1964
Sept 14, 15
Sept. 15

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

THE PORTAGE LA PRAIRIE MUTUAL INSURANCE COMPANY RESPONDENT.

Revenue—Income—Income tax—Special payments by employer on account of employees' superannuation or pension fund—Deductibility of special payments in computing employer's income—Special payments on account of employees' superannuation fund in year when employer's income exempt from taxation—Income Tax Act, S of C. 1948, c. 5, s 69(1)—Income Tax Act, R.S C. 1952, c. 148, ss. 62(1)(5) and 76(1)—Income Tax Act, S. of C. 1958, c. 32, s. 26(2).

This is an appeal from a decision of the Tax Appeal Board allowing an appeal by the respondent from its assessment under the *Income Tax Act* for the 1958 taxation year The only question involved in the appeal is whether the deduction allowed by s. 26(2) of c. 32 of S. of C. 1958 in computing the respondent's income by reason of a special payment made in a previous year in respect of an employees' superannuation fund or plan should be calculated as an amount equal to the special payment less amounts actually deducted under s. 76 of the *Income Tax Act* in determining taxable income in respect of which the taxpayer was liable to pay income tax in previous years, or whether it is an amount equal to the special payment less amounts the deduction of which was permitted by s. 76 of the *Income Tax Act* in determining the income or loss of the taxpayer for previous years whether or not the taxpayer was liable to pay income tax for any or all of those years and whether or not the taxpayer actually claimed and was allowed to take such deduction in computing its income for any or all of those years.

Held: That under s 76(1) of the *Income Tax Act,* R S C 1952, the amount that could be deducted for any year, in the case of a single special payment, being the amount that was recommended by the actuary, was one-tenth of the amount of the payment or the amount of the payment less amounts deductible for previous years, whichever was the lesser, and the deduction was permitted only in computing incomes for the ten years commencing with the year during which the special payment was made.

2. That there is nothing in the language of s. 62(1) of the *Income Tax Act* that negatives the deductibility of the amounts referred to in s 76 or any other amounts in computing the respondent's income for a year merely because the taxable income for that year or some portion of that year is exempt.
3. That the deduction of such an amount for a year of exemption is not necessarily academic because for a particular "exempt" year, it may well result in a loss that will be deductible in computing the taxable income for some other year in respect of which the respondent is not exempt under s 62.
4. That the conclusion as to what was "deductible" under s. 76 in computing income for a particular year is supported by the fact that when Parliament intended that amounts should not be regarded as "deductible" to such an extent as to create a loss, it went to some pains to define the amount deductible as not exceeding what the income for the year would be if the deduction in question were not allowed.
5. That the appeal is allowed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Jackett, President of the Court, at Winnipeg.

F. J. Cross for appellant.

W. P. Fillmore, Q.C. and *Joseph C. Miller, Q.C.* for respondent.

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

JACKETT P. at the conclusion of the argument (September 15, 1964) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Tax Appeal Board allowing an appeal by the respondent from its assessment under the *Income Tax Act* for the 1958 taxation year. The only question involved in the appeal is what deduction is allowed by subsection (2) of section 26, of chapter 32 of the Statutes of 1958, in computing income for the 1958 taxation year, by reason of a special payment made in a previous year in respect of an employee's superannuation fund or plan. The question is whether the deduction so allowed is an amount equal to the special payment less amounts actually deducted under section 76 of the *Income Tax Act* in determining taxable income in respect of which the taxpayer was liable to pay income tax in previous years, as the respondent contends and the Tax Appeal Board has held, or whether it is an amount equal to the

1964

MINISTER OF NATIONAL REVENUE v. THE PORTAGE LA PRAIRIE MUTUAL INS Co

Jackett P.

special payment less amounts the deduction of which was permitted by section 76 of the *Income Tax Act,* in determining the income, or loss, of the taxpayer for previous years whether or not the taxpayer was liable to pay income tax for any or all of those years and whether or not the taxpayer actually claimed and was allowed to take such deduction in computing its income for any or all of those years, as the Minister contends.

