1937
Sept. 29.
1938
July 27.

BETWEEN:

WILLIAM HAROLD MALKIN .........APPELLANT;

AND

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

*Revenue—Income tax—Income War Tax Act, R.S.C., 1927, c. 97, s. 3 (e) and s. 11—Income of trust not to be taxed as income of the settlor of the trust when the beneficiaries are ascertained—Occupancy of real property rent free—No liability for tax.*

Appellant entered into a trust agreement with his four children and a trustee pursuant to the terms of which he transferred to the trustee his interest in a parcel of real estate known as "Southlands" which had been owned by appellant's wife in her lifetime, and on her death had devolved to the appellant as to an undivided one-third interest, and to the children as to the remaining two-thirds; certain shares in the Malkin Company; certain life insurance policies on appellant's life in existence at the date of the agreement, and certain new insurance taken out on appellant's life, subsequent to the date of the agreement. The children joined with appellant in transferring Southlands to the trustee, the upkeep to be provided by the trustee who was to sell it as soon as a reasonable price could be obtained for it. By permission of the children the appellant lived in Southlands without paying rent therefor during the taxation period in question.

The trust agreement provided *inter alia* for the payment of the premiums on the insurance policies, the upkeep of Southlands, the giving to the appellant of an irrevocable proxy to vote the shares in the Malkin Company, the sale of such shares subject to certain conditions, the investment of the trust moneys, the appointment by appellant of a new trustee and the division of the trust estate at the termination of the trust.

The only income received by the trustee during the taxation period in question was the sum of $6,400 as dividends from the shares of the Malkin Company. The Commissioner of Income Tax assessed the appellant on this income and that assessment was confirmed by the Minister of National Revenue from whose decision the appellant appealed.

*Held:* That appellant is not taxable for his occupancy of Southlands during the taxation period in question.

2. That a statute levying a tax cannot be extended by implication beyond the clear import of its terms.

3. That the appellant is not a beneficiary of the trust within the meaning of s. 11 of the Income War Tax Act.

4. That s. 11 of the Income War Tax Act does not tax the income of a trust as part of the income of the settlor of the trust when there are ascertained beneficiaries.

APPEAL under the provisions of the Income War Tax Act from the decision of the Minister of National Revenue.

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The appeal was heard before the Honourable Mr. Justice Maclean, President of the Court, at Vancouver, B.C.

*W. Martin Griffin, K.C.* for appellant.

*A. R. Creagh* and *J. R. Tolmie* for respondent.

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

THE PRESIDENT, now (July 27, 1938) delivered the following judgment:—

This is an appeal under the provisions of the Income War Tax Act from the decision of the Minister of National Revenue in respect of an assessment for income tax, in the sum of $2,272.54, levied against the appellant. The appellant resides in the City of Vancouver, and is a shareholder in The W. H. Malkin Company Ld. (hereafter referred to as "the Malkin Company") which carries on the business of wholesale grocers in the same city.

The appellant, as Settlor, on November 29, 1934, entered into a trust agreement with his four children (as the next-of-kin of the Settlor's deceased wife) and the Toronto General Trusts Corporation as trustee. The trust agreement provided:—

(1) That certain real estate known as "Southlands," which at the date of the agreement was owned by the appellant as to one-third, the remaining two-thirds interest being owned by the four children of the appellant, should be conveyed to the trustee upon the trusts of the agreement. The realty Southlands was the property of the wife of the appellant and upon her death intestate it devolved to the appellant and his children in the respective shares mentioned. It was transferred by the appellant and his four children to the trustee which undertook to provide for its upkeep and to sell the same as soon as a reasonable price, in the opinion of the trustee, could be obtained therefor. By a letter dated April 5, 1935, the children authorized the trustee to permit the appellant to have the use of Southlands until it was sold, and the appellant did live therein without paying rent, during the taxation period in question.

(2) That the appellant was to transfer to the trustee sixteen hundred (1,600) second preference shares in the Malkin Company. This transfer, which was duly made,

was subject to the condition that the trustee should execute an agreement which had been made in 1934 between the appellant and two of his brothers who were shareholders in the Malkin Company, and which was a share pooling agreement. The trustee was to become bound by that agreement with respect to the second preference shares transferred by the appellant.

(3) That certain named life insurance policies, six in number, on appellant's life, in the total amount of $43,394 and which were in existence at the date of the trust agreement, should be assigned to and held by the trustee upon the trusts of the agreement; the policies were accordingly assigned by the appellant to the trustee.

