

BETWEEN:

C. I. BURLAND PROPERTIES }
LIMITED

APPELLANT;

Toronto
1967
Sept. 12-13

AND

THE MINISTER OF NATIONAL }
REVENUE

RESPONDENT.

Ottawa
Oct. 3

Income tax—Withholding tax—Payment of municipal taxes by tenant of foreign owner—Whether similar to rent—Income Tax Act, s. 106(1)(d).

Under the Ontario *Assessment Act*, R.S.O. 1960, c. 23, a tenant is jointly liable with his landlord for municipal taxes. Hence a tenant who pays taxes pursuant to a covenant to do so pays them in discharge of the statutory obligation and such a payment is not subject to withholding tax as being a payment similar to rent within the meaning of s. 106(1)(d) of the *Income Tax Act* where the landlord resides outside Canada.

Finch v. Gilroy (1889) 15 Ont. A.R. 484, *Boone v. Martin* (1920) 47 O.L.R. 205, and *United Geophysical Co. of Canada v. M.N.R.*, referred to.

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INCOME TAX APPEALS.

Wolfe D. Goodman and Max M. Steidman for appellant.

J. R. London for respondent.

CATTANACH J.:—These are appeals from assessments by the Minister under the *Income Tax Act*, R.S.C. 1952, chapter 148, wherein additional tax was levied against the appellant in respect of its 1961 to 1964 taxation years inclusive.

There is no dispute between the parties with respect to the facts which are relatively simple and straight forward.

The appellant is a joint stock company incorporated by an Act of the Legislature of Bermuda under date of January 28, 1955 for the purpose of acquiring real property in any part of the world outside those islands.

In the exercise of its powers the appellant acquired real property from the former owner thereof, C. I. Burland, who, prior to his death, was the principal shareholder in the appellant.

The real property so acquired is part of Lot 106 situate on Clifton Hill in the City of Niagara Falls, in the Province of Ontario. At all times material to these appeals this particular property was the only property owned by the appellant. The real property, being in the mecca for honeymooners and tourists, had constructed thereon a motel building, a restaurant, a gift shop and like facilities.

Under a lease dated April 1, 1961 the appellant leased the property to Melforte Limited from year to year at an annual rental of \$60,000.

Melforte Limited is a joint stock company incorporated pursuant to the laws of the Province of Ontario and is resident in Canada.

During the currency of the lease dated April 1, 1961 the appellant constructed greatly expanded facilities on the land at an approximate cost of \$700,000.

Accordingly the appellant and Melforte Limited entered into a new lease dated May 1, 1963 whereby the appellant leased to Melforte Limited the land and the improved facilities which had been constructed thereon for a term of five years and six months from May 1, 1963 to October 31, 1968, at an increased annual rental of \$150,000.

Melforte Limited, in turn sublet the motel, restaurant and gift shop facilities and premises to three Ontario companies which conducted those respective enterprises. If my recollection of the evidence serves me correctly the premises on which these enterprises were conducted had been sublet by Melforte Limited under the lease dated April 1, 1961 to individuals rather than joint stock companies as was the case under the subsequent lease dated May 1, 1963.

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The lease dated April 1, 1961 provided in part as follows:

THE said Lessee COVENANTS with the said Lessor to pay rent.

AND to pay taxes.

AND to pay water rates and charges for gas, electricity and telephone.

AND to repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted.

AND to keep up fences.

AND not to cut down timber.

The lease dated May 1, 1963 provided in paragraph 4, as follows:

The said lessee covenants with the said lessor to pay rent and to pay all property and business taxes, including, without limiting the generality of the foregoing, all public utilities and services including maintenance and charges for heating and air conditioning.

Both the lease dated April 1, 1961 and the lease dated May 1, 1963 contained the usual proviso for the right of re-entry by the lessor on non-payment of rent or non-performance of covenants.

In addition both such leases contained a provision that, in the event of circumstances as therein specified, the current month's rent, together with the rent for the three months next accruing and, if payable by the lessee, the taxes for the then current year, shall become due and payable and in the circumstances provided for, such taxes or accrued portion thereof shall be recoverable by the lessor in the same manner as the rent reserved.

The appellant financed the construction of the additional facilities on its property from the proceeds of a first mortgage on the property in question with The London Life Insurance Company. Under the terms of the mortgage indenture, the appellant, as mortgagor, authorized the mortgagee to pay all taxes or charges and assessments and undertook to repay the mortgagee in blended monthly instalments of principal, interest and taxes.

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By arrangement between the appellant and Melforte Limited these monthly instalments were regularly paid on due date by Melforte Limited to The London Life Insurance Company, the mortgagee.

