

1944
Apr. 17
1946
Oct. 23

BETWEEN:

WILLIAM HAROLD CONNELL, APPELLANT,

AND

THE MINISTER OF NATIONAL REVENUE, } RESPONDENT.

Revenue—Income tax—Income War Tax Act, R.S.C. 1927, c. 97 s. 32 (2)—Transfer of property by husband to his wife—Headings may be referred to only where there is ambiguity—No tax liability unless expressly imposed.

Prior to his marriage appellant transferred certain securities to trustees for his intending wife and by a marriage settlement directed the trustees to transfer certain shares to her immediately after the marriage and to hold other securities in trust with the income to be paid to her for life. The respondent sought to assess the appellant on the income derived by the wife from such securities.

Held:—That a tax liability cannot be fastened upon a person unless his case clearly comes within the express terms of the enactment by which it is imposed. It is the letter of the law that governs in a taxing Act. *Partington v. Attorney General* (1869) L.R. 4 H.L. 100 at 122 followed.

- 2 That the Court has no right to assume that a transaction is within the intention or purpose of a taxing Act if it falls outside its words. *Tenant v Smith* (1892) A.C. 150 at 154 followed.
- 3. That a transfer of securities by a taxpayer to trustees for his intending wife with instructions in a marriage settlement, executed prior to the marriage, that immediately after the marriage certain shares should be transferred to his wife and other securities held in trust with the income to be paid to her for life is not a transfer of property by a husband to his wife within section 32 (2) of the Income War Tax Act and the taxpayer is not liable to income tax on the income derived by his wife from such securities.

APPEALS under the provisions of the Income War Tax Act.

The appeals were heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

H. E. Manning K.C. for appellant.

R. Forsyth K.C. and *A. A. McGrory* for respondent.

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

THE PRESIDENT, now (October 23, 1946) delivered the following judgment:

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These appeals under the Income War Tax Act, R.S.C. 1927, chap. 97, from assessments for the years 1938 and 1939 raise the question whether the appellant is liable to income tax on the income derived by his wife from certain securities which he had transferred to trustees prior to the marriage to be dealt with by them according to the terms of a marriage settlement also executed prior to the marriage.

There is no dispute as to the facts. On September 1, 1938, a marriage settlement was executed by the appellant and Edith Ellen James, who had promised to marry one another, and A. B. Mortimer and John de N. Kennedy as Trustees. The recitals show that on the treaty for the marriage it was agreed that the appellant should transfer certain specified shares to Edith Ellen James for her own absolute use and benefit and should also settle certain other stocks, debentures and bonds in the manner specified in the settlement. It also appears that in part performance of the said agreement the appellant had prior to the execution of the settlement delivered to the trustees share certificates and transfers of the shares that were to be transferred absolutely and had also transferred to the trustees the stocks, debentures and bonds that were to be subject to the trusts of the settlement. The marriage settlement contained, *inter alia*, the following provisions:

5. NOW IN CONSIDERATION of the marriage THIS DEED WITNESSETH as follows:—

Transfer of Assets to Wife

6. The Husband authorizes and directs the Trustees immediately following the marriage to cause the shares mentioned in the second recital to be transferred on the transfer registers of the respective companies into the name of the Wife, whereupon such shares shall become the sole and absolute property of the Wife and shall not be subject to the trusts of this settlement nor subject to any trusts, provisoes or conditions whatsoever.

Transfer of Assets to Trustees

7. The Husband directs that the Trustees shall henceforth hold the stocks, debentures and bonds described in the schedule hereto (all which stocks, debentures and bonds and the investments into which from time to time and under any trust or power herein contained the same may be converted are hereinafter called the TRUST FUND that term being

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intended to denote the constituents from time to time of that fund) and the income therefrom upon the trusts and subject to the powers and provisions hereinafter declared concerning the same.

Trusts during Life of Husband or Wife

8. The Trustees shall hold the Trust Fund upon the trusts following:—

(a) Until the marriage in trust for the Husband.