(4) That the appellant was to borrow on the security of two of such insurance policies issued by the Great West Life Assurance Company, such sum or sums of money as that company might be willing to lend, and to pay to the trustee the moneys so borrowed with such further moneys of the appellant as would enable the trustee to pay the single premiums necessary to enable the trustee to acquire further fully paid insurance for $50,000 on the life of the appellant, such insurance to be applied for either by the appellant or by the trustee as might be found convenient. This covenant of the appellant was duly carried out. The other life insurance policies were left intact.

(5) That the appellant was to apply for insurance on his life in the further amount of $65,000, making the same payable to the trustee, or making the trustee a preferred beneficiary thereunder as trustee for the children of the appellant. The appellant took out this further insurance of $65,000 and assigned the same to the trustee, the latter paying the premiums thereon.

All the property and assets above mentioned constitute what is called the Trust Estate, and the trust agreement provides for the distribution of the estate among the four children of the appellant, after his death. From the income of the trust estate the trustee was to pay the insurance premiums, and the expenses incidental to the upkeep of Southlands, it being empowered to borrow money if necessary to do so, should the trust income be insufficient. The trust agreement further provided that the trustee as registered holder of the second preference shares, should

give to the appellant an irrevocable proxy entitling him to vote upon the said shares in the Malkin Company during his lifetime, at any and all meetings of that company; in the event of the income of the trust estate exceeding the outlay required in the execution of the trust the trustee was to accumulate so much thereof as it thought expedient as a reserve against possible diminution of revenue in following years and after making such reserve from time to time should pay the balance of the revenue in equal shares to the appellant's four children, annually, semi-annually, or quarterly as the trustee might decide; the trustee if requested in writing at any time by the appellant was required to pay or transfer the trust estate, or any part thereof, to the four children of the appellant, in equal shares; the trustee was to be at liberty if it thought fit so to do (but only with the appellant's consent during his life) to join with other shareholders of the Malkin Company in any sale either of the business and assets of that company or of the shares hereinbefore mentioned or some of them, for such price and upon such terms as the trustee thought wise, the proceeds of any such sale to become a part of the trust estate; the trustee was empowered to enter into any pooling arrangement, for certain defined purposes, with any or all of the shareholders of the Malkin Company, and any such pooling arrangement which the appellant might propose and which he might himself agree to join in, the appellant still being the holder of shares in the Malkin Company other than those transferred to the trustee; the trustee was to invest such money as it had in hand from time to time, in such investments as should be designated by the appellant during his life, and so far as the appellant did not designate investments, in any investments authorized by law for trustees; the appellant was empowered from time to time during his life to appoint a new trustee, other than himself, by instrument in writing or by will; and upon and after the death of the appellant the trustee was to divide the trust estate into four equal shares and pay or transfer the same to or amongst the appellant's four children, or their representatives.

There was no accumulation of income from the trust and the point in issue is solely whether the income of the trust was properly assessed against the appellant. The only

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income received by the trustee during the taxation period in question was the dividends from the second preference shares of the Malkin Company registered in the name of the trustee, amounting to $6,400, the whole of which was assessed against the appellant. The disbursements made by the trustee altogether amounted to $8,586.27 of which $5,560.18 was disbursed on account of the life insurance premiums, and $3,026.09 on account of taxes, water rates, and the maintenance and repairs of Southlands. The disbursements therefore exceeded the trust income by over $2,000.

It was contended on behalf of the Minister that the trustee is required to apply the trust income in payment of what were essentially the personal and living expenses of the appellant. It was urged that there was no effective alienation of the second preference shares in the Malkin Company to the trustee and that the income therefrom was really the appellant's income and was expended for his benefit, and, in support of this view, attention was directed, *inter alia,* to those provisions of the trust instrument which state that the shares in the Malkin Company, transferred to the trustee, are subject to a pooling agreement made between the appellant and two of his brothers who were also shareholders in the Malkin Company, that the appellant retains by an irrevocable proxy the voting power of the said shares during his life, and that the said shares can be sold only with the appellant's consent during his life. Then, it was pointed out that the trustee may make investments only in such investments as are designated by the appellant during his life, that the trustee on the request of the appellant shall pay or transfer the whole or any part of the trust estate to the children of the appellant in equal shares, and that the appellant retains the right to appoint by instrument in writing, or by will, a new trustee, in place of the trustee appointed under the trust agreement or in addition thereto.

