1953
Oct. 19
Oct. 21

BETWEEN:

TRANS-CANADA INVESTMENT CORPORATION LIMITED ..... } APPELLANT;

AND

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

*Revenue—Income—The Income Tax Act 11-12 Geo. VI, c. 52, s. 27(1)—Dividends received from a Canadian Corporation—Appeal from Income Tax Appeal Board allowed.*

*Held:* That in the circumstances of this case dividends from a Canadian Corporation are deductible by virtue of s. 27(1) of the Income Tax Act notwithstanding the fact that such dividends are paid in the first instance to a trustee-corporation and by it paid to the receiving corporation.

APPEAL from a decision of the Income Tax Appeal Board.

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

*K. E. Meredith* for appellant.

*J. L. Farris, Q.C.* and *T. E. Jackson* for respondent.

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

CAMERON J. now (October 21, 1953) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated April 9, 1953, which disallowed an appeal by the appellant from an assessment made upon it for its taxation year 1950. By that assessment, dated February 1, 1952, there was added to the declared income of the appellant the sum of $737.26 received by it in that year from the Yorkshire and Canadian Trust Limited, under the circumstances presently to be mentioned, and which amount the appellant had claimed as a deduction under s. 27(1) of the Income Tax Act.

The facts are not in dispute. The appellant is a company incorporated under the laws of the Province of British Columbia, and carries on business as the administrator of certain fixed investment trust known as Trans-Canada Shares, Series "A", Series "B", and Series "C". The trust known as Trans-Canada Shares Series "B" was constituted and is governed by an agreement dated September 1, 1944 (Exhibit 1), the parties thereto being (*a*) the Administrator of the Trust, the appellant herein; (*b*) the Trustee, the Yorkshire and Canadian Trust Limited; and (*c*) the holders of certificates representing Trans-Canada Shares Series "B".

The plan of operation was as follows. The appellant, as administrator of the Trust, from time to time purchased a fixed number of common shares in fifteen selected Canadian corporations (called a "Trust Unit"), endorsed the share certificates in favour of the Yorkshire and Canadian Trust Limited (hereinafter to be called "the Trustee"), and delivered them so endorsed to the Trustee, which thereupon registered them in its own name. Upon the deposit with it of one "Trust Unit" as aforesaid, the Trustee issued certificates representing 1,000 undivided one-thousandths' interest in the "Trust Unit", each of such interests being termed a Trans-Canada Share Series "B". These certificates, so issued by and in the name of the Trustee, were in two forms:

(*a*) certificates which are registered on the books of the Trustee in the name of the registered owner; and

(*b*) bearer certificates which are not registered on the books of the company, but which are negotiable and passed by delivery. Attached to these is a series of coupons which

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entitle the holder thereof, upon surrender on the semi-annual dates mentioned, to receive the proportion of the income from the "Trust Unit" to which he is entitled.

The certificates when issued by the Trustee were in the denominations requested by the administrator, were then delivered by the latter to the various purchasers thereof. Exhibits 2 and 3 are respectively samples of the registered and bearer certificates so issued.

The Trustee, as the registered owner of the shares in the fifteen companies (which I shall hereafter refer to as the "underlying companies"), received all dividends paid thereon, and on March 1 and September 1 in each year, as required by the said Trust Agreement, distributed its net income therefrom to the holders of the Series "B" certificates, after deducting therefrom the various charges specified in the agreement, which were as follows:

(*a*) a fixed fee to the administrator;

(*b*) its own charges;

(*c*) taxes and other Governmental charges;

(*d*) a reserve fund for contingent tax liability. I understand, however, that no such reserve was set up at any time.

In the case of registered owners of the Series "B" certificates, payment was made by the special cheque of the Trustee, which was headed "Trans-Canada Shares Series 'B' —semi-annual distribution of income." In the case of those holding bearer certificates, payment was made to an individual, bank or trust company surrendering the semi-annual coupon.

