

The Minister of National Revenue - - - *Appellant*

v.

The Trusts and Guarantee Company Limited - - *Respondents*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 12TH OCTOBER, 1939.

Present at the Hearing:

LORD ATKIN
LORD THANKERTON
LORD RUSSELL OF KILLOWEN
LORD WRIGHT
LORD ROMER

[*Delivered by* LORD ROMER]

This is an appeal by the Minister of National Revenue from a judgment of the Supreme Court of Canada dated the 19th December, 1938, reversing by a majority a judgment of the Exchequer Court of Canada given in his favour on the 4th January, 1938.

The question to be determined on the appeal is whether the respondents who are a Canadian company are, as the trustees of an indenture of the 27th May, 1918, liable to be assessed to income tax in respect of the income accumulated by them during the years 1919 to 1934 inclusive pursuant to the trust for accumulation contained in that indenture.

The indenture which was made between one Peter Birtwistle, therein called the settlor, of the one part and the respondents of the other part, is of a somewhat unusual nature, and is by no means clearly worded. The effect of it, however, would seem to be as follows. Various assets of the settlor which had already been or were thereby transferred to the respondents were to be converted and got in by them and the net proceeds, together with the net income of the assets pending conversion after deduction of expenses, were to be transferred to an investment account. The money so transferred constituted the capital of the trust fund and was to carry interest at the rate of 5½ per cent. per annum, such interest being provided by the respondents. Out of this interest the respondents were to pay to the settlor during his life such sums as they might think fitting and proper for him

to expend on his "living expenses" which expression, however, was not to be deemed to include any obligations incurred by the settlor by speculation. The respondents were also permitted to pay out of the income \$150 a year to such charitable purposes as the settlor might request. The surplus of such interest was to be paid into the investment account on the 1st January in each year and added to and become part of the corpus and itself carry interest at $5\frac{1}{4}$ per cent. This accumulation of interest was to go on until the expiration of 21 years from the death of the settlor when the whole fund with the accumulations was to be paid by the respondents to the municipal council of the town of Colne in Lancashire, England, "to be used by the said council for the benefit of the aged and deserving poor of the said town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said council . . .". In the meantime the respondents might invest the fund and its accumulations standing to the credit of the investment account in the purchase of or loan upon such securities as they thought fit. Any such investments, however, were to be at the risk of the respondents who guaranteed the eventual payment to the said municipal council of the corpus of the fund together with the accumulations of the interest at the rate of $5\frac{1}{4}$ per cent. It was on the other hand provided that by way of remuneration for such guarantee and for their management of the trust the respondents should be entitled to retain for their own use and benefit "the surplus of interest or profit, if any, resulting from the investment or loaning of the said investment account over and above the rate of interest ($5\frac{1}{4}$ per cent.)". It was further provided that upon the payment over to the municipality of Colne at the expiration of the said period of 21 years from the settlor's death of the guaranteed sum, the securities then held by the respondents in respect of the investment account should become the property of the respondents freed from the trusts thereby created.

The events subsequent to the execution of this indenture that led up to the present appeal must now be stated.

In each of the years from 1919 to 1934 inclusive the respondents reported to the appellant on the regular form required to be filed by trustees and others acting in a fiduciary capacity the amounts of the income received by them under their trust. The purpose of this return is for information and not for taxation, inasmuch as the Dominion income tax legislation does not, speaking generally, provide for taxation by deduction at source of trust income in the hands of trustees, but imposes the tax directly upon the beneficiaries who are entitled to receive that income. The return to be made by the trustees must therefore give the names and addresses of the beneficiaries who are so entitled. In the present case accordingly the respondents, after stating in each return the income of the trust for the year in question (which presumably was the surplus for that year of the interest that they had guaranteed), added the following words: "Income accrues to the municipal council of Colne, England, for the

benefit of aged and deserving poor". Now, had the income been applied each year for the benefit of such aged and deserving poor instead of being subject to the trust for accumulation, the income would not have been liable to taxation under the income tax legislation of the Dominion, one sufficient reason being that the beneficiaries under the trust were not resident in Canada. But the Income War Tax Act of 1920 contained a section which was deemed to have come into force at the commencement of the 1917 taxation period and which was reproduced verbatim as section 11 (2) of the Revised Statutes of 1927, chapter 97. It was in these terms:—

"Income accumulating in trust for the benefit of unascertained persons or 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 section was repealed by section 7 of chapter 55 of the statutes of 1934 but re-enacted in the same form except that for the concluding words "an unmarried person" there were substituted the words "a person other than a corporation" followed by a proviso that is not material for the present purpose.

