

BETWEEN :

SETTLED ESTATES LIMITEDAPPELLANT;

AND

THE MINISTER OF NATIONAL }
 REVENUE } RESPONDENT.

1959
 Apr. 16
 May 25

Revenue—Income tax—The Income Tax Act, R.S.C. 1952, c. 148, s. 68(1), 139(1)(u)(ac)—Personal corporation must be controlled by a family group—Legal representatives controlling corporation disqualify it for exemption as personal corporation—Appeal dismissed.

Appellant incorporated as a private company under the *Companies Act* of British Columbia, was controlled by one Fiddes, a resident of Canada, for a number of years and at the time of his death on April 25, 1954. Letters probate of his last will and testament and codicil were granted to Montreal Trust Company and an individual, both residents of Canada for the appellant's taxation years 1955 and 1956.

By his will Fiddes bequeathed his estate to certain brothers and sisters, nephews and nieces and to various organizations. The executors of his will continued to operate the affairs of appellant company with the same assets and in the same manner as Fiddes had done until, under the terms of the will and codicil, they were able to sell or realise his shares therein in the 1957 taxation year.

Appellant, originally assessed as a personal corporation for the years 1955 and 1956, was re-assessed by respondent as an ordinary corporation. An appeal from this re-assessment to the Income Tax Appeal Board was dismissed, and appellant appealed to this Court.

Held: That the "individual" referred to in s.-s. 1(a) of s. 68 of the *Income Tax Act* must be a natural living person resident in Canada, capable of having a family, and the expression "family" is limited by s.-s. (2) of s. 68 to a spouse, sons and daughters, legal representatives not being included in the word "individual" as used in such section.

2. That the Act contemplates personal control by a member or members of one family group, which does not extend beyond spouses, sons and daughters, and when control is in the hands of that limited group the corporation may truly be regarded as a "personal corporation".

1959
 SETTLED
 ESTATES
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE

3. That the control of a personal corporation must be in the members of a family group or by others on their behalf and on the death of Fiddes there was no such family group and after his death the affairs of appellant were administered on behalf of a large number of persons not falling within any such category.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Cameron at Vancouver.

K. E. Meredith for appellant.

E. S. MacLatchy and *T. E. Jackson* for respondent.

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

CAMERON J. now (May 25, 1959) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated July 23, 1958¹ dismissing the appellant's appeal for its taxation years 1955 and 1956. The question raised involves the interpretation to be placed on s. 68(1) of *The Income Tax Act*, defining a "personal corporation" and in particular whether, in the circumstances of this case, the appellant ceased to be a "personal corporation" upon the death of the individual who had held the controlling interest therein.

There is no dispute whatever as to the facts, which were admitted either in the pleadings or by counsel at the trial. The appellant was incorporated as a private company under *The Companies Act* of British Columbia, with its registered office at Vancouver. For a number of years prior to April 25, 1954, it was controlled by one Robert William Fiddes (hereinafter called "Fiddes"), a resident of Canada, who was the owner of 1,699 shares of a total of 1,700 issued ordinary shares. It is admitted that for those years the appellant qualified in every respect as a "personal corporation" under s. 68 of the Act and was assessed as such.

Fiddes died on April 25, 1954 (that date being also the end of the appellant's fiscal year) and Letters Probate of his last will and testament and codicil thereto were granted by the Supreme Court of British Columbia to Montreal

Trust Company and Elmore Meredith of Vancouver (the executors named in the said will), both being admittedly resident in Canada for the appellant's taxation years 1955 and 1956. While the appellant was originally assessed in both years as a "personal corporation", the respondent by re-assessments dated June 6, 1957, assessed the appellant as an ordinary corporation. As a result, the appellant lost the benefit of s. 67(2) of the Act which provides that

1959
 SETTLED
 ESTATES
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE
 Cameron J.

No tax is payable under this Part on the taxable income of a corporation for a taxation year during which it was a personal corporation.

The taxes levied by the re-assessments were \$47,472.50 and \$18,871.42 (and interest) for the years 1955 and 1956 respectively, and no question arises as to the amount of such tax.