The amount of the principal and interest paid to The London Life Insurance Company by Melforte Limited on behalf of the appellant was considered and treated as payments of rent to the appellant by Melforte Limited under the leases dated April 1, 1961 and May 1, 1963 between them and entered in the books of account of both as such.

The amount attributable to the taxes on the real property in the blended payments made to The London Life Insurance Company by Melforte Limited was used by the Insurance Company to pay the property taxes imposed by the Municipality of the City of Niagara Falls directly to the municipality.

Counsel for both parties took the position, with which I was in agreement, and argued the case on the basis that the payments of the real property taxes by The London Life Insurance Company to the Municipality was, in effect, the payment of those taxes by Melforte Limited.

The amounts of the municipal property taxes assessed and so paid in respect of the demised premises were:

| | |
|-------------------------|-------------|
| for the year 1961 | \$ 4,217.97 |
| for the year 1962 | 7,739 65 |
| for the year 1963 | 10,878.88 |
| for the year 1964 | 28,743 01 |
| | <hr/> |
| Total | \$51,579 51 |
| | <hr/> <hr/> |

Melforte Limited deducted and remitted to the Minister withholding tax under section 106(1)(d) of the *Income Tax Act* at the rate of 15% on the rent of \$60,000 per year and \$150,000 per year, when applicable, as stipulated under the leases between it and the appellant.

In assessing the appellant the Minister added withholding tax at the rate of 15% in respect of the property taxes in the above total paid by the tenant, Melforte Limited, through the instrumentality of The London Life Insurance Company pursuant to the above mentioned leases for the years 1961 to 1964 inclusive.

The Minister so assessed the appellant on the assumption, that the payment of the sums aforesaid by Melforte Ltd. to the City of Niagara Falls in respect of the demised premises for the taxation years 1961 to 1964 inclusive were amounts which were paid or credited to the Appellant on account of or in lieu of or in satisfaction of rent or similar payments for the use in Canada of property within the meaning of paragraph (d) of s.s. (1) of sec. 106 of the *Income Tax Act*.

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Section 106(1)(d) of the *Income Tax Act* reads as follows: Cattanach J.

106.(1) Every non-resident person shall pay an income tax of 15% on every amount that a person resident in Canada pays or credits, or is deemed by Part I to pay or credit, to him as, on account or in lieu of payment of, or in satisfaction of,

- (d) rent, royalty or a similar payment, including, but not so as to restrict the generality of the foregoing, any such a payment
- (i) for the use in Canada of property,
 - (ii) in respect of an invention used in Canada, or
 - (iii) for any property, trade name, design or other thing whatsoever used or sold in Canada,
- but not including

- (A) a royalty or similar payment on or in respect of a copyright, or
- (B) a payment in respect of the use by a railway company of railway rolling stock as defined by paragraph (25) of section 2 of the *Railway Act*;

In disputing the assessment counsel for the appellant contended that it was not subject to withholding tax under section 106(1)(d) on the amounts which were paid by Melforte Limited, the tenant, as property taxes with respect to the demised premises.

The question which rises sharply for determination is whether the amount of the municipal taxes paid by Melforte Limited is an amount paid or credited to the appellant "as, on account or in lieu of payment of, or in satisfaction of", rent or a similar payment for the use in Canada of property.

The word "rent" has a fixed legal meaning and does not include all payments which a tenant is bound to make under the terms of his lease. Normally money expended for taxes is not rent because it is not usually reserved or payable to the landlord.

In *Finch v. Gilroy*¹ and in *Boone v. Martin*² it was decided that a mere covenant to pay taxes is not a

¹ (1889) 16 Ont. A.R. 484.

² (1920) 47 O.L.R. 205.

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covenant to pay rent. Upon the authority of the two foregoing cases I am of the view that the covenants in the two leases here involved to pay taxes do not constitute covenants to pay taxes as rent.

However, there remains for consideration whether the amounts paid constitute "a similar payment including, but not so as to restrict the generality of the foregoing, any such a payment for the use in Canada of property" within the meaning of the section.

Thurlow J. in *United Geophysical Company of Canada v. Minister of National Revenue*³ had occasion to consider the meaning of section 106(1)(d) to determine if amounts paid to a non-resident parent company by its subsidiary resident in Canada as "rental" (the correct term being "hire") for equipment used in Canada in the conduct of the subsidiary's business, fell within the meaning of that section.

He said this at page 294:

On behalf of the appellant, it was submitted that the word "rent" is a technical term used to refer to a profit issuing from real property, that the words "or any similar payment including any such a payment for the use of property" which follow "rent" in s. 106 are to be construed as meaning payments having the characteristics of rent and that the payments in question do not have such characteristics, there being no certainty in the agreement as to the amount to be paid or as to the time when payment is to be made.