Substantially, the contention advanced on behalf of the appellant is that the trust is absolutely irrevocable and that he can never recover back his property, nor is there any provision for his receiving any income therefrom; that the appellant occupied Southlands only under the revocable permission of the trustee and his children, and that the

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upkeep of Southlands is not a personal and living expense of the appellant under s. 3 (*e*) of the Act; that the proxy gives the appellant no control over the trust and merely gives him the right to vote on the shares, with his brothers, for the mutual benefit of the whole Malkin family including the beneficiaries of the trust; that any power or control given the appellant by the trust agreement is not ownership and does not alter the position of the property, nor does it divert the income from one person to another; that the power to change the trustee, or to add a further trustee, does not make the trust property the property of the appellant; that the right to designate the form of any investment of the trust income is not in substance a control of the trust estate, and is not such a control as would give the appellant ownership or possession of the trust estate; and that the income received in respect of the Malkin Company shares is received not for the benefit of the appellant but for his four children.

The provisions of the Income War Tax Act relied upon to sustain the assessment in question are sections 3 (*e*) and 11. The former provides:—

For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including (*e*) personal and living expenses when such form part of the profit, gain or remuneration of the taxpayer.

Sec. 11 reads:—

The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period.

On behalf of the appellant it was argued that his occupancy of Southlands was not related to any "personal and living expenses" incident to any salary, wages, emoluments, profit or gain, earned or received by the appellant, and that the appellant is not in fact or in law a "beneficiary" under the trust instrument, or within the meaning of s. 11 of the Act.

It seems to me that this appeal resolves itself into the question whether the whole income of the trust is taxable against the appellant, and that the matter of the occupancy of Southlands by the appellant may be entirely dismissed from consideration. If the appellant is not liable for the tax upon the income in question it is, of course, unnecessary to decide if any other person is liable therefor. It seems quite clear that s. 3(*e*) of the Act contemplates a situation where the taxpayer, for services rendered, receives as salary or remuneration (1) money, and (2) something in addition to the money by way of either (*a*) a living allowance in money, or (*b*) the free use of premises for living purposes, or (*c*) some other allowance or perquisite, all or any of which may as a matter of sense and right be considered as part of the gain, salary or remuneration of the taxpayer. Southlands was owned only in part by the appellant before the trust deed was entered into. His use of it thereafter was permissive; he had no legal right to demand occupation of it and it could be sold or rented over his head at any time by the trustee and he would have no legal right to register an objection; nor was the trustee bound to furnish the appellant with another residence, or a sum of money in lieu of Southlands. We must assume that Southlands had been owned by Mrs. Malkin for some time before her death—there is no evidence of how long—and there is no evidence that she had acquired it in any way other than by the expenditure of her own money; and there is no evidence that the appellant ever owned it. Because of the law of devolution of estates, the appellant, on the death of his wife, intestate, became the owner of an undivided one-third interest only in the property. There is nothing to show that he got possession of Southlands, or was allowed to live in it, because he was a salaried employee, manager or officer of the Malkin Company, or that, after the date of the trust deed, he got possession for any reason other than the good will of his children and the accession thereto of the trustee. I was referred to certain English cases such as *Sutton* v. *The Commissioners* (1), and *Tollemache* v. *The Commissioners* (2). I have carefully considered these cases but I do not think they are of any assistance here. The corre-

(1) (1929) 14 Tax Cases 662. (2) (1926) 11 Tax Cases 277.

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sponding English Act specifically imposes the tax upon property in, and the occupation of, all lands, tenements, hereditaments and heritages, in the United Kingdom. The scheme of the English Act is to tax occupiers as well as owners of land, and as Russell L.J. said in *Shanks* v. *The Commissioners* (1). "According to the provisions of the Income Tax Act, a person in returning his total income from all sources ought, in my opinion, to include as part thereof something in respect of land the annual value of which he has enjoyed during the year in question." I do not think the appellant is taxable under s. 3 (*e*) for his occupancy of Southlands during the taxation period in question. If justification to tax the appellant is sought in the word "emoluments" in the general definition of "income," it cannot be said that such "emolument," namely, the occupation of Southlands, is one "directly or indirectly received by any person from any office or employment, or from any profession or calling, or from any trade, manufacture or business." The dictionaries define "emoluments" as fees, salary, reward, remuneration, perquisites, profit or gain, arising from station, office, employment or labour. Nowhere does the Canadian Act attempt to tax the property in, and the occupation of, land. And so I think all the debate arising from the occupancy of Southlands, and s. 3 (*e*) of the Act, may be dismissed. I am not overlooking s.s. 5 of s. 11 of the Act, as enacted by Chap. 55 of the Statutes of Canada, 1934. But there is no question here of a tenancy for life in respect of Southlands, and, in any event, the Minister has not, I think, put himself in a position to avail himself of this provision of the Act, and in fact it was not advanced by counsel for the Minister.

