ALLAN MORRISON .....APPELLANT;

AND

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

1927
Nov. 21-22.
Dec. 28.

Revenue—Income—Trade or Business—Irregularities in Department—"Annual"—Section 3 of Income War Tax Act, 1917—ejusdem generis

M. was carrying on the business of grain commission merchant in partnership with one K., and his assessment as such is not in question here. He was also personally buying and selling grain through his firm and paying it the necessary margins and commissions. He was assessed for the net profit from these transactions, but refused to pay, contending that this was not carrying on a trade or business. Hence the appeal. During the period of taxation in question M. had had 260 such transactions. It was also contended that the assessment was illegal, as the commissioner who made the assessment in the first place was also the judge on appeal from his own pronouncement.

Held, That in the present Act there is the imperative enactment to tax, being the main purpose of the Act, and there is the directory enactment, providing the machinery to do so, and whilst the former must be fulfilled absolutely, it is sufficient if the latter is substantially fulfilled. That assuming the act of the commissioner to be irregular, as no one was thereby prejudiced, his ruling should not be invalidated.

2. That the personal transactions of M. amounted to the carrying on of a trade or business, and that the net profit of such trading was liable to taxation under the Income War Tax, 1917.

3. That when an interpretation clause in any Act, extends the meaning of a word it does not take away its ordinary meaning.

4. That the word "annual" in sec. 3 of the Act is used to mean all profits during the year.

5. That the seven different classes of subjects mentioned in sec. 3 of the Act, following the definition of income, as "the annual net profit or gain or gratuity," are not exhaustive, but are only there by way of illustration and not as limiting the foregoing language of the Act, as these provisions are further supplemented by the words "and also the annual profit or gain from any other sources."

6. That the words "and also" and "other sources" in the Act make the said illustration absolutely inconsistent with the application of the doctrine of *ejusdem generis.*

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APPEAL under the provisions of the Income War Tax Act, 1917, from the decision of the Minister.

The appeal was heard before the Hon. Mr. Justice Audette, at Ottawa.

H. Phillips K.C. and *A. E. Hoskin K.C.* for appellant.

C. Fraser Elliott for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. now (December 28, 1927) delivered judgment.

This is an appeal, under the provisions of sec. 15 et seq. of the Income War Tax Act, 1917, and the amendments thereto—from the assessment of the appellant's income for the year 1922.

No oral evidence was offered, either by appellant or the respondent, on the hearing of this appeal, which was submitted altogether upon documentary evidence, the pleadings, and more especially, the admissions, the latter reading as follows:—

[The learned judge here gives the written admissions of facts of the case, filed.—He then proceeds.]

The appellant, during the period of taxation in question, was carrying on, in partnership with one Ewart Kelly, a business of grain commission merchants, and his assessment as such is not in question in this case. However, at the same time he was so carrying on such business in partnership he was also personally buying and selling grain, through his own firm, sometimes at a loss and sometimes at a profit, and paying to his firm the necessary margins and commission. For the gains and profits made in these grain transactions on margins, after deducting losses, the appellant was duly taxed, but he refuses to pay. Hence the present controversy.

The appellant, *in limine,* attacked the departmental proceedings, laying great stress on the irregularity of the same in that the Commissioner, who primarily pronounced upon the assessment, is also made the judge on appeal from that pronouncement—his own decision—under an alleged delegation of power from the Minister to him which could not, under the Statute, be so plenary as to cover this jurisdiction, and that the finding is illegal and

not justified by the Statute. The whole contention presenting on the one hand an illegal finding under the statute, and on the other hand an officer placed in the "grotesque" position of a person sitting on appeal from his own finding or decision.

While I am disposed to agree with the appellant's counsel, in recognizing the impropriety of placing an officer in what he called such a "grotesque" and objectional position, which (besides making of it a parody of administration of justice) is subversive of judicial tradition,—on purely legal grounds I am not prepared to accept his view with respect to the decisions on appeal in the present case. I would, however, in the interests of public policy, earnestly recommend an amendment of the statute to cure the impropriety without delay.

Coming to the consideration of the legal effect of the finding or appeal of this departmental officer, it must be pointed out that the appellant proceeded with his appeal before the Commissioner without taking any objection to his jurisdiction or authority to hear the same. Is he not now thereby estopped from raising that question on appeal before this Court? Has he not by his attitude before the Commissioner sitting on appeal acquiesced in and attorned to his jurisdiction?

In the interpretation of statutes, it is the duty of the Court to ascertain the real intention of the legislature by carefully regarding the whole scope of the statute to be construed. *Liverpool Borough Bank* v. *Turner* (1). And in each case the Court must look at the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act. Light on the true meaning of the words used in the statute has to be sought from the context and the scheme of taxation with reference to which they are used.

In construing this taxing act, in expounding its enactments, it must be borne in mind that it is passed for the purpose of taxing incomes and that it also prescribes the procedure or manner in which such taxation is to be accomplished. Here there is to be found an absolute or impera-

(1) (1861) 30 LJ. Ch. 379-380.

