

BETWEEN:

CAPITAL TRUST CORPORATION }  
 LIMITED AND DANIEL J. }  
 COFFEY, EXECUTORS OF THE WILL OF }  
 JOSEPH M. MACKENZIE, DECEASED. . . . }

APPELLANTS;

1935  
 Nov. 25.  
 1936  
 May 15.

AND

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

RESPONDENT.

*Revenue—Income War Tax Act—Income—Payment to executor for services—Accumulation of salary taxable in year received.*

A testator appointed his sons, R. J. and J. M., together with a third person executors of his will, and by codicils named additional executors and directed that "my son J. M. shall be paid the sum of \$500 per month in addition to any sum which the Courts or other proper authorities may allow him in common with the other executors." The testator died on December 5, 1923. From that date until March 10, 1927, the son J. M. did not receive any of the monthly payments of \$500. On March 10, 1927, he received all the payments that had accumulated from December 5, 1923, and, subsequent to March 10, 1927, until his death on July 16, 1932, he received the sum of \$500 per month. Income tax returns filed by J. M. or, after his death, by his executors, did not mention the monthly payments of \$500.

Appellants, as executors of the will of J. M., were assessed for income tax purposes for all the payments received by J. M., and such assessment was confirmed by the Minister of National Revenue. The executors appealed to this Court.

*Held:* That the remuneration of \$500 per month to J. M. as provided for in the codicil was in payment of his services as executor and not a gift or bequest, and therefore taxable under the Income War Tax Act, R.S.C. 1927, c. 97.

2. That the Income War Tax Act assesses income for the year in which it is received, irrespective of the period during which it is earned or accrues due.

APPEAL under the provisions of the Income War Tax Act, R.S.C. 1927, c. 97, from the decision of the Minister.

The appeal was heard before the Honourable Mr. Justice Angers, at Ottawa.

*D. J. Coffey, K.C.*, for the appellant.

*W. S. Fisher* for respondent.

The facts are stated in the reasons for judgment.

ANGERS J. now (May 15, 1936) delivered the following judgment:

This is an appeal by the executors of the will of the late Joseph Merry Mackenzie, under sections 58 and following of the Income War Tax Act (R.S.C. 1927, chap.

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97), from the assessment of the said Joseph Merry Mackenzie's income for the years 1927, 1928, 1929, 1930, 1931, and 1932.

Joseph Merry Mackenzie, who was a son of Sir William Mackenzie, died on July 16, 1932. Capital Trust Corporation Limited and Daniel J. Coffey were sometime in August, 1932, appointed executors of his will.

By his last will and testament executed on May 20, 1909, Sir William Mackenzie appointed his sons, Roderick J. and Joseph M., and Byron J. Walker as executors and trustees and gave and devised to them the whole of his estate to be held, dealt with and disposed of upon certain trusts and for the purposes set forth in the said will.

I need not deal with the various stipulations of the will, which are immaterial herein; it will suffice to note that the testator directs that his estate shall be divided among his wife and children and children of any deceased child in the same manner as the law at the time of his death would divide it had the testator died intestate.

By a codicil bearing date the 14th of November, 1923, Sir William Mackenzie, after stating that in his will he had named Sir Edmund Byron Walker and Joseph Merry Mackenzie as his trustees and executors, appointed two additional trustees and executors, namely Robert John Fleming and Frank H. McCarthy.

By another codicil made on the following day the testator bequeathed a sum of \$5,000 to each of his grandchildren alive on the date of the codicil (November 15, 1923).

On November 28, 1923, Sir William Mackenzie made a third codicil on which depends, mainly if not solely, the issue of the present suit; I think it is expedient, in the circumstances, to quote the material part thereof:

Whereas by my said will I appointed my son, Joseph Merry Mackenzie, and Sir Edmund Byron Walker, President of the Canadian Bank of Commerce, to be two of the executors thereof, And Whereas by codicil to my said will made on the fourteenth day of November, one thousand nine hundred and twenty-three, I appointed Robert John Fleming, formerly General Manager of the Toronto Railway Company, and my son-in-law, Frank H. McCarthy, to be additional executors of my said will Now I Direct that my son, Joseph Merry Mackenzie, shall be paid Five hundred dollars a month in addition to any sum which the courts or other proper authorities may allow him in common with the other executors. And in all other respects I confirm my said will, and the codicils thereto made.

A fourth codicil executed on December 4, 1923, has no relevance in the present case.