In 1951 the respondent made, in respect of an employees' superannuation or pension fund or plan, a payment in the sum of $81,007.79 that met the requirements of subsection (1) of section 69 of the 1948 *Income Tax Act,* chapter 5 of the Statutes of 1948, as amended, which subsection as applicable to the 1951 taxation year, read as follows:

> 69. Where a taxpayer is an employer and has made a special payment (or payments) on account of an employees' superannuation or pension fund or plan in respect of the past services of employees pursuant to a recommendation by a qualified actuary in whose opinion the resources of the fund or plan required to be augmented by the amount of one or more special payments to ensure that all the obligations of the fund or plan to the employees may be discharged in full and has made the payment so that it is irrevocably vested in or for the fund or plan and the payment has been approved by the Minister on the advice of the Superintendent of Insurance, there may be deducted in computing the income for the taxation year the lesser of
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> (*a*) 1/10 of the whole amount so recommended to be paid, or
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> (*b*) the amount by which the aggregate of the amounts so paid during a period not exceeding 10 years ending with the end of the taxation year exceeds the aggregate of the amounts that were deductible under this section in respect thereof in computing the income of the taxpayer for the previous years

In the Consolidation of the *Income Tax Act* to be found in chapter 148 of the Revised Statutes of 1952, which is applicable to 1953 and subsequent taxation years, section 69 of the 1948 *Income Tax Act* became subsection (1) of section 76. Hereafter, when I refer to the "old" section 76, I shall be referring to subsection (1) of section 69 for the 1950, 1951 and 1952 taxation years, and to subsection (1) of section 76 for the 1953 and subsequent taxation years.

By virtue of the principle established by the Supreme Court of Canada in *Stanley Mutual Fire Insurance Company v. Minister of National Revenue*[1], the respondent was not liable to pay income tax for the taxation years 1951, 1952 and 1953 in respect of profit for its under-

[1] [1953] 1 S C R 442

writing business. It paid income tax in respect of investment income for each of those years but it did not claim any allowance in respect of the special payment under old section 76, and the Minister accordingly made no such allowance when assessing the respondent for those years.

In the computation of the respondent's income for 1954 under the *Income Tax Act,* in respect of which it was liable to pay income tax, a deduction was made of $8,100.78. A similar deduction was made in determining the respondent's income for 1955, in respect of which it was also liable to pay income tax. These deductions were made under the old section 76.

The respondent was not liable to pay income tax for 1956 or 1957, because it was exempt by paragraph (*s*) of subsection (1) of section 62 of the *Income Tax Act,* which reads as follows:

> 62. (1) No tax is payable under this Part upon the taxable income of a person for a period when that person was
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> * * *
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> (*s*) an insurer, who was engaged during the period in no business other than insurance, if, in the opinion of the Minister on the advice of the Superintendent of Insurance, 50% of its gross premium income for the period was in respect of the insurance of farm property, property used in fishing or residences of farmers or fishermen

The respondent is liable to pay income tax for the 1958 taxation year. As indicated above, the only question in dispute with regard thereto is what deduction the respondent is entitled to make in computing its income for 1958 by virtue of subsection (2) of section 26 of chapter 32 of the Statutes of that year. Subsection (1) of section 26 repealed the old section 76 and re-enacted it so worded as to permit, in respect of a special contribution to a pension or superannuation fund or plan made in 1958 or a subsequent year, the deduction of the full amount of the special payment in computing the income of the taxpayer for the taxation year in which the payment was made.

Subsection (2) of section 26, which is the provision concerning the interpretation of which the parties to this appeal differ, reads as follows:

> 26. (2) This section is applicable to the 1958 and subsequent taxation years, and in the case of any special payment made before the commencement of the 1958 taxation year in respect of which an amount would, but for this section, have been deductible under section 76 of the said

1964

MINISTER OF NATIONAL REVENUE v. THE PORTAGE LA PRAIRIE MUTUAL INS. CO.

