BETWEEN:

1957
Feb. 20
Dec. 30

MONTREAL MILK PRODUCERS' CO-OPERATIVE AGRICULTURAL ASSOCIATION ..... APPELLANT,

AND

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

Revenue—Income—Income tax—Association incorporated under the Co-Operative Agriculture Association Act, R.S.Q. 1925, c. 57—Pursuit of gain not excluded from Association's objects—Association not one contemplated by s-ss. (e) and (h) of s. 4 of the Income War Tax Act, R.S.C. 1927, c. 97—Association a "person" receiving fees or emoluments within the meaning of s. 3 of the Income War Tax Act, R.S.C. 1927, c. 97—Liability for income tax—Appeal dismissed.

Appellant was incorporated under the terms of the Co-operative Agriculture Association Act, R.S.Q. 1925, c. 57 (now R.S.Q. 1941, c. 120). Its revenues for the purpose of this appeal are derived from two sources (a) payments to appellant by the Quebec Dairy Industry Commission of money collected by it on milk delivered to distributors in the City of Montreal and paid to appellant in proportion to the number of member-producers and credited by appellant to "association account" (b) deductions from sales returns to member shippers from the operation of a surplus milk plant which the association credits to its "plant account".

In each of the taxation years 1947 and 1948 appellant's "association account" was in receipt of a surplus or net profit which appellant omitted to declare as taxable income for those years. Respondent added such amounts to appellant's taxable income for those years and assessed appellant for income tax accordingly. An appeal to the Income Tax Appeal Board was dismissed and a further appeal to this Court was taken. In the same years appellant's "plant account" returned a profit on which appellant paid income tax.

Held: That appellant was not entitled to exemption from income tax under s. 4, s-ss. (*e*) and (*h*) of the Income War Tax Act, R.S.C. 1927, c. 97 as amended since it is not a religious or charitable institution, a board of trade or a chamber of commerce nor is it an agricultural or educational institution, nor was it organized or operated solely for social welfare or other non-profitable purposes: it was not prohibited from declaring dividends or distributing profits nor is the objective of pecuniary gain excluded in its charter provisions; its objects are to some extent of a commercial nature and even if it did not pursue some of its stated objects of a commercial and gainful nature nevertheless because it had declared objects of such nature it cannot qualify as a company organized exclusively for purposes other than profit.

2. That the profits made in appellant's surplus milk plant prove that appellant was not operated exclusively for purposes other than profit.

1957

MONTREAL MILK PRODUCERS' CO-OPERATIVE AGRICULTURAL ASSOCIATION v. MINISTER OF NATIONAL REVENUE

3. That the true character of the amounts in dispute discloses that they were received as fees or commissions which belong to the association and the lack of intent to make a profit is not sufficient to enable appellant to escape liability for income tax on them; the largest of these amounts consists of fees or emoluments received by a person for services rendered within the meaning of s. 3 of the Income War Tax Act.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Kearney at Montreal.

J. W. Long, Q.C. for appellant.

Laurent Belanger, Q.C. and *C. Couture* for respondent.

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

KEARNEY J.:—now (December 30, 1957) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board[1], dated January 5, 1955, dismissing the appellant's appeal against its income tax assessments for 1947 and 1948.

The appellant, sometimes hereinafter referred to as "the Association," was incorporated in 1919 under the authority of the Minister of Agriculture for the Province of Quebec, in virtue of Arts. 1971 and following of the Revised Statutes of Quebec (1909) as amended, concerning co-operative agricultural associations. No amendments which would have any bearing on the present case occurred between 1919 and 1925, and the governing Act, in so far as the powers, purposes, and the corporate status of the appellant at the time of its incorporation, may be conveniently referred to as the *Co-operative Agriculture Association Act*, R.S.Q. (1925), c. 57, (now R.S.Q. 1941, c. 120).

From 1919 until 1935 the appellant's primary efforts were directed to the stabilization of the price of milk to the producers thereof, who became members of the Association, and the promotion of orderly marketing and transportation of milk to the Montreal market. Until 1935, when the price payable by Montreal distributors of bottled milk to member-producers was fixed by the Quebec Dairy Industry

[1] (1954-55) 12 Tax A.B.C. 33.

Commission, hereinafter called "the Commission," the Association, as selling agent for its members, endeavored to obtain the best prices possible. Producers brought in, particularly in the season when milk was most plentiful, more milk than the dairies were ready to purchase and resulting surpluses threatened to unstabilize the producers' market. As a consequence, the appellant established, early in 1935, a surplus milk plant in the City of Montreal where it processed, and manufactured into milk products, such as casein, powdered milk and butter, the surplus milk of its members and of any other milk producers who cared to avail themselves of the Association's facilities.