At the trial, counsel for the Minister admitted the allegations in clauses 5, 6 and 7 of the Notice of Appeal. These are

5. Under the will of Fiddes the said shares held by Fiddes devolved upon the Executors and were for the whole of the taxation years 1955 and 1956, held by the Executors as such, and by persons on their behalf, pursuant to the directions contained in the said will.

6. Sale or realization of the shares was deferred by the said Executors, under directions contained in the said will, until the taxation year 1957, by reason of a limitation contained in the codicil of the deceased in respect of the disposal of assets owned by the appellant, and

7. The Appellant was, for the taxation years 1955 and 1956, controlled solely by the executors of Fiddes and the income of the Company continued to be derived wholly from rents, interest or dividends.

Exhibit I is a copy of the probate of Fiddes' will and codicil and it indicates that his estate had a value in excess of \$3,000,000. No provision is made therein for a wife or children and I think I may assume that the testator had neither at his death. After providing for certain obligations and payment of a small annuity and legacies, the residue (which comprised the greatest part of the estate) was to be divided into 100 shares, 10 of such shares passing to each of five brothers and sisters; 40 shares were left to eight individuals who were his or his deceased wife's nephews or nieces; the remaining 10 shares were left in varying proportions to a symphony society, a foundation, a church and a hospital. There is no evidence as to whether any of the individual beneficiaries resided in Canada in the 1955 and 1956 taxation years.

1959
 SETTLED
 ESTATES
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE
 Cameron J.

The definition of a "personal corporation" is found in s. 68 of the Act, which reads in part as follows:

68(1) In this Act, a "personal corporation" means a corporation that, during the whole of the taxation year in respect of which the expression is being applied,

- (a) was controlled, whether through holding a majority of the shares of the corporation or in any other manner whatsoever, by an individual resident in Canada, by such an individual and one or more members of his family who were resident in Canada or by any other person on his or their behalf;
- (b) derived at least one-quarter of its income from
 - (i) ownership of or trading or dealing in bonds, shares, debentures, mortgages, hypothecs, bills, notes or other similar property or an interest therein,
 - (ii) lending money with or without securities,
 - (iii) rents, hire of chattels, charterparty fees or remunerations, annuities, royalties, interest or dividends, or
 - (iv) estates or trusts; and
- (c) did not carry on an active financial, commercial or industrial business.

(2) For the purpose of paragraph (a) of subsection (1), the members of an individual's family are his spouse, sons and daughters whether or not they live together.

It is agreed that the appellant in each year complied fully with the requirements of paras. (b) and (c). As I understand the situation, the executors of Fiddes' will continued to operate the affairs of the appellant company with the same assets and in the same manner as Fiddes had done until, under the terms of the will and codicil, they were able to sell or realize his shares therein in the 1957 taxation year.

The submission of counsel for the appellant may be put very briefly. He says that the requirements of s-s. (a) of s. 68(1) are fully met if it is shown that the appellant company was for these years controlled by "an individual resident in Canada". He refers to the admissions that both executors of the Fiddes estate were resident in Canada and had control during both years. He relies on the following definitions of "individual" and "person":

139(1)(u) "Individual" means a person other than a corporation;

139(1)(ac) "person", or any word or expression descriptive of a person, includes any body corporate and politic, and the heirs, executors, administrators or other legal representatives of such person, according to the law of that part of Canada to which the context extends;

It is argued that inasmuch as an individual means a *person* (other than a corporation) and as the definition of "person" includes executors and legal representatives, it follows that the executors of the Fiddes Estate are "individuals" and that, having had the requisite control and all other requirements having been met, the appellant company was in each year a "personal corporation". In his argument, counsel for the appellant expressly stated that he did not rely in any manner on the concluding words of para. (a) "or by any other person on his or their behalf".

