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Jan. 20, 21

BETWEEN:

DOUGLAS U. McGREGOR .....APPELLANT;

AND

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

Revenue—Income tax—The Income Tax Act, S. of C. 1948, c. 52, ss. 3, 5, 55(2)—Meaning of income from employment.

On July 21, 1938, Dr. J. K. McGregor, the owner of the McGregor Clinic at Hamilton, made an agreement with the appellant, who was his brother and a surgeon employed at the clinic, that if the appellant should be on the permanent staff of the clinic at the time of his death or discontinuance of the clinic the appellant would be entitled to one-sixth of the amount realized from the accounts receivable outstanding on the books of the clinic at the date of such death or discontinuance. At the date of Dr. J. K. McGregor's death on January 22, 1946, the appellant was on the permanent staff of the clinic and in due course received from his brother's executor in 1949 the sum of $7,125 as part of his entitlement under the agreement. In his return for 1949 the appellant claimed this amount as a legacy but the Minister in his assessment added it to the amount of taxable income reported by the appellant in his return. From this addition the appellant appealed directly to this Court.

Held: That the amount received by the appellant was not compensation for the loss of an office. *Fullerton* v. *Minister of National Revenue* (1939) Ex. C.R. 13 distinguished.

2. That the appellant earned the amount in his character as an employee. It thus came to him from his employment and was remuneration for it and was income from employment.

3. That the amount was received under a profit sharing arrangement and was remuneration because of and for employment and, as such, income from employment.

APPEAL under The Income Tax Act.

The appeal was heard by the President of the Court at Toronto.

R. B. Law, Q.C. for appellant.

E. D. Hickey and *J. D. C. Boland* for respondent.

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

The PRESIDENT on the conclusion of the hearing (January 21, 1953) delivered the following judgment:

This is an appeal under The Income Tax Act, Statutes of Canada, 1948, chapter 52, from the appellant's income tax assessment for 1949. It is brought directly to this

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Court under section 55(2) of the Act as enacted by section 20(1) of chapter 40 of the Statutes of Canada, 1950.

The appeal relates only to the sum of $7,125 which the appellant received in 1949, under the circumstances hereinafter described, from National Trust Company, Limited, the executor of the last will and testament of James Kenneth McGregor, the appellant's deceased brother and former employer. In the financial statements accompanying his income tax return for 1949 the appellant showed this amount as an item of capital account describing it as a "legacy from Dr. J. K. McGregor Estate", but the Minister in his assessment added it as an item of taxable income to the amount of taxable income which the appellant had reported in his return. It is against this addition that the appeal herein is taken.

In his notice of appeal the appellant alleges that the amount in dispute constituted compensation for loss of office or a legacy or bequest and was not income within the meaning of the Act. The Minister, on the other hand, after alleging certain facts, submits that the amount was income from an office or employment within the meaning of sections 3 and 5 of the Act.

The facts are not in dispute. The appellant is a surgeon and has been practising as such in Hamilton since 1925. In that year he joined the staff of the McGregor Mowbray Clinic at Hamilton, which was then owned by his brother, Dr. James Kenneth McGregor, and one Dr. Mowbray. Subsequently, his brother became the sole owner of the clinic and it was thereafter called the McGregor Clinic. Then, on or about July 21, 1938, Dr. J. K. McGregor brought an agreement to the appellant's house, handed it to him and asked him to sign it. It had already been executed by himself. The appellant read it through, signed it and put it away. In the agreement the parties recited that Dr. J. K. McGregor owned and operated the McGregor Clinic and that the appellant was and had been for many years a surgeon on its staff and then set out its terms in 6 paragraphs only one of which, namely, paragraph 1(*a*), need be mentioned for the purposes of this appeal. It read as follows:

1. (*a*) In the event of the Party of the Second Part being on the permanent staff of the said Clinic at the time of the death of the Party of the First Part, upon the death of the said Party of the First Part

during the operation by him of said Clinic, or should the Party of the First Part discontinue the operation of said Clinic as provided for in paragraph 5 hereinafter contained and the Party of the Second Part is on the permanent staff at the time of such discontinuance, the Party of the Second Part shall be entitled to one-sixth of the amount realized from the accounts receivable outstanding on the books of the said Clinic at the date of the death of the Party of the First Part or discontinuance of said Clinic, and which share of the amount realized from the said accounts receivable shall be paid to the Party of the Second Part if, as and when the same are collected in each year thereafter, and as soon as convenient after the completion by the auditors for the said Clinic of the annual audit for each year shall receive his share of the amount realized from the said accounts receivable during the preceding year.