The appellant kept, in a special "association account," a separate record of its revenue, expenses, and surplus of what may be called its association activities or services. Such services, during 1947 and 1948, consisted *inter alia* in acting as representative of its members in procuring the enactment of provincial legislation favorable to the dairy industry, in maintaining a business office for the purpose of advising and assisting its members in obtaining satisfactory outlets for their products, in investigating their complaints, in supplying information to producers and consumers on market conditions and cost of production in the district.

The operations of the surplus milk plant were also segregated by means of a "plant account".

Leaving aside receipts from relatively minor items such as investments and miscellaneous sources, the appellant's revenues are derived from two sources.

(a) One-half cent per 100 pounds of milk delivered to distributors in the City of Montreal. This revenue was collected monthly by the Quebec Dairy Industry Commission and paid by the latter to the appellant in proportion to the number of member-producers and was credited by the appellant to the "association account".

(b) Deductions from sales returns to member shippers from the operation of the surplus milk plant which the association credits to its "plant account".

According to the appellant's "association account," its surplus or net profit from the revenues described in subpara. (*a*) together with some receipts from investments and miscellaneous sources for the taxation years 1947 and 1948, amounted to $2,989.83 and $4,771.24 respectively. The

1957

MONTREAL MILK PRODUCERS' CO-OPERATIVE AGRICULTURAL ASSOCIATION v. MINISTER OF NATIONAL REVENUE

Kearney J.

Association considered that these sums were non-taxable and accordingly omitted to declare them as taxable income in its tax return for the said years.

The Association's "plant account" disclosed that its sales exceeded a million dollars per annum, and its net profit from the operation of its surplus milk plant, as well as receipts from investments and other miscellaneous sources for 1947, amounted to $14,897.95. The net profit from the same sources for 1948 was $26,973.60. The appellant showed, in its tax returns, the aforesaid profits as being subject to tax and paid the tax exigible thereon, amounting to $4,183.82 for 1947 and $8,011.45 for 1948.

The respondent added to the declared income of the appellant for the years 1947 and 1948 the amount of the net profit disclosed in the "association account," with the result that the appellant was assessed $923.74 for 1947 and $1,648.34 for 1948, in addition to payments already made.

The appellant objected to the aforesaid assessments which, on reconsideration by the respondent, were confirmed in particular on the ground that the appellant did not qualify for exemption under s. 4 of the *Income War Tax Act*. Later the assessments were affirmed by the Income Tax Appeal Board, as herein first mentioned.

The first issue, which may be called the appellant's main submission, is whether it is exempt from income tax because it is an association organized for non-profitable purposes, within the meaning of s-s. (*e*) or (*h*) of s. 4 of the *Income War Tax Act*, R.S.C. 1927, c. 97, as amended.

Section 4(*e*) and (*h*) reads as follows:

> Sec. 4. *Incomes not liable to tax.*—The following incomes shall not be liable to taxation hereunder:—
>
> (*e*) *Charitable institutions.*—The income of any religious, charitable, agricultural and educational institution, board of trade and chamber of commerce, no part of the income of which inures to the personal profit of, or is paid or payable to any proprietor thereof or shareholder therein;
>
> (*h*) *Clubs.*—The income of clubs, societies and associations organized and operated solely for social welfare, civic improvement, pleasure, recreation or other non-profitable purposes, no part of the income of which inures to the benefit of any stockholder or member.

I fail to see how the Association can justifiably claim exemption under s. 4(*e*). It is certainly not a religious or charitable institution, or a board of trade, or a chamber

of commerce. Although it is an agricultural co-operative association, it is not, in my opinion, an "agricultural and educational institution." Even if it were, it cannot be said that ". . . no part of the income . . . . . is paid or payable to any . . . shareholder . . ." The provisions of the *Co-operative Agricultural Association Act*, R.S.Q. 1925, c. 57, indicate the contrary. According to the said Act, the appellant was incorporated as a joint-stock company, (s. 4), having shares of par value of $10 each, (s. 5). Only the holders of paid-up shares could be members, (s. 9). An annual statement showing the profit and loss of the association is required, (s. 24). Section 25 provides in part as follows:

> The general meeting shall decide, in accordance with such statement, the amount of the profits to be allotted.
>
> The association may have a reserve fund. So long as such fund is not equal to the subscribed capital, the total amount of the dividends distributed shall not exceed six per cent of the paid-up capital.
>
> When the association has a reserve fund equal to or greater than the subscribed capital, it may, after having paid dividends of not more than eight per cent of the paid-up capital, and after having set aside for the reserve fund at least ten per cent of the profits, distribute the remainder of the profits among the shareholders in proportion to their dealings with the association upon the basis established by the association or the board of directors.

The evidence also shows that the Association, although it did not generally pay dividends, at least on one occasion in 1937-38 paid a six per cent dividend to its shareholders.

