
1955
Oct. 18 & 19
Nov. 28

BETWEEN:

THE ESTATE OF THE LATE WILSON WORKMAN BUTLER ..... } APPELLANT,

AND

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

Revenue—Income—Income earned during life of taxpayer but received after his death—The Income War Tax Act, R.S.C. 1927, c. 97, as amended, s. 11(4)(b)—Amount held in escrow and paid in year following taxation year—Payment not "received" when, in fact, withheld —Appeal from Income Tax Appeal Board allowed in part.

In 1944 one B, appointed the American ancillary executor of the appellant estate, brought an action before the New York courts on behalf of the Canadian executrix of the appellant estate, Mrs. Butler, against an American corporation for unpaid salary due to her husband, who until his death in 1937 was for a number of years an officer and director of the company, and for compensation for services he rendered to the latter in that capacity in preparing and pressing certain claims of the company before the Mixed Claims Commissions in U.S.A. The action was contested by the company but eventually settled out of court in February, 1948, for an amount of $125,000. Out of that amount Mrs. Butler's American attorneys received $97,855 in March, 1948, and in April, 1948 remitted to her in Canada $50,000. Pursuant to an agreement between the parties the balance of the amount of the settlement was deposited on March 18, 1948, to be held in escrow pending the determination of the estate's federal and state tax liability. No such taxes being payable a first amount of $18,750 was

released from the escrow and paid to the estate's American attorneys on May 4, 1948 and on January 13, 1949 the balance of the amount so withheld was paid to them. The appellant estate was first assessed on the basis of an income of $50,000 for the taxation year 1948 being the amount received in Canada by Mrs. Butler from her American attorneys in that year. However it was later reassessed on the basis of the amount of the settlement i.e. $125,000 less certain costs and expenses. An appeal from the reassessment to the Income Tax Appeal Board was dismissed and from the Board's decision appellant now appeals to this Court.

Held: That on the evidence the whole of the amounts paid under the settlement relate to the salary and services of the late Mr. Butler and were "income earned during the life" of the deceased within the meaning of s. 11(4)(*b*) of the Income War Tax Act.

2. That s. 11(4)(*b*) of the Income War Tax Act relating specifically as it does to "income earned during the life of any person" its words are satisfied whether the income was earned before or after January 1, 1940, when the section came into effect.

3. That on the evidence the claims were advanced by the Butler estate as a *bona fide* claim and settled on that basis. Any evidence relating to the manner in which the action was financed, or evidence in regard to the disposition to be made of the "income earned" *after* it had been received are wholly irrelevant to the question before the Court as to whether or not the moneys paid as the result of the settlement represent "income earned" by the deceased during his lifetime. *Goldman* v. *Minister of National Revenue* [1953] 1 S.C.R. 211 at 214.

4. That on the evidence the two payments received by the American attorneys in 1948 were constructively received by Mrs. Butler on behalf of her husband's estate in that year and the fact that a portion thereof was not remitted to her in Canada until the next year is of no importance.

5. That, however, the amount of $8,395 held in escrow until January, 1949 was not received in 1948 by anyone acting in a fiduciary capacity for the Butler estate. A payment cannot be considered as having been "received" when, in fact, it was withheld. The amount was not at the disposal of the estate and it was not reduced into its possession until 1949. The reassessment therefore should be reduced from $125,000 to $116,605.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cameron at Montreal.

Edouard Masson, Q.C. for appellant.

Guy Favreau, Q.C. and *Maurice Paquin, Q.C.* for respondent.

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

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CAMERON J. now (November 28, 1955) delivered the following judgment:

This is an appeal from a decision of the Chairman of the Tax Appeal Board dated November 27, 1954 (1), which dismissed an appeal from a reassessment dated October 30, 1952 (as amended in the notification by the Minister dated September 9, 1953), on the estate of Wilson Workman Butler, late of the city of Montreal, for the taxation year 1948. Mr. Butler died on June 18, 1937. In assessing his estate to income tax, the respondent relied and now relies—on the provisions of paragraph (*b*) of subsection (4) of section 11 of the Income War Tax Act which in 1948 read as follows:

> 11.(4(*b*) Income earned during the life of any person shall, when received after the death of such person by his executors, trustees or other like persons acting in a fiduciary capacity, be taxable in the hands of such fiduciary.

Certain basic facts are not in dispute. The late Mr. Butler in his lifetime was president of Canadian Car and Foundry Company Limited for a number of years. That company had a wholly owned subsidiary operating in the United States, namely, Agency of Canadian Car and Foundry Company Limited; in 1917 the latter company was engaged in the manufacture and assembly of munitions of war at its plant at Kingsland in the State of New Jersey. On January 11, 1917, the plant was badly damaged by an explosion and it was alleged by the company officials that such explosion was caused by saboteurs acting on behalf of the German Government.

