1960
Oct. 13, 14

1962
Mar. 23

BETWEEN:

ALEX MILLER .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 3, 5, and 16—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 15 and 16(1)—Income or capital receipts—Commissions payable under agreement—Payment on termination of contract—Payments for assignment of rights to commissions—Payments commuting rights to commissions—Commissions in lump sum—Taxation of commissions not received—Whether payments taxable—Appeal allowed—Cross-appeal dismissed.

Appellant introduced M to a United States manufacturer of parking meters and as a result M obtained an exclusive license under a patent to manufacture and sell these parking meters in Canada. In August 1950, pursuant to the provisions of an earlier agreement between them, the appellant became exclusive sales agent for M in the Province of Quebec and part of Ontario on a commission basis and became entitled on the termination of the agency to a commission of 2½ per cent on sales made in the same territory payable during the life of the appellant so long as the patent existed. In July 1951 M purported to terminate the agency by a notice given pursuant to the agreement and a dispute having arisen as to the validity of such termination, the appellant and M in October 1951 entered into another agreement by which the termination of the agency was confirmed but it was further provided that the appellant should receive $3,750 in instalments and a commission in respect of certain pending sales and his right to the commission of 2½ per cent during his life for the term of the patent was confirmed. Of the $3,750, $1,750 was paid to the appellant in 1952, one of the taxation years with which the appeal is concerned. In the same year the appellant assigned his rights to payment of the commission on the pending sales to A.M.I. in consideration of an immediate payment of $12,000 and 42 per cent of the commissions in excess of that sum. Under this assignment appellant received in 1952 payments of $12,000 and $1,470 and in 1953 received $896.27. In 1953 appellant by a further agreement released his rights to future payments of the 2½ per cent commission in return for an immediate payment of $5,000. The Minister assessed all amounts paid to the appellant under these agreements as subject to tax and on the assumption that s. 16(1) of the *Income Tax Act* applied to the appellant's transaction with A.M.I. also assessed as income of the appellant amounts representing the 58 per cent of the commissions in excess of $12,000 retained by A.M.I. Appellant's appeal to the Tax Appeal Board succeeded with respect to the inclusion in his income of the amounts retained by A.M.I. but in other respects failed. He thereupon appealed to this Court and the Minister cross-appealed seeking to have the assessments restored.

Held: That the $1,750 received in 1952 under the 1951 agreement was not a profit from appellant's business but a capital receipt, and was not subject to tax as income.

2. That the sums of $12,000 and $1,470 received from A.M.I. in 1952 and $896.27 in 1953 were income receipts and subject to tax.
3. That the right of the appellant to the 2½ per cent commission was a right of a capital nature and the $5,000 received by appellant for the release of such right was also capital.
4. That s. 16(1) of the *Income Tax Act* did not apply to the appellant's transaction with A.M.I. and that the cross-appeal failed.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Thurlow at Toronto.

G. R. Dryden for appellant.

E. A. Goodman, Q.C. and *J. D. C. Boland* for respondent.

1962
MILLER
v.
MINISTER OF NATIONAL REVENUE
Thurlow J.

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

THURLOW J. now (March 23, 1962) delivered the following judgment:

This is an appeal from a judgment of the Tax Appeal Board by which appeals by the appellant from re-assessments of income tax for the years 1952 and 1953 were allowed in part. There is also a cross-appeal by which the Minister seeks to have the re-assessments restored. The issue in the appeal is whether certain sums received by the appellant and which are referred to in the outline of the facts which follows, were properly included by the Minister in computing the appellant's income for income tax purposes. The applicable statute for 1952 was the *Income Tax Act,* Statutes of Canada 1948, c. 52, and for 1953 was the *Income Tax Act,* R.S.C. 1952, c. 148, but there is no difference in the applicable provisions. The issue raised by the cross-appeal is whether in the circumstances sums not received by the appellant but by A. M. I. Distributing Co. Ltd. are taxable as income of the appellant under s. 16 of the applicable statute.

The appellant, who at one time had been engaged in manufacturing clothing and later was a part-time employee of a clothing firm, in or about 1938 became interested in parking meters and commenced acquiring information about them. Some years later, while still a part-time employee of the clothing firm, he began operating a parking lot. In 1949 or 1950, he contacted McGee-Hale Park-O-Meter Company, a United States firm which held the Canadian patent on a type of parking meter, and succeeded in getting that firm interested in granting a licence under the patent to manufacture and sell the meters in Canada. He then contacted some fifty or more persons in an endeavour to interest someone with the necessary means in joining in an undertaking for that purpose and ultimately, in August, 1950, concluded a contract with one David A. McCowan by which the latter, with the appellant's consent, which was necessary in view of an earlier contract between them, undertook to negotiate for the patent licence and, upon obtaining it, to appoint the appellant as exclusive sales representative for the Province of Quebec and the portion of Ontario lying east of Fort William and Port Arthur. By the contract, McCowan retained the right to set and change prices and