It is, I think, apparent from the use in the section of the wording which follows the words "rent" and "royalty" that Parliament did not intend to limit the type of income referred to in the subsection to either what could strictly be called "rent" or "royalty" or to payments which had all of the strict legal characteristics of "rent" or "royalty".

...

He concluded his remarks in this particular context with the following words on page 295:

... Without attempting to determine just how wide the net of s. 106(1)(d) may be, I am of the opinion that the subsection does refer to and include a fixed amount paid as rental for the use of personal property for a certain time.

From my brother Thurlow's remarks I conclude that in his opinion (assuming the amount was paid for the use of property) there must be two attributes present to constitute a payment similar to rent, although without

³ [1961] Ex. C.R. 283.

all other strict legal requirements thereof, (1) that it is a fixed amount and (2) that it is paid for a certain time. I would add that the amount is fixed if it is stated so that it can be ascertained with certainty. Both of the foregoing attributes are present in the circumstances now under review.

There remains to be considered whether the payment of municipal property taxes by the tenant Melforte Limited is a payment for the use of property in Canada, rather than payment of a statutory obligation on the tenant. If the latter is the case then any payment so made would not be for the benefit of the landlord, the appellant, and would not be credited to him.

Section 32, subsection (4) of the *Assessment Act*, R.S.O. 1960, chapter 23 provides as follows:

32.(4) Occupied land owned by a person who is not a resident in the municipality shall be assessed against the owner, if known, and against the tenant.

Subsection (7) of the same section provides that where the land is assessed against a tenant under subsection (4) for the purpose of imposing and collecting taxes upon and from the land, the tenant shall be deemed to be the owner.

The remedies afforded the Municipality to collect taxes from an owner or tenant assessed therefor are, under section 105 by special lien and sale, under section 106 by action for a debt due and under section 121 by distress and sale for taxes that are a charge on the land. These remedies are based upon a personal liability of the landlord or tenant.

Under section 107 an additional method of collection of unpaid taxes is afforded a municipality where taxes are due on land occupied by a tenant. The tenant may be notified that rent for the premises shall be paid to the municipality to be applied to the unpaid taxes and by virtue of section 108 the tenant may deduct from his rent any taxes paid by him that as between him and his landlord, the latter ought to pay. This is a remedy different from that which exists directly against the person who is assessed.

By section 20 every assessor is required to prepare an assessment roll in which, after diligent inquiry, he shall

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set down the names of all persons, whether they are resident in the municipality or not, who are liable to assessment thereon and by section 73 the assessment roll is made binding on all parties.

Extracts from the assessment roll of the City of Niagara Falls for the years 1960, 1961, 1962, 1963 and 1964 were produced in evidence. In each such roll the appellant was assessed as owner.

In the years 1960, 1961, 1962, Dudley Burland, and Noel Burland, were included presumably as proprietors of one or other business enterprises conducted on the premises.

In the roll for 1963 these same two persons were also included but with the additional symbol "T" which by virtue of section 20(2) would indicate that they were tenants.

The roll for 1964 is substantially the same as that for 1963 except that Honeymoon Hotel Ltd., House of Burland Ltd., and Beefeater (Niagara) Ltd., are added as tenants. These three companies are the subtenants of Melforte Limited which I previously referred to as three Ontario companies.

In none of the rolls was Melforte Limited assessed as tenant or in any other capacity.

All notices of real property assessments were addressed to the appellant at 943 Clifton Hill, Niagara Falls, Ontario as were all tax bills.

The appellant appealed against the assessment on the buildings on the 1963 roll for the ensuing year and was successful in having that assessment reduced by a Court of Revision.

The failure of the assessor to include Melforte Limited on the assessment rolls as tenant, as it was his mandatory duty to do under section 20(1)I, would preclude the municipality from resorting to any of the remedies available to it to recover unpaid taxes from the tenant, but such omission does not affect the nature of the liability of the tenant.

The liability to pay taxes to the taxing authority is, under the *Assessment Act*, a joint liability of the landlord and the tenant. If, therefore, one of them pays the taxes, the other is relieved of his obligation to pay.

As between the landlord and the tenant the question as to which of them will pay the taxes is usually settled by the terms of the lease. It must be emphasized, however, that when the tenant by agreement with his landlord undertakes to pay municipal taxes, he is not agreeing to discharge an obligation of the landlord towards the municipality but is only assuming an obligation which has been imposed on him by the provincial statute.

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Therefore it cannot be said that the payment of municipal property taxes by Melforte Limited is a payment to the appellant for the use in Canada of the demised property.

Accordingly the appeals are allowed with costs.