Thereafter the Agency filed claims for its damages with the Mixed Claims Commission, an agency created to make and distribute awards to parties who had suffered damages by reason of acts of the German Government and its agents, out of funds held in part by the Alien Property Custodian of the United States. The Agency claims were completely unsuccessful up to the time of Mr. Butler's death in 1937. Subsequently, however, the claim was allowed and in 1939 the Agency secured a decision that the Government of Germany was liable for the damages suffered in the explosion and it was awarded some millions of dollars. About 1940 or 1941 the Agency collected a substantial part of the amount so awarded.

(1) 11 Tax A.B.C. 424.

By his last will and testament, Mr. Butler appointed his widow, Mary Jane Butler, Mr. Arnold Wainwright, Q.C., and the Royal Trust Company, as his testamentary executors; they carried out their duties as such executors and were eventually discharged in 1938. The residuary legatees of the Butler estate (including his widow), having heard in 1940 that the claim of the Agency had been allowed and that certain of its officials had received special compensation from the Agency for their services in preparing and pressing its claim before the Mixed Claims Commission, decided to negotiate with the Agency for the purpose of securing a like award in respect of similar services rendered over many years by the late Mr. Butler. Their claims were not allowed by the Agency and it was decided to take action against the Agency in the courts in New York. For the purpose of such contemplated action, the widow, Mary Jane Butler, petitioned the Superior Court of the province of Quebec, Judicial District of Montreal, to be appointed executrix of her husband's estate. By a judgment of Tyndale J., dated August 19, 1943, the petition was granted, the full terms of the order being set out in the decision below. Thereby Mrs. Butler was appointed executrix of her late husband's estate for the purpose of prosecuting a claim against both the Agency and the Canadian company, namely, the Canadian Car and Foundry Company Limited. The action as instituted, however, was against the Agency only.

Inasmuch as the Agency was an American corporation, it was necessary to bring action in the courts of that country and to take the action in the name of an American citizen. Accordingly, upon petition of the widow and executrix, the Surrogate Court of the county of New York appointed one C. Napier Blakeley as ancillary executor of the Butler estate for the purpose of instituting the action against the Agency. In 1944 Blakeley filed an action for $1,168,990.00 against the Agency.

The claim was a lengthy one but for the purpose of this appeal it is sufficient to adopt the summary of the two demands made, as stated by the Chairman of the Board, as follows:

> A. As a result of the destruction of the defendant's (the Agency's) plant and injury to its business, caused by the explosions, the defendant's assets, income and earnings were substantially decreased,

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with the additional result that, for a time, the salary payable to the late Wilson W. Butler was reduced by 50% and, for a further period, was not paid at all. Agreements had been reached between the parties to the effect that the defendant would pay Butler any unpaid salary out of the moneys it would receive as a result of its claim to the *Mixed Claims Commission*. This unpaid salary amounted to $168,990, and although in 1941 the defendant received a large amount of its award, no part of the unpaid salary was paid to the plaintiff or to any of the executors of his estate, and the plaintiff claimed payment of the said sum of $168,990 for unpaid salary.

B. From the time of the destruction of the defendant's plant in 1917, and continuously until his death in 1937, Wilson W. Butler rendered extensive and extraordinary services to the defendant in connection with its aforesaid claim for damages, both before the *Mixed Claims Commission* and otherwise. By reason of the damages, the defendant had not sufficient means to pay for these services which it had however accepted. These services were of the reasonable value of $1,000,000, no part of which was paid, and payment for which was thereby claimed.

The Agency duly filed its answer to the said complaint and denied all the material allegations in the claim and all liability to the plaintiff. As shown by the "Papers on Appeal" (Exhibit A-1), there were many interlocutory motions and appeals. Finally, an out-of-court settlement was agreed upon and on February 28, 1948, an agreement was entered into between the ancillary executor, the widow and sole executrix of the Butler estate, and the Agency. Counsel for the appellant relies to some extent on the terms of this agreement and for that reason I think it desirable to reproduce it in full. It is as follows:

