

Privy Council Appeal No. 76 of 1932.

John B. Holden - - - - - *Appellant*

v.

The Minister of National Revenue - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 10TH APRIL, 1933.

Present at the Hearing :

LORD ATKIN.
LORD TOMLIN.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.

[*Delivered by* LORD TOMLIN.]

The appellant, who is, and at all material times has been, resident in Canada is the sole surviving executor and trustee of the will of Duncan McMartin, who died on the 2nd May, 1914, domiciled in the Province of Quebec.

Under the provisions of the Income War Tax Act, 1917, and the subsequent amending Acts, certain assessments to income tax for the years 1917 to 1928, both years inclusive, in respect of the income of the residuary estate of the testator were made on the appellant. The total amount of the tax claimed was \$822,866.02. The assessments upon objection were confirmed by the respondent Minister, but were set aside on appeal to the Exchequer Court of Canada. The Supreme Court of Canada have reversed the judgment of the Exchequer Court of Canada and restored the assessments, and it is of that reversal that the appellant complains before His Majesty in Council.

By his will the testator, after giving certain pecuniary legacies, gave an annuity of \$25,000 per annum to his wife until she should marry again, and directed that upon her re-marriage the annuity should cease, but that she should then be paid out of his estate a legacy of \$150,000. He then gave all the residue of his estate to his executors and trustees upon trust to sell and convert and to pay legacies and to invest the balance, and out of the income derived from the investments and the income or profits derived from the unrealised portion of his estate to pay his wife's annuity.

In clause 9, sub-clauses E and F of his will, he disposed of the balance of the income and also of the corpus of his estate by directions to his trustees in the following terms :—

(E) To divide the balance of the income from such investments or the income or profits derived from the unrealised portions of my estate, into three equal parts and to pay or apply one of such parts, or so much thereof as my executors and trustees in their discretion deem advisable, in or towards the support, maintenance and education of each of my children until they have respectively attained the age of twenty-five years, or until the period fixed for the distribution of the capital of my estate which ever event shall last happen, provided that any portion of any child's share not required for his or her support, maintenance and education shall be re-invested by my said executors and trustees and form part of the residue of my estate given and bequeathed to such child.

(F) After the death or re-marriage of my wife, whichever event shall first happen, to divide the residue of my estate equally between such of my three children as shall attain the age of twenty-five years, as and when they respectively attain that age, provided that if any of the said children shall have died before the period of distribution arrives, leaving a child or children, such children shall take the share in my estate which his or her parent would have taken had he or she survived the period of distribution, if more than one in equal shares.

The facts with regard to the testator's family are as follows :

- (1) The testator left him surviving a widow and three children, all of whom had been prior to and were on the 1st January, 1917, residing in the city of New York.
- (2) The widow re-married on the 4th March, 1925, and was paid her legacy of \$150,000.
- (3) The three children of the testator were Allen A. McMartin, Melba McMartin and Duncan McMartin.
- (4) Allen A. McMartin, the eldest child, resided in New York until January, 1926, when he took up his residence and since when he has resided in the City of Montreal in the Province of Quebec. On the 29th August, 1923, he married, but there has been no issue of his marriage. On the 4th November, 1928, he attained the age of 25 years.
- (5) Melba McMartin, the second child, has throughout continued to reside in the United States of America. She has been twice married. Her first marriage was dissolved. There was issue of such marriage, one child

only. Of the second marriage there has been no issue. On the 3rd March, 1930, Melba McMartin (now Melba Orr) attained the age of 25 years.

- (6) Duncan McMartin, the third child, has throughout continued to reside in the United States of America. He married on the 1st July, 1931, but there has been no issue of such marriage. He has not yet attained the age of 25 years, but attained the age of 21 years on the 17th February, 1930.

The relevant provision of the statutes which has been treated by the Supreme Court of Canada as applicable to the present case first appeared in section 4 of an amending Act passed in 1920, and was by section 16 (1) of the same amending Act made retrospective so as to cover the taxation periods back to and including the year 1917.