(b) From and after the marriage to pay the income therefrom to the Wife during her life but so that such income shall, during any coverture, be without power of anticipation.

(c) From and after the death of the Wife to pay the income therefrom to the Husband, if surviving her, during his life.

and finally

23. Provided always that if the marriage shall not be solemnized within six calendar months from the date hereof these presents shall be void, and the shares hereby settled shall be transferred to the Husband.

Subsequently, on September 2, 1938, the appellant and Edith Ellen James were married.

On the income tax assessments levied against the appellant for the years 1938 and 1939 the income which his wife had received from the securities referred to was added as taxable income to the amounts respectively shown by him on his returns. Appeals from those assessments were taken to the Minister who affirmed them upon the ground that the securities had been transferred by a husband to his wife within the provisions of section 32 (2) of the Income War Tax Act and that the appellant was liable to be taxed on the income derived therefrom as if such transfer had not been made. Being dissatisfied with the Minister's decision the appellant then brought his appeals from the assessments to this Court where they were heard together.

Section 32 (2) of the Income War Tax Act provides as follows:

32 (2) Where a husband transfers property to his wife, or *vice versa*, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

The section is in Part IV of the Act, dealing with "Special provisions relating to the incidence of the tax", and immediately under the heading "Transfers to Evade Taxation".

Counsel for the appellant put forward two arguments, one of which was that only transfers made to evade taxation are covered by section 32 (2); that it does not

apply to transfers made for valuable consideration; that if the transfers made by the appellant in this case can be regarded as transfers from a husband to a wife, as contended on behalf of the respondent, such transfers were not made for the purpose of evading taxation but for the valuable consideration of marriage and are not covered by the section. In support of this argument he relied upon *Molson et al. v. Minister of National Revenue* (1). In that case the deceased Molson by his marriage contract on March 28, 1913, had made to his future wife a donation *inter vivos* of the sum of \$20,000 and then by a deed on March 23, 1925, being desirous of fulfilling the conditions of his marriage contract, transferred to his wife certain shares which she accepted in full payment of the sum of \$20,000. It was sought to assess the deceased's estate in respect of the income from the said shares. From this assessment the executors appealed. In this Court Angers J. allowed the appeal, holding that the object of section 32 (2) was to tax in the hands of the transferor property transferred for the purpose of evading taxation; that the conveyance by Molson to his wife was not a transfer to evade taxation; and that it was not subject to the provisions of the section. An appeal to the Supreme Court of Canada having been taken by the Minister, the appeal was dismissed on grounds quite different from those adopted in this Court. Indeed, Duff C. J., giving the judgment of the majority of the Court, was careful to express no opinion upon them. At page 218 he said:

It is also contended, and the learned trial judge has acted upon this contention, that the heading "Transfers to evade taxation", which did not appear in the statute of 1926, but appeared for the first time in the Revised Statutes, manifests an intention that section 32 should have no application except to transfers made with such intent; and that in this case such intent is conclusively negated by the fact that the transfer was executed pursuant to an ante-nuptial contract.

We do not think it necessary to consider either of these questions. We express no opinion upon them.

Under the circumstances the *Molson* case (*supra*) cannot be regarded as authority for holding that section 32 (2) applies only to transfers made for the purpose of evading taxation. The question is left open. It may be that the

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(1) (1937) Ex. C.R. 55; (1938) S.C.R. 213.

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headings of different portions of a statute may be referred to in order to determine the sense of any doubtful expression in a section ranged under any particular heading: *Hammersmith and City Railway Co. v. Brand* (1), but it is also clear that there must be some ambiguous expression in a section before the aid of the heading under which it appears can be invoked: *Fletcher v. Birkenhead Corporation* (2). I find no ambiguity in the words of section 32 (2) and see no reason for restricting its application to transfers made for the purpose of evading taxation; nor am I prepared to hold that a transfer made for valuable consideration is necessarily excluded from its scope. But in view of the conclusion I have reached on the other argument advanced it is not necessary in this case to decide the question.