> SETTLEMENT AGREEMENT dated February 28, 1948, between C. Napier Blakeley, Ancillary Executor of the Estate of Wilson Workman Butler, deceased (hereinafter referred to as BLAKELEY), MARY JANE MACKIN BUTLER, sole Executrix of the Estate of Wilson Workman Butler, deceased (hereinafter called MRS. BUTLER) and AGENCY OF CANADIAN CAR & FOUNDRY COMPANY, LIMITED, a corporation organized and existing under the laws of the State of New York (hereinafter referred to as the AGENCY COMPANY),
>
> WHEREAS—
>
> A. Prior to June 18, 1937, and for many years prior thereto, Wilson Workman Butler (hereinafter called BUTLER) was an officer and director of the AGENCY COMPANY and also of CANADIAN CAR & FOUNDRY COMPANY, LIMITED, (hereinafter called the CAR COMPANY), a corporation organized under the laws of the Dominion of Canada and the corporate parent of the AGENCY COMPANY.
>
> B. On October 30, 1939, the Mixed Claims Commission, United States and Germany, entered an award (hereinafter called the Agency Company Award) decreeing that the Government of Germany is obliged to pay to

the Government of the United States on behalf of the AGENCY COMPANY the sum of $5,871,105.20 with interest at the rate of 5% from January 31, 1917.

C. On August 19, 1943, the Superior Court of the Province of Quebec appointed MRS. BUTLER (the widow of BUTLER) sole testamentary executrix under the Last Will and Testament of BUTLER for the purpose of prosecuting or causing to be prosecuted a claim or claims on behalf of BUTLER's estate against the AGENCY COMPANY and against the CAR COMPANY for alleged unpaid salary and for services alleged to have been rendered by BUTLER in connection with the securing of the Agency Company Award.

D. Pursuant to the petition of MRS. BUTLER and BLAKELEY, the Surrogate's Court of New York County on March 16, 1944, issued ancillary letters testamentary to BLAKELEY with the right to prosecute the said claim or claims of BUTLER against the AGENCY COMPANY and not the right to compromise, settle or collect the same.

E. Thereafter an action was instituted in 1944 by BLAKELEY against the AGENCY COMPANY in the Supreme Court of the State of New York, New York County, (hereinafter called the New York Supreme Court action) to recover the sum of $168,990 with interest thereon from January 1, 1941, on account of alleged unpaid salary and services alleged to have been rendered by BUTLER in connection with the recovery of the Agency Company Award.

F. BLAKELEY, MRS. BUTLER and the AGENCY COMPANY have agreed to settle and compromise the New York Supreme Court action and all claims, demands and causes of action (including unliquidated and contingent claims and demands) which the estate of BUTLER has or may have against the AGENCY COMPANY and/or the CAR COMPANY upon the terms and conditions hereinafter set forth:

NOW THEREFORE, THIS AGREEMENT WITNESSETH

FIRST: Upon the delivery to the AGENCY COMPANY of the documents enumerated in clause "SECOND" hereof the AGENCY COMPANY will pay to BLAKELEY, or his attorneys, the sum of $125,000.

SECOND: Simultaneously with such payment, BLAKELEY shall deliver to the AGENCY COMPANY:

(*a*) a certified copy of the order of the Surrogate's Court of New York County authorizing and approving the compromise and settlement in accordance with the terms of this Agreement;

(*b*) a general release executed by BLAKELEY in the form annexed hereto;

(*c*) a general release executed by MRS. BUTLER in the form annexed hereto;

(*d*) a stipulation discontinuing the New York Supreme Court action executed by BLAKELEY's attorneys in the form annexed hereto.

THIRD: The AGENCY COMPANY further covenants and agrees to pay to BLAKELEY, or his attorneys, subject to full performance by BLAKELEY and MRS. BUTLER of all acts and things required by clause "SECOND" hereof, an amount equal to two (2%) per cent of any and all payments which the AGENCY COMPANY may hereafter receive on the Agency Company Award, on account of principal and/or interest due or to become due on the Agency Company Award *excepting* payments

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the AGENCY COMPANY may receive as a result of the transfer of funds by the Attorney General to the Secretary of the Treasury as provided in Public Law 375, 80th Congress, 1st Session, approved August 6, 1947, and provided that the aggregate of the payments to be made pursuant to this clause "THIRD" shall in no event exceed Fifty Thousand ($50,000) Dollars. In the event that BLAKELEY shall be discharged as Ancillary Executor prior to the time any sums pursuant to this clause "THIRD" shall become payable to BLAKELEY, such sums shall be paid to MRS. BUTLER as sole executrix or to her legal successor or successors. Provided, *however,* that the AGENCY COMPANY shall be entitled to deduct and withhold from any payment pursuant to this clause "THIRD" the portion thereof required to be deducted or withheld under applicable revenue laws and regulations then in force.

FOURTH: This Agreement shall be binding upon, and inure to the benefit of, the parties hereto, their legal representatives, successors and assigns.