to control the form of sales contracts and the credit arrangements under which the meters would be sold, and it was also provided that he should not be liable to the appellant for failure to perform a contract with a purchaser by reason of labour trouble or any other cause not within his control, but he reserved no express right to refuse orders secured by the appellant. The appellant, on his part, among other things, undertook to sell a minimum of 375 meters by June 30, 1951, and a minimum of 750 meters each year thereafter, and there were provisions for termination of the agreement if he failed to meet this undertaking. His remuneration was to be a commission at specified rates on the price of meters sold by him or his salesmen, and it was also provided in para. 12 that

> Miller shall not be entitled to commissions on Park-O-Meters which have not been contracted for in writing by a purchaser prior to the termination of this contract or any extention thereof. Provided that in any case where Miller has commenced negotiations for the sale of Park-O-Meters which are not concluded by the date of such termination, Miller shall be allowed 30 days from such date to conclude such sale, and upon obtaining a firm order in writing within such 30 day period, will be entitled to commission thereon as hereinbefore provided.

By a further term of the agreement, the appellant agreed to provide a sales office in Toronto and McCowan undertook to contribute $500 per year towards the cost of such office. By para. 8 it was also provided that if the appellant should become unable to carry out his undertaking or if the agreement were terminated prior to the expiration of the licence under the patent, he should have no further obligation under the contract but would "in consideration of the introduction by him to McGee-Hale and the information and assistance freely given and to be freely given by Miller to McCowan," be entitled to a commission of 2½ per cent. of the selling price of meters thereafter sold by McCowan in the territory so assigned to Miller, for so long as Miller should live and the licence remain in force provided always that Miller should not in the meantime become interested in the manufacture or sale of any other parking meter.

McCowan assigned the contract to Park-O-Meter Co. of Canada, Ltd., a company which he had had incorporated, obtained the patent licence and began manufacture of the meters, but ran into difficulties in obtaining steel and was also hampered by a patent infringement proceeding brought

when he sold a number of meters to the City of Vancouver. In the meantime, the appellant gave up his part-time employment with the clothing firm and set up a small sales office in Toronto. He had no employees engaged at this office and after some months it was discontinued. Thereafter, he conducted his operations from his home. In this operation, he contacted a number of municipal authorities in Ontario and Quebec, and he spent time and effort in connection with a prospective sale to the City of Toronto of some 1,300 meters. In this connection, a tender by Park-O-Meter Co. of Canada, Ltd. was submitted on June 11, 1951, but it had not been accepted when on July 13, 1951, the appellant was formally notified by McCowan of the termination of his agency in 30 days because of his failure to sell 375 meters by June 30, 1951.

The matter did not, however, rest there. The appellant contacted McCowan, blamed his own failure to sell 375 meters on McCowan's difficulties and the latter's inability or unwillingness to permit him to promise definite delivery dates or to quote firm prices, and asked for a further opportunity to make the sales provided for in the agreement. McCowan declined to accede to this request but offered the appellant a different territory in which to operate and the appellant being dissatisfied with this proposal later put the matter in his solicitor's hands and threatened suit. In the period of 30 days which followed the 30 day period mentioned in the notice of termination, Miller secured an order for meters from the City of Kitchener and a further order from the City of Hamilton.

Ultimately, by an agreement dated October 1, 1951, a settlement was concluded. This agreement, after referring to the earlier agreement, recited that Miller had sold no meters except as thereinfter mentioned, that McCowan on July 13, 1951, had given Miller 30 days' notice of cancellation of the agreement and that Miller disputed the validity of the notice. By this agreement, the termination of the earlier agreement as of August 13, 1951, was confirmed, but McCowan and Park-O-Meter Company of Canada agreed to pay Miller $3,750 in certain instalments extending over a period of six months, $200 for costs, commission at the rate of $13.63 per meter for each meter that should be sold

to the City of Toronto pursuant to the tender already mentioned, and commission as provided in the earlier agreement in respect of the sales to the City of Kitchener and the City of Hamilton of meters for which the appellant had obtained orders prior to September 13, 1951. It was also provided that Miller should have the right to continue to represent McCowan and his company in the negotiations connected with the tender made to the City of Toronto and that McCowan and Park-O-Meter would co-operate and render him every reasonable assistance. Miller was also given a similar right in connection with the order which he had obtained from the City of Kitchener. At the time of the making of this agreement, the tender made to the City of Toronto had been approved by the City Engineer, the City Treasurer and the Police Department, but it was not approved by the Board of Control until October 15, 1951. The provision of the earlier agreement whereby Miller would be entitled on termination of his agency to 2½ per cent. commission on sales made thereafter in his territory remained in force with an alteration in respect of the sales which might be concluded to the Cities of Toronto, Hamilton and Kitchener after August 13, 1951, on which commission was to be paid as provided in the agreement of settlement, and with a further alteration extending Miller's right to such commissions on sales made in the defined territory so long as McCowan or Park-O-Meter of Canada Ltd. or any subsidiary thereof, or any person or company in which McCowan or Park-O-Meter of Canada might be interested either directly or indirectly, should have the right to manufacture or distribute meters in the defined territory during the life of the patent.