The aforesaid last will and testament as well as the codicils thereto were probated on March 25, 1924; duly certified copies of the will, of the codicils and of the letters probate thereof were filed as exhibit 1.

Sir William Mackenzie died on December 5, 1923.

From the death of his father until the 10th of March, 1927, Joseph Merry Mackenzie did not receive any of the monthly payments of \$500 provided for in the codicil of the 28th of November, 1923, the reason given for this omission being that there were no funds available for that purpose until said date. On the 10th of March, 1927, Joseph Merry Mackenzie received \$19,500 representing 39 payments of \$500 each from December 5, 1923, to March 5, 1927. Subsequent to March 10, 1927, Joseph Merry Mackenzie was paid the sum of \$500 per month, in compliance with the stipulation contained in the said codicil, until his death which, as previously pointed out, occurred on July 16, 1932.

Income tax returns filed by Joseph Merry Mackenzie or, after his decease, by his executors for the years 1927, 1928, 1929, 1930, 1931, and 1932 made no mention of these monthly payments of \$500.

On February 3, 1934, assessment notices for the years 1927 to 1932 inclusive were sent by the Commissioner of Income Tax to Capital Trust Corporation Limited including in the income, in addition to the amounts mentioned in the returns, the monthly payments of \$500 received by Joseph Merry Mackenzie during the said years, to wit:

for the year 1927	\$24,416.67 plus interest
“ “ “ 1928	6,000.00
“ “ “ 1929	6,000.00
“ “ “ 1930	6,000.00
“ “ “ 1931	6,000.00
“ “ “ 1932	3,250.00

On or about February 21, 1934, within one month after the date of mailing of the notice of assessment, the Estate of Joseph Merry Mackenzie, through its solicitors, served a notice of appeal upon the Minister, in accordance with the requirements of section 58 of the Income War Tax Act.

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The appellant in its notice says (*inter alia*):

The appellant claims that the Department has no right to make an assessment on the whole or any part of the moneys paid to the late Joseph Merry MacKenzie under the said provision of the will of the late Sir William MacKenzie, as the said payments are a bequest and not otherwise and come entirely within subsection (a) of section 3, being chapter 97, R.S.C.

The payment of the said moneys was not earnings nor compensation and in any event the said payments are exempt under the said subsection (a) of section 3 of the said Act.

The said appellant claims that assessment should not be made for 1927, in any event for more than the amount payable for that year, being \$500 per month during such year, but does not admit that any of said sum is assessable.

The appellant claims that it was the intention of the late Sir William MacKenzie to provide a gift of \$500 per month to the said Joseph Merry MacKenzie which should be exclusive of any moneys which he earned as executor's fees or compensation.

The appellant claims that the executorship of the executors of the late Sir William MacKenzie was completed in 1927 and from then on the trustees were acting as trustees only for the heirs of the estate.

On December 19, 1934, the Minister, represented and acting by the Commissioner of Income Tax, affirmed the assessment on the ground that the payments received by Joseph Merry Mackenzie in the years 1927 to 1932 inclusive from the Estate of the late Sir William Mackenzie are executor's fees, as provided by the codicil of November 28, 1923, and as such are income taxable under the provisions of section 3 and other provisions of the Income War Tax Act; on or about the same day the Minister, represented and acting as aforesaid, notified the appellant of his decision.

On December 31, 1934, the appellant's solicitors sent to the Minister a notice of dissatisfaction in which it is stated that the particulars in support of the appeal are contained in the notice of appeal.

On January 31, 1935, the Minister, represented and acting by the Commissioner, replied denying the allegations and contentions set forth in the notice of dissatisfaction and affirming the assessment appealed from for the reasons alleged in the decision of the Minister.

Formal pleadings were ordered filed.

The statement of claim, after stating that the late Joseph Merry Mackenzie filed income returns for the years 1923 to 1932 (with the exception of the year 1929) and giving particulars of the amounts reported each year and after relating the facts hereinabove mentioned, says in sub-

stance: that the Department has no right to assess in whole or in part the moneys paid to the late Joseph Merry Mackenzie under the provisions of his father's will, as the said payments are a bequest; and come within subsection (a) of section 3 of the Act; that the assessment for 1927 is in error in any event and that, if it should be found that the monthly payments of \$500 are earnings, the said earnings should be assessable in each of the years for which they were allocated; that it was the intention of the testator to provide a gift of \$500 a month to the said Joseph Merry Mackenzie exclusive of any moneys which he earned as executor's fees; that, when all the debts of Sir William Mackenzie were paid in 1927, the executorship ceased and from then on Joseph Merry Mackenzie was only acting as a trustee for the heirs.