I think I may assume that the documents which were to be delivered to the Agency by reason of the *second* clause of the agreement were so delivered. It will be noted that the amount then due under the settlement was $125,000.00. Of that amount, $97,855.00 was paid by the Agency to Breed, Abbott and Morgan, the New York attorneys who acted on behalf of the ancillary executor, on March 16, 1948. The balance of $27,145.00 was paid by the Agency to its attorneys, Messrs. Graustein and Kormendi, on March 18, 1948, to be held by them under the terms of its letter of the same date (such terms had been agreed to by the other parties to the settlement). In brief, such terms were that $18,750.00 was to be held until it was ascertained by the estate that the Agency company was not liable to the Commissioner of Internal Revenue for "withholding taxes" in respect of the settlement of $125,000.00, and upon such proof being produced, that amount was to be paid to Messrs. Breed, Abbott and Morgan. The remaining amount of $8,395.00 was to be held on similar terms in connection with any duty that might be payable to the New York State Tax Commission. In the result it was found that no such taxes were payable, but the estate in 1949 voluntarily paid $2,422.24 to the United States Government to secure the required release. On May 4, 1948, Messrs. Graustein and Kormendi sent $18,750.00 to Messrs. Breed, Abbott and Morgan and on January 13, 1949, the balance of $8,395.00 was likewise sent to them.

From her New York attorneys Mrs. Butler received in Canada the sum of $50,000.00 on April 19, 1948; and on

December 12, 1949, she received a further remittance of $42,252.02, together with an exchange premium thereon of $4,225.20, the total receipts actually coming into her hands in both years aggregating $96,477.22.

In the assessment dated October 30, 1952, tax was levied on the basis of an income of $50,000.00 in 1948. That amount, of course, corresponds to the amount that actually came into Mrs. Butler's hands in that year. It was stated to be "Amount received in 1948 from Agency of Canadian Car and Foundry Limited in respect of a claim for services rendered by the deceased during his lifetime". In the Notification of the Minister the respondent, having reconsidered the assessment and having considered the facts and reasons set forth in the Notice of Objection, notified the taxpayer of his intention to reassess the income as follows:

Amount received from Agency of The Canadian Car and Foundry Company Limited	$125,000.00
Less expenses of collection	62,066.81
	63,933.19

And will allow a tax credit under section 8 of the Act of $2,422.44, paid to the Government of the United States of America,

In Exhibit A-2 and the schedule thereto (filed on behalf of the appellant), the gross receipts by Mrs. Butler are shown as $96,477.22. From that amount there are deducted detailed "expenses incurred in Canada" aggregating $33,904.73; and finally the following statement appears:

Net Amount Shared Between Participants in Litigation

Amount received	$ 96,477.22
Amount expended	33,904.73
	62,572.49

It will be noted, therefore, that the amount of income assessed against the appellant for the year 1948 includes amounts actually coming into her hands in 1948 and 1949 as the result of a settlement arrived at with the Agency and that the amount of the assessment—$63,933.19—is somewhat in excess of the "net amount" shown in Exhibit A-2. No evidence was introduced by other parties to account for the discrepancy or to indicate what items of expense were disallowed.

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At the hearing, it was agreed that the evidence given before the Tax Appeal Board would be taken as evidence in this appeal, the Court, however, to rule on the admissibility of any evidence to which objection had been taken below. In addition, certain oral evidence was introduced at the hearing.

Later herein it will be necessary to consider the question as to whether the amounts which actually came into the hands of the widow-executrix in 1949 form part of the taxable income of the estate in 1948. The first point which I shall consider is whether the amounts paid as a result of the settlement were "income earned during the life" of the late Mr. Butler within the meaning of section 11 (4) (*b*) (*supra*). It is submitted by counsel for the appellant that they are not "income earned" or, alternatively, that they are not wholly "income earned".

In so far as the payments relate to the settlement of the claims advanced in the New York courts, there is not the slightest doubt that they were paid in respect of salary claims from the Agency and/or special services rendered by the late Mr. Butler to the Agency. I have carefully perused the claims as found in the appellant's Exhibit A-1 and it is abundantly clear that the entire demand related to salary and services and to nothing else. That fact was admitted by Mr. Masson, counsel for the appellant. There is no doubt whatever that payments made in respect of salary and services rendered fall within the definition of "income" as defined in section 3 of the Income War Tax Act.

Counsel for the appellant, however, attempted to establish that the terms of the settlement and the forms of the releases given show that another claim by the late Mr. Butler against the Agency was taken into consideration and that such claim did not relate to his salary or to services rendered. He referred to clause F of the recital to the settlement (*supra*) and to the form of the general releases to be supplied by both the executrix and the ancillary executor. A copy of the latter release is in the record; it is couched in the terms usual for a general release and fully releases the Agency from all claims and demands which the ancillary executor, as such, had or could have against it.