It will be convenient to add just here that I was referred to the judgment of the Supreme Court of the United States in the case of *Commissioner of Inland Revenue (Burnet)* v. *Wells* (2). A careful examination of this case will show that it is not of any relevancy here. There the settlor assigned to the trustee certain shares of stock, and the trust income was to be used to pay the annual premiums upon policies of insurance on the life of the settlor for

(1) (1928) 14 Tax Cases 249 at p. 269.
(2) (1933) 289 U.S.R. 670.

named beneficiaries. But there the United States Revenue Act provided that when an irrevocable trust was established to pay for insurance on the settlor's life, collect the policy upon his death, and hold or apply the proceeds, under the trust, for the benefit of his dependents, income of the trust fund used by the trustee in paying the premiums, was taxable to the settlor as part of his income. There is therefore no similarity between that case and the one under discussion.

It was urged upon me that the various provisions of the trust agreement indicated that the trust estate was in reality created for the benefit of the appellant and that the settlement was nothing more or less than an ingenious attempt on the part of the appellant to avoid taxation. This contention was not in terms mentioned in the decision of the Minister, or in the statement of defence filed on his behalf, and it is purely an inference drawn from particular provisions of the trust instrument itself, and which I have already mentioned. But even if the purpose and effect of the trust settlement were to avoid some of the burden of taxation, the appellant being assessed over $10,000 on other income for the same period, that would not sustain the assessment in question if it were not clearly authorized by the taxing statute. A statute levying a tax cannot be extended by implication beyond the clear import of its terms, and the terms of a taxing statute cannot be extended to frustrate the efforts of a taxpayer to avoid taxation, for example, by a trust settlement. In the case of *Commissioners* v. *Fisher's Executors* (1), Lord Sumner said:—

> My Lords, the highest authorities have always recognized that the subject is entitled so to arrange his affairs as not to attract taxes imposed by the Crown, so far as he can do so within the law, and that he may legitimately claim the advantage of any express terms or any omissions that he can find in his favour in taxing Acts. In so doing he neither comes under the liability nor incurs blame.

In *Duke of Westminster* v. *Commissioners* (2), Lord Atkin said:—

> It was not, I think, denied—at any rate it is incontrovertible—that the deeds were brought into existence as a device by which the respondent might avoid some of the burden of surtax. I do not use the word device in any sinister sense, for it has to be recognized that the subject, whether poor and humble or wealthy and noble, has the legal right so to

(1) (1926) A.C. 395 at 412 and 10 Tax Cases 302 at 327 and 340.
(2) (1936) A.C. 1 at 7 and 8.

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dispose of his capital and income as to attract upon himself the least amount of tax.

In the course of the same case, Lord Tomlin said:—

Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.

The late Mr. Justice Holmes, discussing the same point, in *Bullen* v. *Wisconsin* (1) said:—

We do not speak of evasion, because, when the law draws a line, the case is on one side of it or the other, and if on the safe side, it is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion, what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law.

In *Ayrshire Pullman Motor Service* v. *Commissioners* (2), the Lord President of the Scottish Court of Sessions said:—

. . . . No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow—and quite rightly—to take every advantage which is open to it under the taxing statutes for the purpose of depleting the taxpayer's pocket. And the taxpayer is, in like manner, entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Revenue . . .

To say that the appellant by the trust settlement sought to avoid taxation does not by itself afford an answer to the appellant's case. It is hardly necessary to say, using the precise language of Lord Cairns in the case of *Partington* v. *Attorney-General* (3), that 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. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute. The language of the Income War Tax Act is so exact, expressed with such particularity, that it negatives the suggestion of any intent on the part of the legislature to go outside the field described.

(1) (1916) 240 U.S.R. 625 at 630 and 631.

(2) (1929) 14 Tax Cases 754 at 763.

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

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There then remains the question whether the appellant is taxable upon the trust income under any provision of the Act, other than s. 3 (*e*). If the appellant is taxable it must be under the first part of s. 11 of the Act. A "beneficiary" is one for whose benefit property is held by trustees or executors, and I do not think it can be successfully urged that the appellant is a "beneficiary" in the sense intended by s. 11. The beneficiaries under the trust here are ascertained persons, the children of the settlor. I do not think that s. 11 is to be construed as authority to tax the income of a trust as part of the income of the settlor of the trust, where there are beneficiaries and they are ascertained. It seems to me impossible to hold that the appellant is a "beneficiary" under the trust and within the meaning and intention of the Act. The real purpose for enacting s. 11 ss. 1 was to make "income" include "all income" accruing to the credit of a beneficiary of an estate or trust whether received by him or not, for any taxation period. My conclusion is that in the facts and circumstances here the statute does not authorize the tax levied against the appellant.

The appeal is therefore allowed with costs.

*Judgment accordingly.*