The provision now appears as section 11 in Part IV of Chapter 97 of the Revised Statutes of Canada, 1927—Part IV being headed “Special Provisions relating to the Incidence of the Tax.”

Section 11 is in the following terms.

Income from Estates and Trusts.

11. 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.

(2) Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of an unmarried person.

The assessments in question have made the appellant liable to tax in each of the relevant years in respect of so much of the income of this residue (treating such income as a single integer) as was not applied for the support, maintenance or education of any of the children.

Now it is to be observed that under the taxing statutes, non-residents in Canada are not taxable, and the Exchequer Court of Canada took the view that upon the true construction of the will, the persons interested in the income were ascertained persons and that as such persons were not resident in Canada (except Allen McMartin after he came to Montreal in January, 1926), the assessments could not be supported, though the share of Allen McMartin after January, 1926, would be taxable.

The Supreme Court of Canada differed from the Exchequer Court of Canada upon the construction of the will, holding that the income was accumulating for the benefit of unascertained persons or of persons with contingent interests, and that the place of residence of the testator's children was upon the true construction of Section 11, a circumstance having no relevance.

Their Lordships are of opinion that upon the true construction of the will the balance of the income accumulated under Clause

9 (E) of the will, is accumulated for the benefit of persons with contingent interests. The gift of the corpus to which, or to some share of which, surplus income becomes an accretion, is clearly a gift to a contingent class. Such gift cannot, in their Lordships' view, by any recognised canon of construction be converted into a vested one, because of the directions for application of some part of the income in the support, maintenance and education of those who are contingently interested in the corpus.

Further, their Lordships are satisfied that upon the true construction of the Taxing Acts, Section 11 (2) fixes the trustee of the accumulating income with liability for the tax, and is a true charging section, and that the position of the section in Part IV under the heading to which reference has been made, does not justify a departure from what in their Lordships' view is the natural meaning of the words. It follows from this that the Supreme Court of Canada were, in their Lordships' judgment, correct in treating the place of residence of the testator's children as an irrelevant circumstance.

It is, however, to be observed that the Supreme Court of Canada have treated the whole of the surplus income arising from the estate as one indivisible taxable integer. In this respect their Lordships are of opinion that the Supreme Court of Canada has erred.

The surplus in any year from one child's share of income remaining after due provision made for such child's support, maintenance and education, may differ in amount from the surplus, if any, arising from any other child's share of income. Upon the true construction of the will the several surpluses are not to be aggregated and added to the general corpus of residue, but each surplus becomes an addition to the contingent share of corpus of the child to whom such surplus is attributable. If this was not the true construction of the will, it is difficult to find any disposition at all of the income arising from the investments representing a surplus of any given year.

Upon this view of the construction of the will their Lordships think that the assessments in question are wrong in treating in each year of taxation the whole surplus income of the residue as one indivisible taxable integer. There are, in fact, three distinct trusts which should be separately assessed and taxed.

In the result, therefore, their Lordships are of opinion that the judgment of the Supreme Court of Canada should be varied in so far as it confirms the assessments, and directs payment of costs, and in lieu thereof that directions should be given for remitting the assessments to the Exchequer Court of Canada to adjust the assessments so as to give effect to the conclusions which have been reached by their Lordships, and that it should be ordered that the appellant be paid by the respondent the same proportion of his costs of the proceedings in the Exchequer Court of Canada and in the Supreme Court of Canada respectively, as he is to receive of his

costs of this appeal under the direction hereinafter contained. Any further costs hereafter to be incurred in the Exchequer Court of Canada will remain in the discretion of that Court.

In the adjustment of the assessments ultimately to be made, regard must be had to the fact (which appears hitherto to have been overlooked) that Allen A. McMartin attained the age of 25 years on the 4th November, 1928.

Their Lordships will humbly tender to His Majesty advice in accordance with the foregoing conclusions.

The respondent must pay to the appellant who has succeeded only in part but whose appeal was necessary for the substantial success he has had, two-thirds of the latter's costs of this appeal.

In the Privy Council.

JOHN B. HOLDEN

o.

THE MINISTER OF NATIONAL REVENUE.

DELIVERED BY LORD TOMLIN.

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