In support of this contention the appellant introduced Exhibit A-7 consisting of

(*a*) a letter dated October 18, 1955, from M. A. Loughman, vice-president of the Agency, to Mr. A. M. Beatty, a witness called on behalf of the appellant and the stepson of the late Mr. Butler; that letter is of no importance here;

(*b*) a letter and an Assignment and Transfer, which are as follows:

New York, February 9, 1934.

Mr. Amos J. Peaslee,
Peaslee & Brigham,
501, Fifth Avenue,
New York, N.Y.

My dear Amos:—

In connection with your suggestion that some arrangement might be made for a contingent interest to persons willing to finance you to the extent of $5,000, I wish to state that Mr. Butler is willing to procure for you the sum of $5,000 in consideration of the assignment by you out of any amount which may become payable to you by way of compensation and/or fees for services in the Lehigh Valley Railroad Company and/or Agency of Canadian Car & Foundry Company, Limited, Claims—from either or both—a sum equivalent to ten (10%) per cent of the aggregate amount of such compensation and/or fees, but not to exceed the sum of $250,000.

It should be understood that as the amount in question will not be advanced by Mr. Butler personally nor by me nor any of the directors or officials of our Company, the assignment is to be made to "W. W. Butler and/or L. A. Peto in Trust".

Yours very truly,
(signed) L. A. Peto.

I hereby agree to and accept the foregoing.
Amos J. Peaslee

ASSIGNMENT AND TRANSFER

In consideration of payment to me of the sum of $5,000, receipt of which is hereby acknowledged, I hereby assign, transfer and make over to Messrs. "W. W. Butler and/or L. A. Peto in Trust", a sum equivalent to ten (10%) per cent of the aggregate amount which may become payable to me by Agency of Canadian Car & Foundry Company, Limited, and/or the Lehigh Valley Railroad Company by way of compensation and/or fees for services or otherwise in connection with or in relation to the Black Tom and Kingsland Claims now pending before the Mixed Claims Commission —from either or both—but not to exceed in all a total sum of $250,000.

In witness whereof I have hereto set my hand this ninth day of February, 1934.

Amos J. Peaslee.

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It is said that these documents created a claim in favour of Mr. Butler against the Agency, which claim was included in the settlement and was released by the general releases executed by Blakeley and Mrs. Butler; that the whole or part of the sum of $125,000.00 may have been referable to that claim, which, by its nature, was not "income earned" by the deceased during his lifetime. The evidence is that Peaslee was a New York attorney working for the Agency in presenting the sabotage claims before the Mixed Claims Commission. I was invited by Mr. Masson to find that the settlement included the release of a claim of the Butler estate for $250,000.00 against the Agency and arising out of the documents filed as Exhibit A-7.

I must reject completely this ground of appeal as being entirely without foundation. From the documents themselves it is clear that both Butler and Peto were trustees only of any rights thereby transferred to them. It is not shown or suggested by any of the evidence that Butler ever had any personal interest in the subject matter of the assignment. The letter states specifically that he advanced no money and the oral evidence of Mr. Beatty is that it was paid by the Agency itself out of a special fund. Butler had died long before the award of the Mixed Claims Commission in favour of the Agency and his trusteeship was then at an end. There is no evidence that Peaslee ever became entitled to any amount, either from the Agency or from the other named corporation—the Lehigh Valley Railroad Company. There is nothing to identify the person for whom Butler and Peto were trustees; it may possibly have been the Agency itself. There is no admissible evidence to establish that the assignment was ever served upon the Agency or that it was at any time brought formally to the attention of its officers.

I am quite unable to construe the general releases as relating in any way to any claim arising out of the Peaslee Assignment and Transfer. The only claims advanced in the litigation were for salary and services rendered and it is for the recovery of these claims only that Mrs. Butler was appointed executrix and Blakeley was appointed ancillary executor. By the settlement this claim was specifically settled and the requirement of the general releases in the specified forms was merely adopted *ex abundanti cautela.*

It must be assumed, I think, that if the parties had in mind any such large claim as that which might have arisen out of the Peaslee assignment, a special reference thereto would have been made in all the documents, but they are entirely silent on that matter. If it had been in the contemplation of the parties, a release from Peto, the surviving trustee, would undoubtedly have been required. The onus is on the appellant to establish that the settlement did, in fact, relate in whole or in part to that claim and the attempt to do so has failed completely. I find that the whole of the amounts paid under the settlement relate to the salary and services of the late Mr. Butler.