Jackett P.

Act in computing the income of a taxpayer for the 1958 or any subsequent taxation year, notwithstanding paragraphs (*a*) and (*b*) of subsection (1) of section 12 of the said Act there may be deducted in computing the income of the taxpayer for the 1958 taxation year for the purposes of Part I of the said Act an amount not exceeding the amount of the special payment minus the aggregate of the amounts that were deductible in respect thereof under section 76 of the said Act or section 69 of the *Income Tax Act* in computing the income of the taxpayer for taxation years previous to the 1958 taxation year.

It will be noted that this provision permits a final deduction in computing income for 1958 in respect of a special payment made before 1958. That deduction is an amount not exceeding

(a) the amount of the special payment, minus

(b) the aggregate of the amounts that were "deductible" in respect of the special payment under the old section 76, in computing the income of the taxpayer for years before 1958.

In reporting its income for purposes of the *Income Tax Act* for 1958, the respondent deducted, in accordance with its understanding of subsection (2) of section 26 *supra,* an amount equal to the special payment made in 1951, $81,007.79, less the aggregate of the amounts actually deducted in computing its incomes for the two years for which it had paid income tax, namely, $16,201.56, making a deduction of $64,806.23. The Minister, by his assessment for the 1958 taxation year, only allowed $48,604.67. The difference between the two amounts is the aggregate of the amounts that would have been deducted under subsection (1) of section 76 if the respondent had been taxable for the years 1956 and 1957 and had claimed deductions under that provision in computing its incomes for those years.

It appears, therefore, that the Minister regarded the amounts of $8,100.78 that the respondent could have deducted in computing its income for 1956 and 1957, if it had computed its incomes for those years, as "deductible" within the meaning of that word in section 26(2), *supra,* but did not regard similar amounts that could have been deducted in computing the respondent's incomes for 1951, 1952 and 1953, if they had been claimed, as "deductible" within the meaning of that word in the same subsection.

The respondent appealed from the assessment for 1958 to the Tax Appeal Board and the Board allowed the appeal.

The Board's reasoning appears in that part of Mr. St-Onge's reasons for judgment, reading as follows:

> According to an amendment of 1958, part of Section 76(2) reads as follows:
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> ". . . an amount not exceeding the amount of the special payment minus the aggregate of the amounts that *were deductible* in respect thereof . . . "
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> Something is deductible, according to the *Income Tax Act,* insofar as it is permitted thereby. In the matter at stake, Section 62(1) renders the income of the appellant not taxable, as the latter complies with the said section. Therefore, why should the appellant deduct an amount that would not lessen its taxable income in any way? Furthermore, why should the respondent be so adamant when Section 69 states there "may" be deducted, instead of there "must" be deducted? Evidently, the respondent has interpreted "may" as "must". According to Section 76(2), the appellant, in 1958, had the right to deduct. "There may be deducted" an amount not exceeding the amount of the special payment minus the aggregate of the amounts that were deductible. Therefore, the amounts deductible were those in fact deducted in 1954 and 1955. Otherwise, they would not have been deductible. "Deductible" implies the right to deduct. That right should not be lost because, in a particular year, there was no taxable income from which to make a deduction. To deduct from non-taxable income would be an abortive step, no advantage resulting to the taxpayer.
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> Section 76(1) of the *Income Tax Act* speaks of amounts that "were deductible", not "were deducted". Clearly, the employer is to have the right to deduct periodically, in instalments over a period of years, the equivalent of the total paid initially, and to treat the word "deductible" as though meaning "deducted" would defeat the employer's right under the *Income Tax Act* to deduct the equivalent of what had been paid in. The intendment of Section 76 was to permit the appellant to deduct what had been paid initially and, to this end, it must be permitted to subtract in recovering the balance of the initial amount paid, the total of the periodic deductions allowable, as well as those actually made

Before considering the question that I have to decide, I might say that, as I understand the submission of counsel for the appellant, it is such that, if it is valid, there was an amount "deductible" in respect of each of the years 1951, 1952 and 1953, as well as in respect of each of the years 1956 and 1957, within the meaning of the word "deductible" in subsection (2) of section 26 of the 1958 statute. If he is correct, the fact that the assessment is less than what would be required to implement his submission to the full extent, does not impede the acceptance of his submission and its application to support the assessment as made.

