IN THE MATTER OF an Appeal under the Income War Tax Act, 1917

1924
June 2.

BETWEEN:

CECIL R. SMITH.....APPELLANT;

AND

THE ATTORNEY GENERAL OF CANADA ..... } RESPONDENT.

Revenue—Income War Tax Act, 1917—Profits from illegal sale of liquor—"Income"—Estoppel.

Held, that profits arising within Ontario from an illicit traffic of liquor therein contrary to the Ontario Temperance Act are "income" within the meaning of section 3, subsection 1 of The Income War Tax Act, 1917, and amendments and liable to be taxed under the provisions of the said Act.

2. That the taxes imposed under the said Act are so imposed upon the person and not upon his trade, business or calling, and it is not necessary for the taxing power to inquire into the source of the income or revenue.

3. That inasmuch as one is estopped from pleading his own illegality or wrongful act with a view of benefiting thereby, *S.* could not claim that revenue from his illicit traffic was exempt from taxation, because it was illegally or improperly obtained.

APPEAL by the appellant from the assessment for the year ending 31st December, 1920, under the provisions of the Income War Tax Act, 1917.

May 27, 1924.

Case now heard before the Honourable Mr. Justice Audette at Ottawa.

George D. McEwen for appellant.

C. F. Elliott for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now, this 2nd day of June, 1924, delivered judgment (1).

This is an appeal,—under the provisions of sections 15 *et seq* of The Income War Tax Act, 1917, and the amendments thereto—from the assessment, for the year ending 31st December, 1920, of that part of the appellant's income dealing with his profits arising out of the illicit traffic in liquor, in the province of Ontario.

The facts of the case are admitted and the matter now comes on before the court in the form of a special case,

(1) An appeal from this judgment has been taken to the Supreme Court.

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under the provisions of Rule 161, and the question submitted for determination is stated as follows, viz:

Are the profits arising within Ontario from illicit traffic in liquor therein, contrary to the provisions of the said existing provincial legislation in that respect, *income* as defined by section 3, subsection 1 of The Income War Tax Act, 1917, and Amendments thereto and liable to have assessed, levied and paid thereon and in respect thereof the taxes provided for in the said Act.

The appellant was engaged, in Ontario, without license, in the illicit business of trading and trafficking in liquors, contrary to the Ontario Temperance Act. His business was limited within Ontario, with no exportation of liquor outside the province. He now claims that the profits earned out of that traffic were illicit, contrary to the Ontario laws and that therefore they are not taxable as

income within the proper interpretation of the Income War Tax Act.

It is true that trading in liquor is not illicit or illegal at common law. To quote the language of Blackstone it is not *malum in se,* but only *malum prohibitum,* and is not a criminal offence. It has, however, been made illegal and illicit by the laws of Ontario, and the appellant now invokes and sets up that illegality to be relieved from paying taxes.

This is not a case with a meritorious quality commending itself to a court of justice. The appellant invokes his own turpitude to claim immunity from paying taxes and to be placed in a better position than if he were an honest and legal trader, and asks the court to discriminate in his favour as against other honest traders. As against an innocent taxpayer no man shall set up his own iniquity to operate such discrimination in his favour. His claim rests upon and is tainted with illegality and no court will lend its aid to a person who rests his case on an illegal act.

The old rule, formulated as far back as 1584 in the Heydon's case (1) is still in force and in harmony with the duty of the court in our days, where it says that

the office of all judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo,* and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico.*

To claim an immunity is to claim something that is in derogation of the proper incidence of taxation under the

(1) 2 Coke's R. 18 at p. 20.

law. Any immunity of the individual shifts the burden that should have been borne by him on the shoulders of his fellow citizens.

Whoever seeks justice must come into court with clean hands. The appellant knew of the impropriety of carrying on such a trade in Ontario; he knew it was wrong and no man can take advantage of his own wrong, *nullus commudum capare potest de injuriâ suâ propriâ.* The author of a wrong cannot be allowed to take advantage or avail himself of his wrong. The appellant is estopped from benefiting by his wrongful act and on that ground alone the appeal must be dismissed.

I may, however, add that the appellant comes under section 4 of the Taxing Act, being a person residing in Canada, carrying on business therein and his income is thereunder subject to assessment. As I have had occasion to say in a recent case, all that is necessary to find in the present case is that the *income* is subject to the Taxing Act. It is not necessary to inquire into the source from which the revenue is derived, as the tax is a charge imposed by the legislature upon the person, and all his revenues—from whatever source derived—mingle with the rest of the income. The tax is imposed upon the appellant personally and not upon his trade, business or calling, whatever it is called.

The *illicit traffic* in question is not a criminal offence and while it is illegal in Ontario, it may not be so elsewhere and the Dominion Taxing Act is not affected by that provincial legislation; such legislation is within its respective power and jurisdiction and is *intra vires.* But the exercise of the right by the province to regulate the traffic of liquor cannot curtail the dominion laws with respect to revenue. Moreover it admits of no doubt that the appellant's business comes within the ambit of the definition of the word *income* found in the Taxing Act. That definition is broad enough to include earnings or gain of every kind.

The Taxing Act, in its definition of the word *income* enacts that

> for the purposes of the Act, the income means the profit or gain of a trade, business or calling,

all of which cover the facts of the present case.

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In re *Partridge* v. *Mallandaine* (1), it was held that the words *vocation* and *calling* are synonymous terms and that there is no limit to

> a lawful vocation nor . . . that the fact that it is unlawful can be set up in favour of these persons as against the rights of the revenue to have payment in respect of the profits that are made.

and Denman J. adds:

> But I go the whole length of saying that, in my opinion, if a man were to make a systematic business of receiving stolen goods, and to do nothing else, and he thereby systematically carried on a business and made a profit of £2000 a year, The Income Tax Commissioners would be quite right in assessing him if it were in fact his vocation.

See also *The Consumer's Cordage* v. *Connolly* (2); *Lapointe* v. *Messier* (3); *Brownlee* v. *McIntosh* (4); Montgomery Income Tax Procedure 441; *Sykes* v. *Beadon* (5).

The appeal is dismissed and with costs.

Judgment accordingly.