A further ground of appeal is that section 11 (4) (*b*) is not to be construed retroactively and that if the amounts received are found to have been "income earned" by the deceased, they were so earned prior to his death in 1937 at which date that subsection was not in effect. It is common ground that the subsection was enacted by section 19 of chapter 34, Statutes of 1940, and was made applicable to the 1940 and subsequent taxation years; it remained in force to December 31, 1948, when the new Income Tax Act came into effect. As I understand the matter, the subsection was introduced to bring into charge income earned during the lifetime of a deceased taxpayer but received by his estate after his death. The previous practice had been to regard such income—which would clearly have been taxable income had it been received in the taxpayer's lifetime—as capital. I agree that it would be improper to construe the subsection as relating to income received by an estate prior to January 1, 1940, as that would involve a retroactive construction. The subsection does not in terms limit its effect to income earned after the coming into effect of a subsection, but does relate specifically to "income earned during the life of any person". In my opinion, the words of the subsection are satisfied whether the income was earned before or after January 1, 1940. I must therefore reject this ground of appeal also.

Another ground of appeal was that the payments made by the Agency were not "income earned" but were paid as the consequence of a *pacte de quota litis* (an agreement which counsel for the Crown admitted would be illegal in the province of Quebec). In the course of his evidence

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before the Board, Mr. Beatty stated that certain of the heirs of Mr. Butler's estate had agreed with his widow to share in the financing of the litigation against the Agency; that certain attorneys, both in Canada and the United States, were to be compensated for their services in prosecuting the claim by payment of a percentage of the amount actually recovered; and that the heirs-at-law were to divide the net proceeds between themselves in agreed proportions. It is submitted that such a contract was illegal and that the respondent could not tax as "income earned" any moneys recovered from such an illegal transaction. It was also suggested by counsel for the appellant that there was probably no merit in the claim as advanced; that the action was taken merely for its nuisance value in the hope that something might be recovered. I find nothing whatever in the evidence to support this last contention. In my view the claims were advanced by the Butler estate as a bona fide claim and settled on that basis.

Counsel for the respondent objected to the introduction of any of the evidence of Mr. Beatty as to the alleged illegal agreement to pay for the attorneys' services and to divide the net balance on the basis of a percentage of the amount recovered. I think that objection must be sustained on the ground that such matters are wholly irrelevant to the issue before me. What I am concerned with here is the nature and character of the amount paid in the settlement. What falls to be determined is the question as to whether or not the moneys paid as a result of the settlement represent "income earned" by the late Mr. Butler during his lifetime. In reaching a conclusion on that question it would be wholly irrelevant to take into consideration evidence relating to the manner in which the action was financed, or evidence in regard to the disposition to be made of the "income earned" *after* it had been received.

Reference may be made to the opinion of Kellock J. in *Goldman* v. *Minister of National Revenue* (1), where it is stated:

> The appellant having succeeded in obtaining the remuneration he set out to obtain, and which he has kept for himself, I do not consider that the form by which that result was brought about is important nor that if there be any illegality attaching to the agreement to divide the taxed costs, this can avail the appellant. What the appellant received, he received

(1) [1953] 1 S.C.R. 211 at 214.

as remuneration as he intended. Mr. Stikeman admits that had the offer of the bondholders to approve payment of $8,000 been accepted, the $3,000 which would thereby have found its way to the appellant would have been taxable in the hands of the latter as remuneration. In my view the mere interposition of the certificate of taxation does not change the character of that which the appellant actually received.

Having found that the sum of $125,000.00 paid by the Agency was in fact "income earned" by the late Mr. Butler during his lifetime, I now turn to the question as to what portion thereof was "received" after his death in the taxation year 1948. I have set out above the details of the dates and amounts of the several payments made by the Agency and its attorneys and of the actual receipts coming into the hands of the executrix. On behalf of the appellant it is submitted that in 1948 the executrix received only the remittance from her New York attorneys of $50,000.00 and it is agreed that in that year only that amount came into her personal possession. Then it is said that as the net amount finally available for distribution was $62,572.49 (Exhibit A-2), the balance of the sum of $125,000.00 represented costs and expenses; that such costs and expenses amounted to $62,427.51, a sum in excess of the $50,000.00 received in 1948, and that, therefore, there remained no taxable income for 1948. That submission, however, is not quite in accordance with the facts. The New York attorneys received in March, 1948, the sum of $97,855.00 and remitted $50,000.00 to the executrix, apparently retaining the balance as security for their fees and disbursements. Exhibit A-2 shows that the total expenses paid by the executrix out of the moneys coming into her hands (paid both in 1948 and 1949) aggregated only $33,904.73, so that even if that amount were paid or payable out of the $50,000.00 received, the balance of $16,095.27 would have been taxable income in her hands.