I likewise do not think that the appellant proved that the Association was *organized* and operated *solely* for social welfare or *other non-profitable purposes*, as provided in s-s. (*h*) (emphasis supplied). It was not prohibited from declaring dividends or distributing profits, as in *St. Catherines Flying Training School Limited v. Minister of National Revenue*[1]. Nowhere in its charter provisions is the objective of pecuniary gain excluded in a manner, for example, as described in Part III, c. 223, s. 198, R.S.Q. 1925, which reads as follows:

> The Lieutenant-Governor may, by letters patent under the Great Seal, grant a charter to any number of persons, not less than three, who apply therefor, for objects of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional, athletic, or sporting character, or the like, but without pecuniary gain.

[1] [1953] Ex. C.R. 259.

1957

MONTREAL MILK PRODUCERS' CO-OPERATIVE AGRICULTURAL ASSOCIATION v. MINISTER OF NATIONAL REVENUE

Kearney J.

The objects of the Association are, at least to some extent, of a commercial nature. At p. 30 of Ex. 1 is a copy of the notice which appeared in the *Quebec Official Gazette* of the incorporation of the Association, dated September 23, 1919, and signed by the Minister of Agriculture, which reads in part as follows:

> . . . The objects for which the association is formed are the improvement and development of agriculture or of one or any of its branches, the manufacture of butter or cheese, or both, the purchase and sale of cattle, agricultural implements, commercial fertilizers and other things useful to the agricultural class, the purchase, the keeping, transformation and sale of agricultural products.

Even if it be true, as claimed by the appellant, that it did not pursue some of its stated objects of a commercial and gainful nature, such as the purchase and sale of cattle, nevertheless because it had declared objects of such nature, the Association cannot, in my opinion, qualify as a company *organized exclusively* for purposes other than profit. I think that the facts of the case, and particularly the evidence concerning the profits made in the appellant's surplus milk plant prove beyond question that the Association was not *operated exclusively* for purposes other than profit.

For these reasons I find that the appellant is not an association exempt from income tax within the meaning of s. 4(*e*) or (*h*) of the Act.

The appellant made a second submission, namely, that, if it failed to prove that the Association was exempt from taxation by virtue of s. 4(*e*) or (*h*) of the Act, nevertheless not all revenues received by it were subject to tax. According to my notes, counsel for the appellant quite rightly, I think, stated that, if his main argument failed, he acknowledged that the profits of the milk plant operations were properly subject to income tax. In any event, one would have to ignore the undisputed facts to argue the contrary. Although the statement of claim makes no reference to tax payments, the appellant both in 1947 and 1948, without protest, paid tax on the said income to which, as shown by the evidence, producers other than Association members contributed. According to the agreement with the appellant (Ex. 2), which every member-producer was obliged to sign, it was in the discretion of the directors of the Association to determine how much member-producers

would receive for their surplus milk and how much the Association would retain for overhead expenses and reserves. I think it is clear that the amounts retained by the Association became its property and were not held by it for the account of each member-producer, as found by Fournier J., in *Minister of National Revenue v. La Société Co-opérative Agricole de la Vallée d'Yamaska*[1]. Neither were such amounts entered in the books of the Association as loans made by the member-producers, as occurred in the judgment, of the President of this Court in *Manitoba Dairy & Poultry Co-operative Ltd. v. Minister of National Revenue*[2].

According to Mr. W. D. Lowe, secretary of the Association, surplus milk accounts were settled at the end of each month. Once the directors had paid the amount which had been determined by them to the producer-shareholders, the latter ceased to have any further rights in the amounts retained by the Association, except to the extent that they might be distributed as dividends.

I am consequently of the opinion that any further consideration of the revenues derived from the surplus milk plant operations can be eliminated.

The remaining issue is whether, admitting the appellant is precluded from invoking s. 4(*e*) or (*h*), the income from the Quebec Dairy Industry Commission constituted taxable income in the hands of the Association.

The first thing, I think, that should be determined is the true character of the amounts in dispute. See Thorson P. in *The Horse Co-Operative Marketing Association v. Minister of National Revenue*[3]. The assessment of $923.74 for 1947 results directly from monies received by the Association from the Commission, except for two relatively small items from investments and miscellaneous revenue (Ex. 3), which I will consider later. Except for the difference in the corresponding amounts, the same thing can be said of the assessment of $1,648.34 for 1948. Consequently I need only direct my observations to the 1947 assessment. The following appears on the directors' audited report for the year ended December 15, 1946, (Ex. 3), under the title "Association Account."

[1] [1957] Ex. C.R. 65 at 66. [2] November 6, 1957 (unreported).
[3] [1956] Ex. C.R. 393 at 411.

1957

MONTREAL MILK PRODUCERS' CO-OPERATIVE AGRICULTURAL ASSOCIATION v. MINISTER OF NATIONAL REVENUE

Kearney J.