It appears that the appellant and the officials administering the Income War Tax Act under him failed to realise that the income referred to in the respondents' returns was being accumulated by the respondents in Canada. He says that he or his officials first became aware of this fact in the year 1935 in consequence of certain proceedings relating to the trust taken in that year in the Supreme Court of the Province of Ontario. He therefore caused notices of assessment to income tax to be served upon the respondents in respect of each of the years 1919 to 1934. The total amount claimed, including interest, was \$36,053.25. The respondents then appealed to the Minister against the assessments. They contended that the income was being accumulated either for the benefit of the municipal corporation of Colne or for the benefit of the aged and deserving poor of that town and that neither the municipal corporation nor the aged and deserving poor were unascertained persons within the meaning of the Act. They contended alternatively that the income in question was the income of a charitable institution and as such exempted from taxation by virtue of section 4 (e) of the Income War Tax Act, chapter 97 of the Revised Statutes, 1927, which exempts "the income of any religious, charitable, agricultural and educational institutions, boards of trade and chambers of commerce".

It should be stated that Peter Birtwistle, the settlor, had died in the year 1927.

The appeal was dismissed by the Minister, the present appellant, who by his decision dated the 21st April, 1936, affirmed the assessments. The respondents thereupon gave notice of dissatisfaction in accordance with the provisions of section 60 of the said Act and the

matter in due course came on for hearing in the Exchequer Court before Maclean J. The learned Judge affirmed the Minister's decision. He held that the income was not being accumulated for the benefit of the town of Colne but for the benefit of a class of which the members are presently unascertainable and will always be fluctuating. He held further that neither the respondents nor the municipal council of Colne nor the town of Colne nor the trust fund itself were charitable institutions. He also decided that interest on the income tax had been properly charged, a matter that will be dealt with more fully later on. By judgment dated the 4th January, 1938, the respondents' appeal was dismissed without costs.

The respondents thereupon appealed to the Supreme Court of Canada, where the case was heard by the Chief Justice and Crocket Davis, Hudson and Kerwin JJ. In the result the appeal was allowed with costs there and below (Kerwin J. dissenting) and the assessments were discharged. Davis J. in whose judgment the Chief Justice and Crocket J. concurred was of opinion that section 11 (2) of the Act of 1927 had in contemplation income that would vest in and ultimately pass to persons for the time being unascertainable, such, for instance, as unborn issue, or to persons whose rights were for the time being merely contingent interests. But under the trust now in question, he said, no particular person will ever acquire a right to demand and receive the beneficial interest in the income from the fund or any part thereof. He held, therefore, that the subsection did not apply. Hudson J. also thought that the persons referred to in the subsection were persons who might become entitled to specific portions of the fund.

Their Lordships are unable to take this view of the matter. They can find no warrant for introducing into the subsection a qualification that is not there. In their Lordships' opinion the subsection applies in every case where income is being accumulated in trust for the benefit of unascertained persons whether those persons will or will not ultimately take a vested interest in such income, and whether they will or will not ever become entitled to specific portions of it. In the present case the accumulated interest in the hands of the respondents as trustees will in the year 1948 have to be handed over to the municipal council of Colne as trustees in trust to be applied for the benefit of the aged and deserving poor of that town. Such aged and deserving poor are without any question persons, and equally without question they are unascertained. The case, therefore, seems to fall within the very words of the subsection. This was the view of the matter that commended itself to Kerwin J.

It is moreover to be observed that in an earlier decision of the Supreme Court the subsection was held to be applicable to a case in which it was possible that no person would ever acquire a vested right in any specific portion of the income that was being accumulated. This was the case of

In re McLeod, 1926, S.C.R., p. 457. In that case income of a residuary fund was being accumulated for 21 years from the death of a testator at the end of which time the whole fund was to be conveyed to his three children, but so that if any child were then dead his share was to be divided by the trustees of the will amongst the testator's grandchildren, if any, as the trustees might think best. Not only, therefore, were the persons for whom the interest was being accumulated unascertained, but in the event of one of the testator's children dying before the expiration of the 21 years, it could not be said, at the end of that period, of any grandchild that he was entitled to receive any specified portion of the trust fund any more than in the present case it will be possible to say it of any of the aged and deserving poor in the town of Colne in the year 1948.