1959
 SETTLED
 ESTATES
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE
 Cameron J.

It is clear from the provisions of s-s. (1)(2) of s. 68 that the status of a "personal corporation" is contingent on full compliance with all the requirements stated. For example, if it carries on an active financial, commercial or industrial business, or does not derive one-quarter of its income from the sources mentioned, or if the individuals in control are not resident in Canada, it ceases to be a "personal corporation" and for taxation purposes becomes an ordinary corporation. The question here is whether a similar result follows when, upon the death of the individual who had the requisite control, such control passes to his executors, keeping in mind, the particular facts of this case.

Now as I read s-s. (a), the control required in order to be a "personal corporation" must be the control of either

- (1) an individual resident in Canada;
- (2) an individual resident in Canada and one or more members of his family resident in Canada; or
- (3) any other person on his or their behalf.

It is clear, I think, that the "individual" referred to in the first two alternatives, by reason of the definition of "individual" (which excludes a corporation), and particularly because of the language of s-s. (1)(a), must be a natural living person resident in Canada, capable of having a family, the expression "family" being also limited by s-s. (2) to a spouse, sons and daughters. Legal representatives are therefore not included in the word "individual" as used there.

In my view, what is envisaged here by the first two alternatives is personal control by a member or members of one family group, which does not extend beyond spouses, sons

1959
 }
 SETTLED
 ESTATES
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE
 ———
 Cameron J.
 ———

and daughters. When control is in the hands of that limited group, the corporation may truly be regarded as a “personal corporation” in the sense that it is personal to members of the family.

The third permissible method of control, it seems to me, is the only possible alternative to the first two which I have just mentioned. Presumably, it might include executors and legal representatives by reason of the definition of “person” (*supra*). But, read in its context, it would not necessarily or in every case include the executors of a deceased person who in his lifetime had had the requisite control. The control “by any other person”, by the very words of the subsection, must be “on his or their behalf”. “His” necessarily refers to “an individual resident in Canada” which, of course, could not apply to a deceased person; and “their” likewise refers to “one or more members of his family” limited by s-s. (2) to a spouse, sons and daughters, all members of one family.

In the instant case, while the executors did have complete control of the appellant company during 1955 and 1956, they did not have such control on behalf of any individual resident in Canada or on behalf of any members of his family, limited as that term is to a spouse, sons and daughters. They did have control on behalf of a large number of individuals and others, none of whom were members of a single family group as so limited. Whether they were residents of Canada does not appear.

The provisions relating to a “personal corporation” constitute an exception to the general rule that corporations are taxed. There is therefore a special onus on the appellant when invoking the provisions of s. 68 to establish that it comes clearly within all the requirements of the section, and in my opinion, for the reasons stated, it has failed to do so. (See *Lumbers v. M.N.R.*¹).

It seems to me that one of the main purposes in providing special legislation for a “personal corporation” was to facilitate the management of the assets of a single family group, subject to the requirement that the control of the corporation must be in the members of that family group (as

¹[1943] Ex. C.R. 202; [1944] S.C.R. 167.

limited by s. 68(1)(2)), or by others on their behalf. In the instant case, and upon the death of Fiddes, there was no such family group and thereafter, affairs of the appellant company were administered on behalf of a large number of persons not falling within any such category.

1959
 SETTLED
 ESTATES
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE
 ———
 Cameron J.
 ———

I have specifically limited my decision to the particular facts of this case. I must not be understood as deciding that in every case a “personal corporation” ceases to be such during the period when executors of a deceased controlling shareholder are administering his estate, or the trusts created thereby. In *Port Credit Realty Ltd.*¹, my late brother, Angers J., reached the conclusion under the then provisions of certain sections of the *Income War Tax Act*, relating to “personal corporations”, that Port Credit Realty Ltd. did not cease to be a “personal corporation” following the death of James Harris who had had the controlling interest therein, the executors of the Harris will administering that company on behalf of his widow and children. It will be seen, of course, that in that case those on whose behalf the executors exercised the control, were within the family group.

Accordingly, the appeal will be dismissed and the reassessments made upon the appellant for the taxation years 1955 and 1956 will be affirmed, the whole with costs.

Judgment accordingly.