Association Account

December 15th, 1946—Balance		$ 29,289.57
REVENUE:		
Received from Members	$ 10,657.13	
Revenue from Investments	877.73	
Miscellaneous Revenue	39.63	
		11,574.49
		$ 40,864.06
EXPENDITURE:		
Salaries	$ 3,470.13	
Directors' Expense	1,239.38	
Annual General Meeting Cost (Jan. 28th, 1947)	814.57	
Dairy Farmers of Canada	600.00	
United Milk Producers' Assoc'n. Province of Que.	350.00	
Printing and Stationery	287.16	
Telephones and Telegraphs	255.52	
Advertising, Insurance, etc.	208.69	
Fees: Board of Trade, Trade Marks, etc.	150.00	
Travelling Expense	155.15	
News-Letter Expense	59.62	
Other Expenses	994.44	
		8,584.66
December 15th, 1947—Balance as detailed below		$ 32,279.40
Bonds	$ 29,289.57	
Receivable from Plant Account	2,989.83	
		$ 32,279.40

The revenue of $10,657.13 described above as being received from members is referred to by Mr. Lowe as membership fees and called a commission in clause 6 of the membership contract (Ex. 2),

> (6) In consideration of the services to be rendered by it as herein provided, the Member agrees to pay to the Associtaion a commission, either directly or through others, on all milk shipped by him to any market within the scope of this agreement.

According to the evidence, in the earlier years the revenues of the Association were contributed voluntarily and directly by the member-producers and, as a result, the funds of the Association sometimes showed a deficit. At the request of the Association, the Commission took measures to remedy the situation. From year to year it fixed the price which the dairies, as distributors of bottled

milk, were obliged to pay to the farmers or producers from whom they received their supply. In 1947 the price for each 100 pounds of milk on a 3.5 per cent butter fat basis was $3.90 f.o.b. Montreal (Ex. 5). Instead of remitting the entire fixed price to the producers, the dairies were required by the Commission to deduct therefrom one-half cent per 100 pounds and pay it to the Commission. The Commission in turn undertook to pay the Association one-half cent to the extent that it had been collected from its members. Instead of remitting the balance to non-members of the Association, the Commission agreed to use it for the purpose of promoting in the territory the consumption of milk in its natural state (Ex. 7). The $10,657.13 received by the Association in 1947 represented 75 per cent of these monies collected by the Commission.

The secretary-manager of the appellant described the half cent as a fee contributed by the farmer to the support of his Association. On cross-examination, he gave the following answer to counsel for the respondent Mtre. Bélanger:

> Q. Talking about the one-half cent which you receive from the Dairy Commission, is the Association obliged to remit to its members any excess of such amount?
> A. No.

The above outline of the nature of the main item of revenue suffices, I think, to indicate that it consists of a fee or commission which belongs to the Association.

It is claimed for the appellant that it is a service organization and that it acts and has always acted as an association of milk producers seeking, without direct profit motive, stabilized prices, an orderly market, and legislation in the interests of milk producers in general. Even if it can be said that it was by a turn of good fortune, and not by design, that an excess of revenue over expenditure occurred in the appellant's association account for 1947, I do not think that the lack of intent to make a profit is a sufficiently weighty factor to enable the appellant to escape the incidence of income tax.

Section 3 of the *Income War Tax Act*, which is applicable, reads as follows:

> For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or

1957

MONTREAL MILK PRODUCERS' CO-OPERATIVE AGRICULTURAL ASSOCIATION v. MINISTER OF NATIONAL REVENUE

Kearney J.

emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source . . .

"Person," according to s-s. (*h*) of s. 2 of the Act, "includes any body corporate and politic."

The association account for 1947 shows the amount of $10,657.13 which was paid in by the Commission as if it had been directly received from its members. This is immaterial since in any event it was this sum that constituted the consideration for which the Association rendered services to its members, as previously described. In addition, it received in 1947 $877.73 interest from an accumulated surplus fund of $29,289.57, which was invested in bonds. It also was in receipt of miscellaneous revenue amounting to $39.63.

I consider that the three items of revenue above-mentioned, totalling $11,574.49, less expenses of $8,584.66 left the Association with a net annual profit of $2,989.83, which constituted income within the meaning of s. 3 of the Act. In my opinion, the largest item ($10,657.13) consisted of fees or emoluments capable of computation, received by a person, namely, the Association, for services rendered. The $877.73, in the words of s. 3, is interest directly received on a security or investment. In the absence of any explanation of the origin or nature of the amount of $39.63, described as miscellaneous revenue, I think it is caught by the concluding words of s. 3, "annual profit or gain from any other source."

For the foregoing reasons I conclude that the assessments of $923.74 for 1947 and $1,648.34 for 1948 as made by the Minister were justified in the circumstances, and I would dismiss the present appeal with costs.

Judgment accordingly.