In 1950, the appellant held as its own property a certificate for 1,000 shares of Series "B", and in respect thereof received from the Trustee the sum of $737.26. These cheques (Exhibit 4) are for an amount in excess of that figure, but nothing hinges on that difference. In its tax return it showed the receipt of that amount but claimed that it was deductible under the provisions of s. 27(1) of the Income Tax Act, which is as follows:

27. (1) Where a corporation in a taxation year received a dividend from a coporation that

(*a*) was resident in Canada in the year and was not, by virtue of a statutory provision, exempt from tax under this Part for the year, . . .

an amount equal to the dividend minus any amount deducted under subsection (2) of section 11 in computing the receiving corporation's income may be deducted from the income of that corporation for the year for the purpose of determining its taxable income.

The respondent, however, being of the opinion that the said sum was not a dividend or the sum of dividends received from the corporation that was resident in Canada, disallowed the said deduction and added that amount to the appellant's taxable income. Then followed the appeal to the Income Tax Appeal Board, and later to this Court.

At the hearing it was conceded that each of the "underlying companies" which paid the dividends to the Trustee was a corporation that was resident in Canada in 1950, and was not, by virtue of a statutory exemption, exempt from taxation under Part 1 of the Act for the year 1950. It follows, therefore, that if the appellant corporation had been the registered owner of the shares in the "underlying companies," and as a consequence had received the dividends directly from them, it would have been entitled to deduct the amount of such dividends in computing its taxable income. Is its position otherwise because of the particular facts of this case?

Counsel for the appellant—on whom the onus lies—submits that, notwithstanding the intervention of the Trustee, that which the appellant received was a dividend from a corporation resident in Canada and that the appellant received it from that corporation. The respondent denies that when received by the appellant it had the quality or characteristics of such a dividend; and that even if it were found to be such, the appellant received it from the Trustees and not from the "underlying companies."

Firstly, was it a *dividend* from a Canadian corporation not exempt from taxation? In considering this question, I must elaborate somewhat on the facts disclosed in evidence. The Trust established under the provisions of the Trust Agreement (Exhibit 1) is a fixed investment trust. The names of the "underlying companies" and the number of shares in each, which together make up a "Trust Unit," are set out in the agreement. They cannot be changed by the Trustee except upon the direction of the administrator who has certain limited powers to direct sales of portions thereof, and in that case the proceeds are held on deposit in a chartered bank or invested in Government bonds until the

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administrator directs the Trustee to purchase therewith shares in some one or more of the named "underlying companies," but not otherwise. By Clause 34 of the agreement, it is provided that the holder of certificates representing in the aggregate 200 Series "B" shares, or any multiple thereof, is entitled upon surrender of his certificates to the Trustee to require the latter to either—

(*a*) sell forthwith the shares of stock in the "underlying companies" then constituting one-fifth of a "Trust Unit," or the proper multiple thereof, and pay over the proceeds to him; or

(*b*) to transfer to him duly endorsed, stock certificates representing one-fifth (or the proper multiple thereof), representing the proportionate part applicable to his shares of stock in the "underlying companies" held by the Trustee.

These facts were known to a purchaser of the Series "B" certificates, not only because he became a party to the agreement upon subscribing for shares, but also because the information was given to him in a summary forming part of the certificate itself. At the time of the semi-annual distribution of income, a registered owner of the certificate was furnished with a statement showing precisely the shares held by the trustee in respect of each "Trust Unit."

It is also shown that the Trustee took meticulous care to ensure that the stocks in the "underlying companies" represented in each "Trust Unit" were kept separate from all others. When dividends were received, they were immediately placed in a special Series "B" Trust Account and all distributions made, whether to registered owners or to those holding bearer certificates, were paid out of that account.

From these facts, and particularly because he could at any time demand that the Trustee deliver to him his proper proportion of the shares in the "underlying companies," it seems to me that the holder of the Series "B" certificate was, in fact, the beneficial owner of the basic shares represented thereby. While he was not the registered owner, and although the administrator had the right to vote the said shares at any meeting of the "underlying companies," no one other than the holder of Series "B" certificates had any beneficial interest in such shares. The number of shares to which he was entitled in each company was fixed at the time he purchased the certificates, remained the same

throughout, and he was entitled to physical possession thereof, upon demand.