For the respondent it is submitted that the full amount of $125,000.00 (less proper deductions for costs and expenses) consists of taxable income in 1948 and was "received" by the executrix in that year. I shall first consider two payments received by the New York attorneys of the executrix in 1948, namely, $97,855.00 on March 16, 1948, and $18,750.00 on May 4, 1948. The submission is that Blakeley, the ancillary executor, was appointed at the request of the widow-executrix and was merely her

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agent for the purpose of claiming and collecting the compensation due her husband's estate; that his attorneys, Messrs. Breed, Abbott and Morgan, were also her agents or attorneys (or in any event the attorneys and agents of Blakeley) and that the receipt of these moneys by them constituted a receipt of such moneys by her.

The appellant's first submission on this point is that only the testamentary executors had power to receive the payments and that as they had fulfilled their duties and had been discharged, the moneys belonged not to the estate but to its heirs, and that Mrs. Butler, the executrix appointed by the order of Tyndale J., had no power to receive and did not receive the money. I cannot agree with this submission. It is proven that she did, in fact, receive the payment of $50,000.00 and I am satisfied that the order of Tyndale J. was sufficient to confer on her the right to prosecute the claim and to receive the proceeds thereof as executrix. Section 11 (4) (*b*) imposes the tax upon her in her fiduciary capacity as executrix. Then it is said that payments to Blakeley, the ancillary executor, are not payments to the estate and that the payments in any event could not be received until they were in the hands of the executrix in Canada. It was not suggested that the payment to the New York attorneys for Mr. Blakeley did not constitute a receipt by him of such moneys and I am of the opinion that they did.

I decide this point on the established fact that upon payment of these amounts to the New York attorneys, such amounts became the property of the Butler estate and, except as to the proper charges of such attorneys, became subject to the control and direction of either the executrix or the ancillary executor, or both. Blakeley was the nominee of Mrs. Butler and had been selected by her to act on behalf of the estate in the proposed litigation. By the terms of the settlement Mrs. Butler authorized "the payments to be made to either Blakeley or his attorneys". The Agency discharged its obligation in full at the date of the settlement, either by payment direct to the attorneys or by the delivery of the balance to its counsel to be held pending the determination of the estate's tax liability. Under no circumstances could any of the moneys revert to it for its own use. The direction in the "escrow agreement" was to

pay to Messrs. Breed, Abbott and Morgan, as attorneys *for the estate of Wilson Workman Butler*, all the moneys so deposited except such amounts as might be found payable to the Federal and state taxing authorities. Under these circumstances, both payments received by the attorneys in 1948, aggregating $116,605.00, were, in my view, constructively received by Mrs. Butler on behalf of her husband's estate in that year. The fact that a portion thereof was not remitted to her in Canada until the next year is of no importance.

The last payment of $8,395.00 received by Breed, Abbott and Morgan on January 13, 1949, must be considered separately. By the terms of the main settlement agreement, the agreed amount of $125,000.00 was to be paid by the Agency to Blakeley or his attorneys upon the delivery of the documents specified. On the same date, however, a collateral agreement was arrived at between the same parties, as shown by the terms of the letter by the executrix and the ancillary executor to the Agency and agreed to by the Agency. Thereby, it was agreed that the Agency "shall be entitled to withhold from the payment of $125,000.00 required to be made under Clause "FIRST" of the settlement agreement the sum of (*a*) $18,750.00 on account of Federal income taxes, and (*b*) $8,395.00 on account of New York State income taxes, or an aggregate amount of $27,145.00", and that the amounts so withheld should be deposited in escrow with Messrs. Graustein and Kormendi, the Agency attorneys.

As I have mentioned above, the deposit was made to protect the Agency against liability for any "withholding taxes" in respect of the amount paid by the settlement. The collateral agreement provided that to the extent that rulings should be received from the taxing authorities releasing the Agency from such tax, the money should be paid "by Graustein and Kormendi to Messrs. Breed, Abbott and Morgan, *our attorneys*", free of any claim by the Agency. To the extent that such rulings should not be secured, Graustein and Kormendi were instructed to withdraw the moneys and pay them to the Collector of Internal Revenue and/or the New York State Tax Commission. The collateral agreement forms part of Exhibit R-4 as is also the letter from the agency to Graustein and Kormendi

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dated March 18, 1948. With that letter was forwarded the Agency's cheque for $27,145.00 and the letter states:

> You will deposit this sum in a special account in your name and you will hold and dispose of the same as escrow agent subject to the terms of this letter.