I might also say a word at this point concerning the interpretation of the latter portion of subsection (1) of the old section 76. The subsection is difficult, and, during argument, there was some question raised as to whether certain

portions of it made sense. However, further study has convinced me that its meaning is reasonably clear. The difficulty arises from the fact that the subsection contemplates, in addition to the more obvious possibilities, the possibility of one or more special payments having been made pursuant to a recommendation that may, or may not, have provided for even more payments than the one or more that have been made at the time that the section is invoked. To cover the complete range of possibilities, a formula has been adopted that is not as easy to read as it might be. The more complicated possibility is exemplified by a hypothetical case where the actuarial report contemplated by the section recommends five annual special payments and a deduction is being made in computing the income for the third year when only three of the payments have been made. The deduction allowed in such a case by the old section 76 is the lesser of

(a) 1/10 of the aggregate of the five payments recommended, or

(b) the amount by which the aggregate of the three payments that have been in fact made exceeds the aggregate of the amounts that were deductible under the old section 76 in computing the taxpayer's income for the two previous years.

When this complicated formula is applied to the simple case of a single payment being the whole of the amount recommended by the actuary, the deduction allowed is the lesser of

(a) 1/10 of the payment recommended, or

(b) the payment so made less the aggregate of the amounts deductible under the section for previous years, if the payment was made in the ten year period ending with the current year, or nothing, if the payment was made earlier than that ten year period.

A little consideration shows therefore that, in the case of a single special payment, being the amount that was recommended by the actuary, the amount that could be deducted under old section 76 for any year was one-tenth of the amount of the payment or the amount of the payment less amounts deductible for previous years, whichever was the lesser, and that the deduction was only permitted in computing incomes for the ten years commencing

with the year during which the special payment was made. There is no doubt, therefore, in my mind that, in the case of a single special payment, being the amount recommended by the actuary, the deductions were restricted to a ten year period. It is also clear that the maximum amount that could be deducted in each year was 10 per cent. of the amount of the special payment.

I turn now to subsection (2) of section 26 of the 1958 Act. The portion of subsection (2) of section 26 on which the respondent's contention and the Board's decision depend, if one omits words irrelevant to the present problem, reads as follows:

> . . . in the case of any special payment made before the commencement of the 1958 taxation year in respect of which an amount would, but for this section, have been deductible under section 76 of the said Act in computing the income of a taxpayer for the 1958 or any subsequent taxation year, . . . there may be deducted in computing the income of the taxpayer for the 1958 taxation year for the purposes of Part I of the said Act an amount not exceeding the amount of the special payment minus the aggregate of the amounts that were deductible in respect thereof under section 76 of the said Act or section 69 of the *Income Tax Act* in computing the income of the taxpayer for taxation years previous to the 1958 taxation year.

The question to be decided here may be stated as follows: "What amount, if any, was 'deductible' under old section 76 in computing the respondent's incomes for the 1956 and 1957 taxation years?"

Before coming to the consideration of this question, it is well to review briefly the basic scheme of Part I of the *Income Tax Act*, in so far as it is relevant for, in my view, the meaning in subsection (2) of section 26 of the 1958 Act of the words "amounts that were deductible . . . under section 76 . . . in computing the income of the taxpayer for taxation years previous to the 1958 taxation year" can only be properly appreciated in the light of that scheme.