The respondent's statement in defence alleges (*inter alia*): that the late Joseph Merry Mackenzie was appointed an executor of the will of Sir William Mackenzie and that he was to receive, in addition to any sums otherwise payable to him as executor, the sum of \$500 per month; that the sum of \$500 so paid to the late Joseph Merry Mackenzie was not a bequest but a payment for services rendered as executor and trustee; that the sums of \$500 per month are taxable against the said Joseph Merry Mackenzie in years in which they were paid; in the alternative, that, if the sum of \$500 per month is not a payment for services rendered as executor and trustee, it is nevertheless taxable as being an annuity received by him from the estate of the late Sir William Mackenzie and is not exempt under the provisions of paragraph (a) of section 3 of the Act.

No evidence was adduced on the hearing of this appeal apart from the last will and testament of Sir William Mackenzie, his four codicils and the letters probate.

It was argued on behalf of appellant that the latter was entitled to a decision by the Minister under section 59 of the Act and that the decision herein, signed by the Commissioner, is irregular. Seeing subsection 2 of section 75 of the Act and the decision of Audette, J., in *Morrison v. Minister of National Revenue* (1), I think that the objection taken to the decision is unfounded. I may note that a copy of Delegation of authority from the Minister of

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National Revenue to the Commissioner of Income Tax published in the *Canada Gazette* of December 16, 1933 (page 1224), was sent to me with a letter from the respondent's solicitor (copies of the two documents having been forwarded to the appellant's solicitor), which Delegation of authority dated the 6th of December, 1933, and signed by the Minister, is thus worded:

Be it hereby known that under and by virtue of the provisions of the Income War Tax Act and particularly section 75 thereof, that I do hereby authorize the Commissioner of Income Tax to exercise the powers conferred by the said Act upon me as fully and effectively as I could do myself as I am of the opinion that such powers may be the more conveniently exercised by the said Commissioner of Income Tax.

It was also urged by counsel for appellant that the decision of the Minister was illegal because no proper notification thereof had been sent to the appellant. The decision in fact appears to have been addressed to Capital Trust Corporation Limited and to Coffey & McDermott, its solicitors. Section 59 of the Act provides that the Minister "shall notify the appellant of his decision by registered post." Capital Trust Corporation Limited is one of the executors of the will of Joseph Merry Mackenzie and Daniel J. Coffey, of the legal firm of Coffey & McDermott, is the other. Strictly speaking the notification to the appellant of the Minister's decision is perhaps not literally regular; the irregularity, however, is trifling and the appellant has suffered no prejudice thereby; furthermore the appellant did not raise any objection to this irregularity in his notice of dissatisfaction, relying therein on the reasons set forth in its notice of appeal, the question being first brought up, after the hearing was closed, in a letter to me from the appellant's solicitors dated November 27, 1935, in reply to a letter from the respondent's solicitor dated November 25, 1935, hereinabove referred to (both said letters having been filed of record), and the appellant is now estopped by his attitude from invoking this irregularity. This question of procedure being disposed of, let us now consider the merits of the appeal.

The first question to determine is whether the sum of \$500 payable monthly to the said Joseph Merry Mackenzie under the codicil of the 28th of November, 1923, is to be treated as income according to the Minister's contention or whether it is a gift or bequest and as such exempt from taxation in virtue of subsection (a) of section 3 of the Act

as claimed by the appellant. If I reach the conclusion that the monthly payments of \$500 are income, I will have to decide whether the assessment for the year 1927 which includes the monthly payments of \$500 from the date of the decease of Sir William Mackenzie (December 5, 1923) to the 31st of December, 1927, is legal or whether these payments should have been assessed in each of the years in which they were payable.

The intention of Sir William Mackenzie seems to me clear: he wished to increase the income of his son Joseph Merry and, with that object in view, he decided to give him, in addition to what the courts or other proper authorities might allow him in common with the other executors, a sum of \$500 per month.