The agreement had not been the subject of any previous discussion between the appellant and his brother. At its date he was employed by the clinic on a salary basis with a yearly bonus determined by his brother. There were then about ten doctors, including the appellant, on the staff, all of them being on salary and bonus. There was only one other member of the staff with whom Dr. J. K. McGregor made an agreement similar to that which he made with the appellant, namely Dr. E. C. Janes, the only other surgeon on the staff in addition to the appellant and Dr. J. K. McGregor himself. After the date of the agreement the appellant continued his employment on the basis of salary and bonus. On January 22, 1946, Dr. J. K. McGregor died. At that time the appellant was on the permanent staff of the clinic. About a week afterwards he ceased his practice with it and set up a private practice of his own. Letters probate of Dr. J. K. McGregor's last will and testament were issued in due course to National Trust Company, Limited, on April 16, 1946. Subsequently National Trust Company, Limited, paid the appellant the sum of $7,125 in 1948 and a similar amount in 1949. These amounts represented one-sixth of the amounts realized from the outstanding accounts receivable of the clinic at the time of Dr. J. K. McGregor's death and were paid to the appellant pursuant to the agreement above referred to.

Dr. Janes was also on the permanent staff of the clinic at the time of Dr. J. K. McGregor's death, on the basis of salary and bonus. He remained with the clinic and is still connected with it. He also received payments from

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National Trust Company, Limited, pursuant to the agreement made with him. These payments amounted to $6,000 in 1948 and $6,000 in 1949.

Counsel for the appellant sought to establish that by the agreement Dr. J. K. McGregor made a special provision for the protection of his brother and his family and that this was a personal gift to him and, therefore, not income. Here I shall briefly summarize what the appellant said touching this question. He stated that his brother was thirteen years older than he, that he had paid for his education and that there was a very close personal relationship between them. They had lived together on the upper floor of the clinic before the appellant was married in 1927 and thereafter his brother had stayed with himself and his wife during the summers at their summer home. The appellant further stated that when his brother brought in the agreement he said, "Here's something I'm giving to you for yourself". He then gave his understanding of its purpose. He did not regard it as a reward for services rendered or as an inducement to stay on in the clinic. Indeed, at that time, he had no intention of leaving it. His view was that the agreement was given to him as a protection to himself and his family, to himself in the event of his brother's death and to his family in the event of his own. Counsel's indirect suggestion by way of question that his brother had made this provision for him because his future was uncertain is a fanciful one in view of his income since he left the clinic. There is also a complete answer to the suggestion that Dr. J. K. McGregor made a special provision for the appellant in the nature of a gift to him because he was his brother and to protect him from the uncertainties of the future in the fact that he made identically the same agreement with Dr. Janes, who was not related to him. In both cases, the payment was made conditional on the recipient being on the permanent staff of the clinic at the time of Dr. J. K. McGregor's death or discontinuance.

Finally, counsel sought to establish that the true nature of the provision in the agreement was that it was a legacy or testamentary disposition. The appellant described his brother as a promiscuous will writer. He had seen practically every will his brother had made, about 15 of them.

At one time, prior to his brother's marriage he was practically his brother's sole heir. The provision relating to him in his brother's wills varied from time to time both in the nature and in the amount of the bequest, particularly after his brother's marriage in 1939 or thereabouts and his subsequent adoption of a child. He was gradually being taken down in the amount bequeathed to him. Finally, in his brother's last will, dated June 4, 1945, he was given a legacy of $10,000.