The scheme may be stated briefly as follows:

(1) Division A of Part I *inter alia* imposes an income tax on taxable income for each taxation year of each person resident in Canada;

(2) Division B lays down certain rules to be applied in determining the "income" of a taxpayer for a taxation year; these rules are supplemented by additional rules to be found in Division H which deals with "Exceptional Cases and Special Rules", and old section 76

1964

MINISTER OF NATIONAL REVENUE v. THE PORTAGE LA PRAIRIE MUTUAL INS. CO.

Jackett P.

contains one of those rules for computing income of a taxpayer for a taxation year;

(3) Division C lays down the rules as to what deductions may be made from "income", as so determined, to ascertain "taxable income";

(4) Division E provides for computing the income tax imposed by Division A by applying certain computations to the "taxable income" determined under Division C;

(5) Division F makes provision for the necessary machinery to impose and collect the tax, and section 44 thereof requires every corporation to file a return of "income" for "each taxation year";

(6) Division G provides that no tax is payable under Part I upon the "taxable income" of a person for a period when that person comes within one of the classes enumerated therein and section 62(1)(*s*) describes one of these classes;

(7) one of the amounts that may be deducted from income for a year in determining taxable income for the year is business losses incurred in certain other years and losses are computed, under section 139(1)(*x*), by applying the provisions of the Act respecting computation of income.

That is a sufficient review of the general scheme of Part I for the purpose of the present problem and I come back to that problem: What amount, if any, was "deductible" under old section 76, in computing the respondent's incomes for 1956 and 1957? This must be determined by an interpretation of old section 76.

Old section 76 provided, in effect, that when a special payment has been made pursuant to an actuarial recommendation to the required effect and with the necessary approval (either in the taxation year in respect of which the section is being applied or in a previous taxation year) "there may be deducted in computing the income for the taxation year the lesser of"

(*a*) 1/10 of the whole amount so recommended to be paid, or

(*b*) the amount by which the aggregate of the amounts so paid during a period not exceeding ten years ending with the end of the taxation year exceeds the aggregate of the amounts that were deductible under this section in respect thereof in computing the income of the taxpayer for the previous years.

When we apply this formula to the facts of this case for 1956 and 1957 in the manner that I have already indicated we come to the amount of $8,100.78. What this provision says therefore in respect of the 1956 taxation year, for example is

"there may be deducted in computing the income for the 1956 taxation year, $8,100.78."

In my opinion, this language *prima facie* makes the amount of $8,100.78 "deductible" in computing the respondent's income for the 1956 taxation year.

The respondent says, however, that the fact that paragraph (*s*) of subsection (1) of section 62 says that no tax is payable upon the respondent's "taxable income" for 1956, in some way, makes the section 76 amount not deductible in computing its income for that year. Surely, however, the taxable income that is exempt by section 62(1)(*s*) is the result obtained by making appropriate deductions from the respondent's income as determined *inter alia* by deducting $8,100.78 under old section 76.

I cannot find anything in the language of section 62(1) that negatives the deductibility of section 76 amounts or any other amounts in computing the respondent's income for a year merely because the taxable income for that year or some portion of that year is exempt. Moreover, the deduction of that amount for a year of exemption is not necessarily academic. It may well, for a particular "exempt" year, result in a loss that will be deductible in computing the taxable income for some other year in respect of which the respondent is not "exempt" under section 62.

I find further support for my view as to what was "deductible" under old section 76 in computing income for a particular year in the fact that, when Parliament intended that amounts shall not be regarded as "deductible" to such

1964

MINISTER OF NATIONAL REVENUE v. THE PORTAGE LA PRAIRIE MUTUAL INS. CO.

Jackett P.

an extent as to create a loss, it went to some pains to define the amount deductible as not exceeding what the income for the year would be if the deduction in question were not allowed. See, for example, section 83A(1).

The appeal is allowed with costs, and the assessment for the 1958 taxation year from which the respondent appealed to the Tax Appeal Board is restored.

Judgment accordingly.