In view of the construction put by the majority of the Supreme Court upon section 11 (2) of the Act it was not necessary for them to express any opinion upon the question whether the respondents could succeed upon the ground that the income in question was exempted from taxation as being income of a charitable institution, or upon the question whether interest was properly chargeable upon the tax prior to the date of assessment. Kerwin J., however, dealt with both of these questions and decided both of them adversely to the respondents. In their Lordships' opinion he was right in so doing.

As to the first of these questions it would appear from the judgment of Maclean J. that the respondents had contended before him that the respondents themselves or the municipal council of Colne or the town of Colne were charitable institutions. Any such contention is obviously absurd and was very properly omitted from the argument on behalf of the respondents before this Board. It was, however, strenuously urged before their Lordships that the trust regarded as a whole was a charitable institution. That it is a charitable trust no one can doubt. But their Lordships are unable to agree that it is a charitable institution such as is contemplated by section 4 (e) of the Act. It is by no means easy to give a definition of the word "institution" that will cover every use of it. Its meaning must always depend upon the context in which it is found. It seems plain, for instance, from the context in which it is found in the subsection in question that the word is intended to connote something more than a mere trust. Had the Dominion legislature intended to exempt from taxation the income of every charitable trust, nothing would have been easier than to say so. In view of the language that has in fact been used it seems to their Lordships that the charitable institutions exempted are those which are institutions in the sense in which boards of trade and chambers of commerce are institutions, such, for example, as a charity organisation society or a society for the prevention of cruelty to children. The trust with which the present appeal is concerned is an ordinary trust for charity. It can only be regarded as a charitable institution within the meaning of the subsection if every such trust

is to be so regarded, and this, in their Lordships' opinion, is impossible. An ordinary trust for charity is, indeed, only a charitable institution in the sense that a farm is an agricultural institution. It is not in that sense that the word institution is used in the subsection.

It only remains to deal with the question of the interest charged upon the tax prior to the date of assessment. The question turns upon sections 48, 49 and 66 of the Act.

Section 48 is in these terms:—

“ Every person liable to pay any tax under this Act shall send with the return of the income upon which such tax is payable not less than one-quarter of the amount of such tax, and may pay the balance, if any, of such tax, in not more than three equal bi-monthly instalments thereafter, together with interest at the rate of six per centum per annum upon each instalment from the last day prescribed for making such return to the time payment is made.”

Section 49 provides as follows:—

“ If any person liable to pay any tax under this Act pays as any instalment less than one-quarter of the tax as estimated by him, or should he fail to make any payment at the time of filing his return or at the time when any instalment should be paid, he shall pay, in addition to the interest at the rate of six per centum per annum provided for by the last preceding section, additional interest at the rate of four per centum per annum upon the deficiency from the date of default to the date of payment.”

In each of the years 1919 to 1934 the respondents failed to make any payment at the time of filing their returns or at the time when subsequent instalments under section 48 should have been paid. They became, therefore, chargeable with the additional interest prescribed by section 49 in addition to the interest mentioned in section 48. This they do not deny. Their contention that in the circumstances the interest should not be charged is based upon section 66 which is in these terms:—

“ Subject to the provisions of this Act, the Exchequer Court shall have exclusive jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act and in delivering judgment may make any order as to payment of any tax, interest or penalty or as to costs as to the said Court may seem right and proper.”

It is contended that this provision gives to the Court a discretion to determine whether interest shall or shall not be exacted from the taxpayer.

Their Lordships cannot accede to this contention. The powers given to the Court by the section are in terms given subject to the provisions of the Act and therefore subject to the provisions of sections 48 and 49. The Court has no more power under the sections to waive the payment of the interest than it has to waive the payment of any tax imposed by the Act, or to impose a greater rate of interest or a larger amount of tax than the Act provides. The section is merely an enactment conferring upon the Exchequer Court exclusively the jurisdiction of dealing with disputes arising in

connection with assessments made under the Act; and, as regards tax, interest and penalties, its powers are confined to seeing that they are only charged in strict accordance with the Act. As regards costs the Court has no doubt a complete discretion.

For these reasons their Lordships are of opinion and will humbly advise His Majesty that the appeal should be allowed; that the judgment of the Supreme Court of the 19th December, 1938, should be discharged; and the judgment of the Exchequer Court of the 4th January, 1938, restored. The respondents must pay the appellant's costs of this appeal and of the appeal to the Supreme Court.

In The Privy Council

THE MINISTER OF NATIONAL
REVENUE

2.

THE TRUSTS AND GUARANTEE
COMPANY LIMITED

DELIVERED BY LORD ROMER

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