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tive enactment to tax and also a directory enactment providing for the machinery in doing so. So far as the statute is an imperative enactment it must be fulfilled absolutely, while it is sufficient if the directory enactment is substantially fulfilled.

In considering the valdity of these departmental appeals it would seem proper that if some formalities have not been strictly followed, and some technical objections are made thereto, and it appears that the person complaining has not been in any way prejudiced, nor any third party affected thereby, as in the present case, to hold the departmental decisions good and valid. The objections need not be discussed at length here. Whether or not there is any formal irregularity in the appeal before the Commissioner, does not affect the final pronouncement upon the case. Whether or not the matter comes before this Court, after the first or second decision of the Commissioner upon the same matter, does not defeat or affect the rights of the subject on the merits. It is a matter for Parliament, if it sees fit, to make the necessary amendments to the Act and remedy the anomaly.

And as was said by the Judicial Committee of the Privy Council, in the *Montreal Street Ry.* v. *Normandin* (1), when the provisions of a statute relate to the performance of a public duty, and the case is such that to hold null and void acts done in neglect of this duty would work serious inconvenience or would cause injustice to persons having no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, such provisions are directory only, and the neglect of them does not affect the validity of the acts done. See also *Re Gold Medal Mfg. Co. Ltd.* (2); *Rex* v. *Cantin* (3); *Rex* v. *Breen* (4); *Rex* v. *Boak* (5) Chitty, Practice of the Law, vol. 3, pp. 76-77. *The National Provident Inst.* v. *Brown* (6).

Coming now to the substantial question as to whether or not the fact of the appellant personally buying and selling grain, on his own private account, distinct from the

(1) (1916-17) 33 T.L.R. 174.
(2) (1927) 8 Can. Ban'cy. R. 39.
(3) (1917) 39 Ont. L.R. 20.
(4) (1917-18) 13 Ont. W.N. 100.
(5) (1925) 3 D.L.R. 887.
(6) (1919) 8 R.T. Cas. 65, at p. 88.

business of his firm, would amount to carrying on a trade and business on his own behalf and would thereby become liable to taxation upon the net profit or gain he realized thereby, it must be at first stated that each case rests on its own merit, different facts will call for different decisions. A person may carry on several distinct commercial operations—distinct businesses or trades—each forming "a scheme of profit making." An individual in his personal exertions may also carry on two or more isolated such transactions on the exchange; but when it comes to a person, like in the present case, using his skill and knowledge in his trade acquired through experiences in trading in the same commodity in partnership, and who in this one year, as appears by exhibit No. 6, has gone into 260 such separate transactions or ventures, the necessary conclusion is that he makes a particular business or trade of it with the object of making profits, and he thereby becomes a dealer in stocks, a trader who carries on business in such commodity. *Smith* v. *Anderson* (1). And the gain or profit he makes thereby, which must have accrued with fair regularity in the course of such business during the year, is the result of such trade or business. A substantial profit was made by the appellant through those transactions, and his firm, treating him as a client, also made substantial profits thereby.

Similar questions have come up in England, and under their Act the Courts, in several cases, found the subject liable. These cases were much discussed at the hearing.

In *Cooper* v. *Stubbs* (2) the dealings in cotton "futures" were private speculations of a person in which his firm of cotton brokers and cotton merchants had no interest, and were held transactions constituting a trade and the profits realized were declared annual profits and gains chargeable with the tax.

The following year the case of *Martin* v. *Lowry* (3) came up for consideration. The head note reads as follows:—

The appellant, who was an agricultural machinery merchant bought a gigantic consignment of linen and set to work to make people buy it, and he succeeded in selling it within a year by organizing a vast activity

(1) (1880) L.R. 15 Ch. D. 247, at p. 260.
(2) (1925) 2 K.B. 753.
(3) (1926) 43 T.L.R. 116.

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for that purpose. He was assessed to income-tax under Schedule D on his profits on the sale of the linen, and on appeal to the Special Commissioners he contended that he did not carry on any trade in connexion with linen, that the transaction was an isolated one, and that the profit was not an annual profit chargeable to income-tax. The Special Commissioners held that in exercising these activities the appellant was for the time being carrying on a trade the profits of which were chargeable to income-tax.

Held, that there was evidence on which the Special Commissioners could find the transaction to be in the nature of a trade, and that the fact of the profits being the income of a trade and belonging to the year of assessment was enough to make the profits "annual" within Case VI of Schedule D, and the decision of the Special Commissioners must be affirmed.

Then in 1927 the same view was taken in the case of *Pickford* v. *Quirke* (1). The head note reads as follows:—

During the "boom" in the Lancashire cotton trade in 1919, the appellant, in company with other persons, engaged in the operation known locally as "turning over" a cotton mill, i.e., acquiring a controlling interest in the mill, organizing its administration and finances, and reselling it to a new company. The operation was successful and the appellant was asked to join and did join other syndicates, composed partly but not entirely, of the same persons engaged in "turning over" three other mills. In each case a profit resulted to the appellant. On March 24, 1923, the Additional Commissioners for the Division in which the appellant resided signed the book containing an estimated assessment upon the appellant to income-tax under Schedule D for the year 1919-20. The book was not delivered to the General Commissioners until April 18, 1923; notice was given to the appellant on May 5, 1923, and the assessment was signed by the General Commissioners on September 5, 1923.