The contention upon which counsel for the appellant really relied was that the dispositions by the appellant and the trustees of the securities referred to were not transfers from a husband to his wife within the express terms of section 32 (2) and that it does not apply to them. The section is a special provision imposing upon a taxpayer a tax liability under certain specified circumstances, which apart from the section would not have rested upon him. The liability is a statutory one. It is well established that a tax liability cannot be fastened upon a person unless his case clearly comes within the express terms of the enactment by which it is imposed. It is the letter of the law that governs in a taxing Act. This was laid down by the House of Lords in the leading case of *Partington v. Attorney General* (3), where Lord Cairns made the classic statement:

If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

The Court has no right to assume that a transaction is within the intention or purpose of a taxing Act if it falls outside its words. In *Tennant v. Smith* (4) Lord Halsbury L.C. stated:

(1) (1869) L.R. 4 H.L. 171.

(2) (1907) 1 K.B. 205 at 214.

(3) (1869) L.R. 4 H.L. 100 at 122

(4) (1892) A.C. 150 at 154.

In a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes. In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may all be reduced to this, that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed.

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Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation.

These are basic principles of income tax law.

The assessments of the appellant for the income received by his wife from the securities referred to can be supported only if it can be shown that it was income derived from property transferred by a husband to his wife. In order that the Minister may bring such income within the letter of the law, so that the words of section 32 (2) may reach it, he must show that the dispositions by the appellant of the securities referred to were transfers of property from a husband to his wife. The only kind of transfer of property that is caught by section 32 (2) is a transfer by a husband to his wife, or *vice versa*, that is to say, a transfer between spouses. At the time of the transfer the transferor and the transferee must be married to one another and the rights to the transferred property must pass to the one spouse by the transfer from the other. Unless a disposition of property meets these requirements it is not within the letter of the law as expressed by section 32 (2) and the income derived therefrom is not reached by its words.

It is established that the appellant had delivered the share certificates and transfers of the shares that were to go to his intended wife after she became such to the trustees before the marriage settlement was executed. He had also transferred to them the stocks, debentures and bonds that were to be subject to the trusts of the settlement. Then by the marriage settlement he gave certain directions to the trustees in respect of the securities he had transferred to them. By these acts he had divested himself of the securities and his control over them before the marriage and no further act on his part thereafter was

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necessary. When he became the transferor of the securities in question he was not a husband. Nor did he after he acquired the status of a husband make any transfer of them to his wife. Indeed, he could not do so, for he had already transferred them to the trustees prior to the marriage. The only transfers of securities to which the appellant was a party were transfers by him to the trustees before he became a husband. Moreover, the wife did not become a transferee of any property from her husband. In respect of the stocks, debentures and bonds that were made subject to the trusts of the marriage settlement, they were never transferred to her at all but remained with the trustees. As for the other shares, she became entitled to a transfer of them from the trustees immediately after the marriage. She thus acquired her rights in respect of the shares and the income from other securities not as a transferee from her husband but by her own acquisition of the status of a wife and the action of the trustees. In view of the transfers made by the appellant to the trustees prior to the marriage settlement and the terms of the settlement all she had to do was to go through with the marriage and then automatically as soon as she acquired the status of a wife she became entitled to the income from the securities subject to the trusts and to a transfer of the shares that were to belong to her absolutely, not from her husband, but from the trustees.

Under the circumstances I have come to the conclusion that the dispositions of the securities in question were not transfers of property by a husband to his wife within section 32 (2) and that neither the income from the shares nor that from the other securities was derived from property so transferred. The Minister had, therefore, no right to assess the appellant for income tax in respect of it. To that extent the assessments under appeal are erroneous, and the appeals from them must be allowed with costs.

Judgment accordingly.