Under these circumstances I do not think that the amounts which the appellant received were other than dividends from the "underlying companies." The majority decision of the House of Lords in *Archer-Shee* v. *Baker* (1), strongly supports that view. There the appellant's wife, resident in the United Kingdom, was the life tenant of a trust fund under an American will, the trustees of which were resident in New York. The trust fund consisted entirely of foreign government securities, foreign stocks and shares, and other foreign property, the trustees having powers of sale and reinvestment. The income from the fund was paid by the trustees to the order of the appellant's wife, at a New York bank. The issue in the appeal against the assessment levied against the appellant in respect of his wife's income was whether such income arose from the specific securities, stocks and shares, and other property constituting the trust fund or from "possessions out of the United Kingdom other than stocks, shares or rents." The House of Lords, reversing the Court of Appeal, held that the appellant's wife was the beneficial owner of the securities, stocks and shares, and other property constituting the trust fund and was entitled to receive and did receive the interest and dividends thereof. In coming to this view they assumed that the law of trusts on this point was the same in New York as in England. That this assumption was erroneous was shown by their subsequent decision in *Garland* v. *Archer-Shee* (2). That fact, however, does not affect the applicability of the decision in the first *Archer-Shee* case (*supra*) to the facts of the present case, it being assumed that the law of trusts on this point in British Columbia is the same as that of England as laid down in the first *Archer-Shee* case.

In the first *Archer-Shee* case, Lord Wrenbury said at p. 866:

> I have to read the will and see what is Lady Archer-Shee's right of property in certain ascertained securities, stocks and shares now held by the Trust Company 'to the use of my said daughter.' It is, I think, if the law of America is the same as our law, an equitable right in possession to receive during her life the proceeds of the shares and stocks of which she is tenant for life. Her right is not to a balance sum, but to the dividends subject to deductions as above mentioned. Her right under the will is 'property' from which income is derived.

(1) [1927] A.C. 844. (2) (1930) 15 T.C. 693; [1931] A.C. 212.

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And Lord Carson, in the same case, said at p. 870:

> In my opinion upon the construction of the will of Alfred Pell once the residue had become specifically ascertained, the respondent's wife was sole beneficial owner of the interest and dividends of all the securities, stocks and shares forming part of the trust fund therein settled and was entitled to receive and did receive such interest and dividends. This, I think, follows from the decision of this House in *Williams* v. *Singer* (1921) 1 A.C. 65, and in my opinion the Master of the Rolls correctly stated the law when he said ((1927) 1 K.B. 123) 'that in considering sums which are placed in the hands of trustees for the purpose of paying income to beneficiaries, for the purposes of the Income Tax Acts, you may eliminate the trustees. The income is the income of the beneficiaries; the income does not belong to the trustees.'

And, at p. 871:

> My Lords, I am unable to understand why or how the character of the sum paid to the respondent's wife ever became changed or, as the Master of the Rolls graphically says, 'was no longer clothed in the form in which it was originally received, having no trace of its ancestry,' simply because the deductions due by law have been made and because it has been mixed up with other trust moneys by the trustees. It is, in my view, in the same position as if the trustees had arranged to have the interest and dividends paid direct to the respondent's wife and she had discharged the necessary outgoings in accordance with the law. Whether the necessary outgoings according to law were discharged by the trustees or by the cestui que trust cannot, in my opinion, make any difference. I think the appeal should be allowed, . . .

Reference may also be made to *Pan-American Trust Company* v. *M.N.R.* (1), in which the President of this Court considered the first *Archer-Shee* case and followed the principles therein laid down. Reference may also be made to *Kemp* v. *Minister of National Revenue* (2); to *Nelson* v. *Adamson* (3); and to *Syme* v. *Commissioner of Taxes* (4).