Held, that though each adventure of "turning over" a mill, taken singly, was not a trade, but a capital transaction, yet the succession of such adventures, in each of which the appellant took part, might constitute the carrying on of a trade, and the Special Commissioners on an appeal against the assessment were not estopped by their previous decisions from reconsidering the whole of the facts and finding that the appellant in so doing was carrying on a trade on the profits of which he was liable to income-tax and excess profits duty on the profits.

Held also, that the assessment was made in time, having been made when it was signed by the Additional Commissioners within the three years allowed by s. 125 (2) of the Income Tax Act, 1918. The subsequent steps need not be within that time.

Now it was contended by the appellant that *Cooper and Stubb* (ubi supra) was decided under the English Taxing Act which is different from the Canadian. This is quite true, but both acts may, by different process, lead necessarily to the same conclusion.

The word "trade" is defined by sec. 237 in the English Act and in lieu of the Canadian sec. 3 defining the word

(1) (1927) 44 T.L.R. 15.

income, the English act has schedules dealing with different classes of matter and in the same will be found also what is called "the sweeping clause" which are both to be found at pp. 457 and 458 of Dowell's Income Tax Laws, 9th ed. This "sweeping clause" corresponds to the Canadian clause which was called the "Omnibus clause."

In this *Cooper* v. *Stubb case* (ubi supra) the judge of first instance and two of the appellate judges found it was a trade and one judge disposed of the case under the "sweeping clause."

Much stress was laid by appellant upon the fact that the word trade is especially defined in the English Act, and that had much to do in arriving at these results in England. Yet it is well to state here in that respect that an interpretation clause in any Act, which extends the meaning of a word, does not take away its ordinary meaning. It is used as a mere glossery for the purpose of that Act.

Be all this as it may, this case will be considered and decided upon the Canadian statute.

By section 3 of our Act, the word "income" is defined and means the *annual* net profit or gain or gratuity of a person; the word annual is used to mean all profits during the year and to be consistent with sec. 4 which says that the income is to be assessed and levied upon the income of the preceding year.

Now the controlling and paramount enactment of sec. 3 defining the income is "the annual net profit or gain or gratuity." Having said so much the statute proceeding by way of illustration, but not by way of limiting the foregoing words, mentions seven different classes of subjects which cannot be taken as exhaustive since it provides, by what has been called the omnibus clause, a very material addition reading "and also the annual profit or gain from any other sources." The words "and also" and "other sources" make the above illustration absolutely refractory to any possibility of applying the doctrine of *ejusdem generis* set up at the hearing. The balance of the paragraph is added only *ex majors cautelâ*. Then follows the enumeration of the exceptions, which do not cover the present case. No help can the appellant find there.

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Expressio unius, exclusio alterius. Burntisland Shipbuilding Co. v. *Weldhen* (1).

The net is thrown with all conceivable wideness to include all *bona fide* profits or gain made by the subject.

Untrammelled by the English Act and the definition of the word "trade" therein, a word which retains its ordinary meaning, I find that the appellant became liable to taxation upon his profits and gains realized in this particular and continuous course of business or pursuit, as a standing commercial practice, in buying, and selling this commodity for profit.

Moreover, the words "trade and business" mentioned in sec. 3 must comprehend every species of continuous course of business in dealings for profits and for a livelihood. See Oxford Dictionary, vo. Trade.

Exhibit No. 6 discloses that he was engaged in two hundred and sixty such transactions during the taxation period; these numerous and continuous activities amount to and constitute the carrying on of a trade and business.

The statute by which the tax is imposed plainly includes this subject, which cannot, by any means, be construed as a casual receipt of profits. In re *Griffin* (2).

These profits are the fruits derived from his monies employed and risked. The *Liverpool and London and Globe Ins. Co., etc.* v. *Bennett* (3). They are the profits derived from a business or trade carried on habitually and systematically during the taxation period. *Grainger & Son* v. *Gough* (4).

The appellant has been assessed and taxed under the provisions of sub-sec. 3 (*a*) of sec. 4 upon his share in the income of the partnership; but the section further provides that he shall be taxed in addition thereto upon "all other income" and this has been done by the present assessment appealed from. *Tenant* v. *Smith* (5).

Appeal dismised with costs.

(1) (1922) 8 R.T.C. 409, at p. 418.
(2) (1890) 60 L.J., Q.B.D. 235, at 237.
(3) (1913) 6 R.T. Cases 327, at p. 378.
(4) (1896) 3 R.T. Cases 462, at p. 472.
(5) (1892) A.C. 150 at p. 155.