The letter substantially conforms to the terms of the collateral agreement. I have not found it necessary to consider that part relating to the sum of $18,750.00 which had been estimated as the amount that might be due to the Commissioner of Internal Revenue inasmuch as that amount was released from the escrow and paid to Breed, Abbott and Morgan on *May 4, 1948.*

The escrow agents were to hold the sum of $8,395.00 until February 15, 1949 (I assume that on or about that date the Agency would be required to pay any withholding taxes for which it might be found liable), unless sooner disposed of as provided therein. Then followed instructions relating to possible taxes due the New York State Tax Commission which are similar to those set out in the collateral agreement, relating thereto. On January 10, 1949, the latter Commission ruled that no tax was payable to it and, in accordance with the terms of the collateral agreement, the whole amount so withheld was paid to Breed, Abbott and Morgan three days later. In the escrow letter it is stated that its terms are irrevocable and may not be changed except upon the written consent of the Agency, Breed, Abbott and Morgan, Mrs. Butler (executrix) and Blakeley (ancillary executor).

It is true, as urged by counsel for the respondent, that by payment of $97,855.00 in cash and the deposit in escrow of the balance of $27,145.00, the Agency had discharged its obligation and paid its debt in full and could under no circumstances recover any part thereof for its own benefit. It is also a fact that the $8,395.00 held in escrow until 1949 would either be paid to the estate attorneys for the estate or be used in settlement of the New York State tax payable by the estate (and for which the Agency would be liable only to withhold the proper amount before making payment). Counsel for the respondent submits that under these circumstances and as the escrow agency was established with the approval of the executrix and the ancillary

executor, the escrow agents were in fact the agents of the estate and that, therefore, this payment also was "received" by the estate in 1948.

I am of the opinion, however, that this payment was not received in 1948 by anyone acting in a fiduciary capacity for the Butler estate. The collateral agreement provided that it should be *withheld* and it was in fact withheld until the following year. I fail to understand how a payment can be considered as having been "received" when, in fact, it was withheld. If the agreement had provided that that sum should be retained until the following year by the Agency for the purpose of clarifying its tax position, and had, in fact, been withheld until then, it could not be said that the payment had been received in 1948 by anyone on behalf of the estate. I do not think that the placing of the amount in the hands of counsel for the Agency, even though agreed to by the other parties, changes the position in any way. In my view, this amount was not at the disposal of the estate and it was not reduced into its possession until 1949. For that reason the reassessment (as stated in the notification of the Minister), on the basis of the amount received from the Agency, should be reduced from $125,000.00 to $116,605.00.

An objection was also taken by Mr. Masson to the form of the assessment. Mrs. Butler died in January, 1950, and by her will her son, Alvah H. Beatty, was appointed the executor of her will. Under the laws of the province of Quebec, the executorship of Mr. Butler's estate did not devolve on Mrs. Butler's death to her executor, Mr. Beatty. The reassessment of October 30, 1952, was directed to "Ex. of Estate of Wilson W. Butler, c/o Mr. Alvah (misspelled as Alvali) M. Beatty, Ex. of the Estate of Mary Jane Butler, c/o Edouard Masson, Q.C., Suite 203, 333 Craig St. W., Montreal, Quebec." It undoubtedly reached the attention of Mr. Beatty as he signed the Notice of Objection dated November, 1952, and participated as a witness not only before this Court, but in the proceedings before the Tax Appeal Board. Mr. Masson's submission is that as there was then no executor of Mr. Butler's estate, its heirs, or those who received the moneys when distributed, should have been assessed.

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I do not think this submission can be supported. When the moneys were received in 1948, Mrs. Butler was alive and then acting as executor for her husband's estate. At that time, as such executrix, she became liable for the payment of income tax in respect of such receipts. As she failed to pay such tax in her lifetime, the obligation to do so did not lapse but falls as a duty upon her executor. In my opinion, the assessment was properly made. It may be noted that section 69(D) of the Income War Tax Act provides that "an assessment shall not be vacated or varied under this Part by reason of any irregularity, informality, omission or error on the part of any person in the observation of any directory provision of this Act". It is also worthy of note that neither in the Notice of Objection nor in the Notices of Appeal was any objection taken to the form of the assessment.

For these reasons the appeal will be allowed to the extent that I have indicated, namely, by reducing the total amount of receipts in 1948 from $125,000.00 to $116,605.00. The assessment will be referred back to the Minister to reassess the appellant in accordance with my finding.

While the appellant to a minor extent succeeded in his appeal, I must keep in mind that by far the greater part of the hearing was taken up with matters in which he has failed completely. I think that under the circumstances I should make no order as to costs.

Judgment accordingly.