Montreal 1967 Mar. 14-15 — Ottawa Apr. 5

BETWEEN:

CAPITAL MANAGEMENT LIMITED ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Income tax—Capital cost allowances—Open-end mutual investment fund —Purchase of exclusive right to manage—Whether "a franchise, concession or licence in respect of property"—Income Tax Act, s. 11(1)(a)—Income Tax Regs., Sch. B, class 14.

In 1959 appellant acquired for $1,913,060 by assignment from another company the exclusive right to manage for 10 years two open-end mutual investment funds established under trust indentures between appellant's assignor and a trust company. In the operation of the business purchase money for certificates evidencing ownership of investments was received from subscribers by the trust company in a fiduciary character as agent, and appellant as manager had no beneficial interest in the certificates or in the investments. Appellant was remunerated for its services by a commission on the corpus of the funds and on the purchase price of units.

Held, the management right acquired by appellant was not "a franchise, concession or licence . . . in respect of property" and no capital cost allowance was therefore allowable on the cost of its acquisition under class 14 of Schedule B to the *Income Tax Regulations.*

---

[1] 492. (1) Each count in an indictment shall in general apply to a single transaction and shall contain and is sufficient if it contains in substance a statement that the accused committed an indictable offence therein specified.

(2) The statement referred to in subsection (1) may be

(*a*) in popular language without technical averments or allegations of matters that are not essential to be proved,

(*b*) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence, or

(*c*) in words that are sufficient to give to the accused notice of the offence with which he is charged.

APPEAL from income tax assessment.

R. deW. MacKay, Q.C. and *P. Manson* for appellant.

G. W. Ainslie and *Bruce Verchere* for respondent.

GIBSON J.:—This is an appeal by Capital Management Limited, the appellant, from the assessment made by the Minister, the respondent, for the appellant's 1960 taxation year.

The issue for determination is whether the respondent erred when on assessing he refused to allow the appellant, in computing its income for 1960, to deduct pursuant to paragraph (*c*) of subsection (1) of section 1100 of the *Income Tax Regulations,* the sum of $191,306 as a capital cost allowance in respect to the capital cost to the appellant of acquiring certain rights and liabilities from the Capital Management Corporation Limited. The determination of this issue is dependent upon the answer to the question:

> "Are the rights or obligations obtained and assumed by the appellant, pursuant to an Agreement dated October 31, 1959, (Exhibit ASF 1) between Capital Management Corporation Limited and the appellant 'Property that is a...franchise, concession or licence for a limited period in respect of property' within the meaning of Class 14 of Schedule B of the *Income Tax Act?*"

The parties, at the commencement of this trial, filed an Agreed Statement of Facts which consists of seventy paragraphs and copies of supporting documents consisting of 171 pages.

The rights and obligations obtained and assumed by the appellant pursuant to the said Agreement dated October 31, 1959 between the Capital Management Corporation Limited and the appellant are contained in two other agreements, namely: (1) The Indenture of the 1st day of October 1954 between Capital Management Corporation Limited and Montreal Trust Company dated 1 October A.D. 1954 which established what is called the All Canadian Dividend Fund (Exhibit ASF 4), and (2) the Indenture of the 1st day of October 1954 between Capital Management Corporation Limited and Montreal Trust

1967
CAPITAL MANAGEMENT LTD.
v.
MINISTER OF NATIONAL REVENUE
Gibson J.

Company dated the 1st day of October A.D. 1954 which established what is called the All-Canadian Compound Fund (Exhibit ASF 9).

The rights and obligations the appellant so acquired may be stated to be the rights and obligations to manage for the period from October 16, 1959 to October 15, 1969 the All Canadian Dividend Fund and the All-Canadian Compound Fund. These funds are what are usually referred to as open-end mutual funds.

The appellant submits, *inter alia,* that the rights and obligations obtained by it pursuant to the said Agreement dated October 31, 1959 included a chose in action, the right to assign, the right to direct when and what securities the trustee should buy and sell from time to time, the right to vote of all securities held in the portfolio of these mutual funds, the right to direct the person through whom unit shares in these mutual funds could be purchased and sold, and the right to estimate quarterly the "portion of the gains made from the realization of the securities in the portfolio".

In order to resolve the issue in this case, it is not necessary to decide what precisely the relationship was among the appellant (the Manager), the Montreal Trust Company (the trustee) and the unit subscribers in these mutual funds during the taxation year 1960.

The respondent submits that the relationship was that of a manager, trustee, and *cestui que trust.*

The appellant disagrees and submits that any categorization is unnecessary, and that it is only necessary to consider what the appellant-Manager bought as set out in the said Agreement of October 31, 1959 (Exhibit ASF 1).

The difficulty of characterizing the status of each of the said parties in these said mutual funds arises not from the fact that mutual funds such as these are a relatively new phenomenon in the Canadian capital market, most of which having been formed since 1950, but from the fact that the relationship of principal and agent may be either that of trustee and *cestui que trust,* or that of debtor and creditor.

But it is clear from the evidence, without making any distinction between trust and contract, that the agent, the Montreal Trust Company, in connection with those subject

mutual funds, received all the purchase monies for unit certificates from each individual subscriber (through the brokers appointed by the Manager) for such unit certificates, in a fiduciary character as agent, and that the Manager, the appellant, had no beneficial interest in any such unit certificates, evidencing ownership of the investments or in the investments themselves or in the investment portfolio held by the Montreal Trust Company.

And three other things are also clear from the evidence, *viz.*: Firstly, that the Manager for his services by these said contracts received and is entitled to receive during the contract period a management fee of 1/8th of 1% per quarter payable out of the corpus of both these said mutual funds, and also in the case of the All Canadian Dividend Fund, from the purchase monies of the unit subscribers a 2% acquisition fee;

Secondly, that the right to receive these fees for ten years from October 16, 1959 and the other rights in the said contract dated October 31, 1959 (Exhibit ASF 1) the appellant acquired by the payment of $1,913,060;

And thirdly, that among these latter rights was the right to appoint selling agents for the unit certificates, and to direct the trustee to issue unit certificates only to subscribers purchasing through such selling agents; but that such rights did not extend to or include any real or personal property rights, or industrial property rights, or any other category of rights that enabled the appellant-Manager to carry on its business or facilitated the carrying on of its business, as distinct from the rights to remuneration for the performance of certain specified services. (c.f. *The Investors Group v. M.N.R.*[1])

In my view, therefore, the answer to the question put at the beginning of these reasons is "no"; and the appeal is dismissed with costs.

[1] [1965] 2 Ex. C.R. 520.