On the principles laid down in these cases, I reach the conclusion that what the appellant was entitled to receive and did, in fact, receive, was the dividends of the various Canadian companies.

The second question is whether, being a dividend as I have found it to be, it was received *from* a Canadian corporation. Counsel for the respondent contends that the language of the section requires that it must have come directly from a Canadian corporation to the appellant, and that as it was paid in the first instance to the Trustee, and then by the latter to the appellant, it was not, in fact, received *from* a Canadian corporation. He submits that

(1) [1949] Ex. C.R. 265.
(2) [1948] 1 D.L.R. 65.
(3) [1941] 2 K.B. 12.
(4) [1914] A.C. 1013.

while it may have been derived from a Canadian corporation, it was not *received from* a Canadian corporation.

I agree that it is possible to interpret the language of the section as requiring that the dividend must have been received directly from the paying corporation. But in my view, there is another interpretation that may be put upon it, an interpretation which I think is more consonant with the intention of Parliament as I deem it to be from the language itself.

In *Caledonian Railway* v. *North British Railway* (1), Lord Selborne said at p. 122:

> The more literal construction of a statute ought not to prevail if it is opposed to the intentions of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which the intention can be better effectuated.

Again, in *Shannon Realties* v. *St. Michel* (2), it was stated that if the words used are ambiguous, the Court should choose an interpretation which will be consistent with the smooth working of the system which the statute purports to be regulating.

Now, from a perusal of the words of the section, it seems clear that the purpose of the enactment was to reduce the number of taxes on corporate earnings. Such earnings are ordinarily subject to taxation when earned by a corporation, and again when ultimately distributed by way of dividend to shareholders who are individuals. Were it not for the provisions of s. 27(1), there would be a further tax on such earnings when they were passed from one corporation to another by way of dividends.

To carry out that intention it was necessary to limit the deduction to corporations—and that was done. It was also necessary to provide that it related to a dividend, and that that dividend issued or came from a corporation resident in Canada and which was not exempt from tax—and that was done in apt language. If the purpose of Parliament was as I have stated, then it was not necessary in order to carry out that purpose, to require that the dividend must have been received directly from the paying corporation. In fact, such a requirement would have drastically curtailed the relief to corporate taxpayers which I think it was intended to grant to them.

(1) (1881) 6 A.C. 114. (2) [1924] A.C. 192.

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It seems to me that counsel for the respondent, in submitting that the dividend must have been "received from" a corporation, has placed the emphasis in the wrong place. In my view, the important matter is that the dividend shall have come from a Canadian corporation and that the emphasis should therefore be placed on "a dividend from a corporation."

In my opinion, the appellant did receive a dividend from Canadian corporations—namely, the "underlying companies"—notwithstanding the fact that the dividends were paid in the first instance to the Yorkshire and Canadian Trust Limited, which company, in my opinion, was nothing more than a trustee for the appellant and other owners of Series "B" certificates to hold the shares to which they were severally entitled, to receive the dividends thereon, to distribute the income semi-annually, and upon demand made to deliver the proper numbers of shares in the "underlying companies," or their proceeds if sold, upon the instructions of the holder.

For these reasons the appellant is entitled to succeed.

I should note that in the Notice of Appeal the appellant, as an alternative to its main appeal, submitted that if it were not successful in the main appeal, it was entitled to a deduction for depletion in respect of the said dividends in the sum of $50.87. While that right was denied in the respondent's reply, his counsel at the trial conceded that he could not support the finding of the Income Tax Appeal Board on that point and conceded the appellant's right to that deduction. I merely note that matter for, in view of my finding that the appellant is entitled to the full deduction of its main claim, it cannot receive the deduction for depletion also.

There will therefore be judgment allowing the appeal on the main issue; the decision of the Income Tax Appeal Board will be set aside, and the matter referred back to the respondent to re-assess the appellant in accordance with my findings.

The appellant is entitled to its costs after taxation.

*Judgment accordingly.*