One other portion of the evidence remains to be mentioned. The bonuses paid to the appellant and the other doctors on the staff of the clinic were always fixed by Dr. J. K. McGregor but they bore a relation to the amount of work done. In the operation of the clinic the amount of fees brought in by the surgeons exceeded that brought in by the physicians. Indeed, as the appellant put it, the clinic was run by the surgeons, notwithstanding the fact that there were only three of them. In my judgment, it would not be unfair to infer that this was the reason why the only members of the staff of the clinic with whom Dr. J. K. McGregor made agreements were the appellant and Dr. Janes, both of whom were surgeons, and that the agreements were intended to remunerate them for their special services by giving them a share in the fees which they had particularly helped to earn subject, in each case, to the condition already specified.

It was argued for the appellant that the amount paid to him was compensation for the loss of an office and the decision of this Court in *Fullerton* v. *Minister of National Revenue* (1) was cited. In my opinion, this decision has no application in the present case. There was no cessation of employment here as there had been in the *Fullerton* case. The appellant could have continued his employment with the clinic if he had wished to do so just as Dr. Janes did but he chose of his own free will to leave it and start a practice of his own. The payment could not possibly be regarded as compensation for the loss of an office.

And there is no support at all for the submission that it was a legacy or testamentary disposition. The appellant received a legacy from his brother under his will but the

(1) (1939) Ex. C.R. 13.

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receipt of the amount in question was of quite a different character. Furthermore, the fact that he would have been just as much entitled to it on his brother's discontinuance of the clinic as on his death negatives the suggestion that it was a testamentary disposition.

Nor am I able to agree with the contention that it was a capital amount or a gift that was personal to the appellant. The evidence is against any such contention.

There are two Canadian cases dealing directly with the amounts received by the appellant and Dr. Janes in 1948 under their respective agreements, namely, *No. 16* v. *Minister of National Revenue* (1), the appellant in that case, described as No. 16, being Dr. E. C. Janes to whom reference has been made, and *No. 51* v. *Minister of National Revenue* (2), the appellant in that case, described as No. 51, being the appellant in the present case. These were decisions of the Income Tax Appeal Board dismissing appeals from assessments for 1948 wherein the Minister had added the amounts respectively received by the appellants in 1948 under their agreements to the amounts reported in their returns. It was explained on behalf of the appellant herein that his reason for not appealing from the decision of the Income Tax Appeal Board to this Court was that he had been too late in filing his security for costs. In my judgment, the Income Tax Appeal Board was right in dismissing the appeals in these two cases. While they were taken under the Income War Tax Act, R.S.C. 1927, chapter 98, and this appeal is under the Income Tax Act, I see no reason for deciding differently in this case from the decisions referred to.

In my opinion, the amount received by the appellant was plainly income from an employment within the meaning of section 3 and 5 of the Act. Section 3 describes income as follows:

> 3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all
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> (*a*) businesses,
>
> (*b*) property, and
>
> (*c*) offices and employments.

(1) (1951) 4 Tax A.B.C. 158. (2) (1952) 6 Tax A.B.C. 257.

And section 5 defines income for a taxation year from an office or employment in part as follows:

> 5. Income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year plus

and then sets out the particular heads of income to be added with which we are not here concerned.

As I see it, the appellant was entitled to the amount received by him as a matter of right under his agreement by reason of the fact that he was a member of the staff of the clinic at the time of Dr. J. K. McGregor's death. Thus he earned the amount in his character as an employee. If he had not been in such employment at that time he would have had no entitlement. It was because he was employed that he was entitled to his share of the accounts receivable. The amount thus came to him from his employment and was remuneration for it. This makes it income from employment within the meaning of sections 3 and 5 of the Act.

I am also of the view that the agreement provided for a sharing of income between the owner and those who had particularly assisted in earning it. It was thus, in a sense, a profit sharing arrangement that was to go into effect if the appellant was still a member of the clinic at the time of the owner's death or discontinuance. This also was remuneration because of and for employment and, as such, income from employment.

For these reasons, I have no hesitation in holding that the amount in dispute was properly included in the assessment, from which it follows that the appeal herein must be dismissed with costs.

Judgment accordingly.