The codicil in which is stipulated this monthly allowance or remuneration of \$500, to wit the codicil of the 28th of November, 1923, deals exclusively with matters pertaining to executorship. The codicil in question first refers to the appointment of Joseph Merry Mackenzie and Sir Edmund Byron Walker as executors by the will and to the further appointment of Robert John Fleming and Frank H. McCarthy as additional executors by the codicil of the 14th of November, 1923, and immediately thereafter expresses the stipulation aforesaid; this codicil contains no other provisions. The only conclusion to draw, it seems to me, is that the intention of Sir William Mackenzie was to provide for his son Joseph Merry a remuneration for his services as executor over and above any sum which the courts or other authorities, as the codicil says, might allow him in common with his co-executors. I find it impossible to conclude that, by the codicil in question, Sir William Mackenzie purposed to make to his son Joseph Merry a gift or bequest. Had he intended to bequeath or give to his son Joseph Merry a sum of \$500 a month in addition to his share under the will, he would not have referred to the appointment of his executors and he would not have stated that the sum of \$500 a month should be paid to him in addition to any other sum which the courts or other authorities might allow him in common with the other executors; such reference and statement would have been superfluous and entirely irrelevant to a gift of bequest; Sir William Mackenzie would undoubtedly have

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drafted his codicil differently, leaving aside any reference to the appointment of his executors and their remuneration; he would have employed plain and unmistakable language, using for instance the words "bequeath" or "give," instead of saying that his son should be paid \$500 a month in addition to any sum which the courts or other authorities might allow him. The codicil of the 15th of November, 1923, anterior by only thirteen days to the codicil with which we are concerned, making a bequest of \$5,000 to each of the testator's grandchildren alive on the date of the codicil, is very plain and unambiguous; I can see no reason why Sir William Mackenzie should not have used the same form and phraseology as he had used in the codicil of the 13th of November, had he wished to make a bequest to his son Joseph Merry. The more I look into the matter, the more I am convinced that Sir William Mackenzie, by his codicil of the 28th November, 1923, contemplated giving his son a remuneration of \$500 per month in payment of his services as executor in addition to what he might be allowed by the courts or other authorities in common with his co-executors. Contrary to the appellant's contention, I do not believe that the sum of \$500 per month payable to Joseph Merry Mackenzie under the codicil of the 28th of November, 1923, is exempt from taxation in virtue of subsection (a) of section 3 or in fact of any other provision of the *Income War Tax Act*.

The second question which I have to determine is whether the Minister of National Revenue had the right to assess in the year 1927 the monthly payments of \$500 which fell due between the date of the testator's decease, i.e., December 5, 1923, and December 31, 1927, or whether the payments which became due during that period should have been assessed in each of the years for which they were allocated as claimed by the appellant in the event of their assessability.

Section 3 of the *Income War Tax Act*, defining the word "income," says that it

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; \* \* \*

Section 3 then goes on to say that income 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 \* \* \*

Then follows a list of various sources specifically included in the stipulation, which have no relevance to the question at issue.

It seems to me evident that the intention of the legislators was to assess income for the year in which it is received, irrespective of the period during which it is earned or accrues due. There is no stipulation in the *Income War Tax Act* providing for the apportionment of accumulated income, paid in one sum, over the period in respect of which it became receivable. This may cause a hardship and increase the burden of the taxpayer, as it does in the present instance, by depriving him of his annual exemption, raising the rate of the income tax and rendering him liable to a surtax, but the statute, if expressed in clear and unambiguous language, must be construed strictly. As Lord Cairns said in *Partington v. The Attorney-General* (1), 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.

Although the law dealing with income tax in the United Kingdom differs from ours in certain respects, reference may be had with some advantage to the following English and Scottish decisions: *Leigh v. Inland Revenue Commissioners* (2); *Hurll v. The Commissioners of Inland Revenue* (3); *Duncan v. The Commissioners of Inland Revenue* (4).

Relief may be obtained in England in regard to surtax in certain circumstances under section 34 of the Finance Act, 1927 (17 & 18 Geo. V, chap. 10); there is no similar or equivalent legislation in this country.

For the reasons aforesaid I can reach no other conclusion than that the assessment must be affirmed and the appeal dismissed.

(1) (1869) L.R., 4 H.L., 100, at 122.

(2) (1928) 1 K.B., 73.

(3) (1922) 8 Rep. Tax C., 292.

(4) (1923) 8 Rep. Tax C., 433.

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The respondent will be entitled to his costs against the appellant, namely, the Estate of the late Joseph Merry Mackenzie.

*Judgment accordingly.*

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