to income tax.

Now, coming to the consideration of the case under section 11 of the Taxing Act, it will be necessary to ascertain the actual position, under the will, of the parties sought to be taxed.

The income, under clause (*e*), after being used for the payment of a certain amount, is divided into three equal parts, such part being assigned and earmarked to each individual, A, B and C individually. Then out of such respective amount—after having set apart and used what was thought adequate for the support, maintenance and education of each child respectively—the portion or balance (which is the amount sought to be taxed in the present case) of such income so divided in three parts respectively and which are not required for the support, maintenance and education, is re-invested by the Trustee and in the language of the will, is given and bequeathed to such child, an individual gift and bequeath to each individual child, in whom such amount becomes vested.

Therefore, such fund or revenue cannot be called, under section 11, an income accumulating for the benefit of unascertained person or persons with contingent interest; because each participant is named, the fund is earmarked and is given and bequeathed to such individual by the deceased testator.

There remains no uncertainty as to the ownership of such income. It is the absolute property of each individual named in the will and thereby left to him. It is not the case of an unascertained beneficiary.

The intention of the testator is quite manifest and unambiguous.

Now clause (*f*) of the will deals with the division of the capital which is now sought to be here taxed. That clause (*f*) only deals with the distribution to be approached, as a matter of law, under clause (*e*) whereby the income in question has been vested in the children. For proper interpretation of the will, the whole of it must be considered and looked at, before passing upon any segregated clause.

Where the income is by the will given for the maintenance, etc., the presumption is obviously in favour of vest-

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ing. There is in this respect no gift over of such income in case the children died. And the postponement of the distribution, by clause (*f*), is for the benefit of the estate and in the present case it is obviously done for the benefit of the wife until her death or remarriage. And that again is a presumption in favour of vesting, since it was to let in the wife's interest. The postponement until the children attain the age of 25 is simply a postponement of the time of payment and does not interfere with the question of vesting.

Furthermore there is the provision that the child or children of a deceased child should take the parent's share and that again supports the contention for vesting, since it becomes a divesting of that share in favour of the issue.

Moreover, one must not overlook the fact that this maintenance is not out of the general fund or residue, it is not a general maintenance; but an individual one out of an amount set aside and bequeathed to each child. After a certain amount is paid from the general revenues, the children get their three partite share, use a certain amount for maintenance and the balance thereof is invested and given and bequeathed to each child respectively.

The facts of this case are different from that of the *McLeod case* (1) and also different from those in *The Royal Trust Case* (2).

The following authorities may be referred to in support of the question of " vesting " as above mentioned.

Williams, On Executors, 12th Ed., pp. 795 to 797, 800. *Halsbury*, 28 pp. 797 *et seq.* At page 798 it is said: " in cases of doubt, the presumption is in favour of the early vesting of the gift at the testator's death . . . and it is presumed that the testator intended the gift to be vested, *subject to being divested, rather than remain in suspense.*"

Then there is a very apposite case to the one in question, *Phipps* v. *Ackers* (3), a case wherein the House of Lords requested the opinion of the common Law Judges, wherein it was held that an equitable estate in fee in lands *vested* immediately on the testator's death, liable to be divested in

(1) (1925) Ex. C.R. 105; (1926) S.C.R. 457.

(2) (1930) Ex. C.R. 172; (1931) 3 D.L.R. 474.

(3) (1835) 9 Clark & Finnelly 583.

the event of the heir dying under 21 without leaving issue of his body.

In re Bartholomew (1), it was held that the words "*to whom I give and bequeath*" constituted a direct gift.

See also *Williams* v. *Williams* (2); Re *Gossling* (3); Hart's Trusts (4); In re *Ussher* (5); *Fox* v. *Fox* (6); *Booth* v. *Booth* (7); In re *Wrey* (8); Jarman, On Wills, 7th Ed., Vol. 2, 1402 at 1403; *Davies* v. *Fisher* (9).

A just appreciation of the circumstances and facts of the case fails to bring the appellant within the scope of the statute for imposing a tax upon them. There is no equitable construction of a taxing statute in favour of the Crown, the exact meaning of the words used in the Act must be adhered to. *Partington* v. *Attorney-General* (10).

The word "income" must not be regarded loosely, the words as used in the taxing Act must be read in conjunction with the meaning of the words used in the context. See per Halsbury, L.C. in *Ystradyfodwg & Pontypridd Main Sewerage Board* v. *Bensted* (11).

There will be judgment allowing the appeal and with general costs—declaring and adjudging that the fund sought to be taxed herein is absolutely vested in well known beneficiaries without any contingent interest and that such beneficiaries being admitted not to be residents in Canada are not liable to be taxed; with however this qualification that as Allen McMartin resided in New York until January, 1926, when from that date he took up his residence in the City of Montreal, Canada, he will from such date be liable to the present taxation, the amount of which can be adjusted between the parties; failing, however, such adjustment, leave is hereby reserved to either party, upon notice, to apply to the court for the settlement of the same. The question of costs as between this issue of the respondent and Allen McMartin from January, 1926, is hereby reserved.

Judgment accordingly.

(1) (1849) 1 MacN. & G. 354.
(2) (1907) 1 Ch. Div. 180 at 183.
(3) (1903) 1 Ch. Div. 448.
(4) (1858) 3 DeG. & J. 195.
(5) (1922) 2 Ch. Div. 321.
(6) (1875) L.R. 19 Eq. 286.
(7) (1799) 4 Vesey jr. 399.
(8) (1885) 30 Ch. Div. 507.
(9) (1842) 5 Beavan, 201.
(10) (1869) L.R. 4 H.L. 100 at 122 (E. & I. App.).
(11) (1907) A.C. 264.