Of the $3,750, payments totalling $2,000 were received by the appellant in 1951 and were later reported by him as income for that year. The remaining $1,750 was received in 1952, and it is the first of the amounts in issue which the Minister has assessed and which the appellant contends were not income but capital.

Shortly after the conclusion of this agreement and before he had engaged in any further enterprise or employment, the appellant suffered a heart attack and was an invalid for several months thereafter. During this period, the City of Toronto accepted the tender and on November 21, 1951, entered into a formal contract with Park-O-Meter of Canada

1962
MILLER
v.
MINISTER OF
NATIONAL
REVENUE
Thurlow J.

Ltd. for the purchase and installation of some 1,300 meters, but by the terms of the contract the City had the right after a six-months' trial period to return the meters at any time during a further period of six months. Early in February 1952, the appellant, being in need of money, assigned to A. M. I. Distributing Co. Ltd. all moneys and commissions that might be or become payable to him under the agreement of settlement with McCowan and Park-O-Meter Co. of Canada, Ltd. on the sale of the meters to the City of Toronto and in the assignment he warranted that the commissions payable to him were at the rate of $13.63 on each meter and that the number of meters so sold was not less than 1,339. The consideration for this assignment was $12,000 to be paid at once and 42 per cent. of the moneys received pursuant to it by A. M. I. Distributing Co. Ltd. in excess of $12,000. The remaining 58 per cent. was to be retained by A. M. I. Distributing Co. Ltd.

The $12,000 so received by the appellant in 1952 and the moneys he received in 1952 and 1953 representing 42 per cent. of the surplus have been included in his income by the Minister in making the assessments and together make a second group of amounts in respect of which the liability of the appellant to tax is in issue in the appeal. For the 1952 taxation year, the amount included by the Minister was the $12,000 and $1,500. It is now conceded by the Minister that the amount actually received by the appellant in 1952 representing the 42 per cent. was $1,470—an amount which the appellant had reported as income in his return. It is not, however, conceded that the appellant is entitled to relief in respect of the tax on the difference of $30. In re-assessing the tax following the appellant's notice of objections, the Minister had (erroneously) assumed that the $1,500 represented the whole amount paid by Park-O-Meter of Canada, Ltd. to A. M. I. Distributing Co. Ltd. and had assessed the appellant on the assumption that he was liable to tax on the whole of such amount. In the Tax Appeal Board the appellant succeeded in respect of the taxation in his hands of amounts representing A. M. I.'s 58 per cent. of the amounts received from Park-O-Meter of Canada Ltd. but by his cross-appeal the Minister seeks to have the assessment in respect of this amount restored. This item of $30 is thus in issue on the Minister's cross-appeal for 1952.

For the 1953 taxation year, the amount included by the Minister as representing the commissions paid by Park-O-Meter of Canada Ltd. was $2,110.16, but it is now conceded by the Minister that this amount should be reduced to $896.27, which represents only the 42 per cent. received by the appellant in the year and which was reported by him as income in his income tax return. The appellant is accordingly entitled to relief from the tax imposed in respect of $1,213.89 of the income as assessed and his appeal for 1953 succeeds to that extent. The amount of $896.27 is, however, still in issue, the appellant contending that it was not income for the purposes of the *Income Tax Act*. As a result of the concession mentioned, no issue remains on the cross-appeal in respect of the year 1953.

Some time after his recovery from his illness, the appellant began selling coin vending machines under an arrangement with another firm and in 1953 decided to buy some of the machines to operate on his own. Requiring money for this purpose, he contacted McCowan and offered to release all his rights to payments accruing in the future under the agreements already mentioned for $5,000. The offer was accepted, the appellant received $5,650, made up of the $5,000 and $650 for amounts already accrued and payable, and he executed a release dated October 14, 1953 of his right to 2½ per cent. in respect of sales made in his former territory and further covenanted not to engage or be concerned in manufacturing or disposing of parking meters in Canada for seven and a half years. The $5,650 so received was included by the Minister in his computation of the appellant's income for 1953. The appellant did not dispute his liability to tax on the $650 but issue arises in respect of the $5,000 which the appellant contends was not income but capital.

To recapitulate, the amounts received by the appellant on which issue arises in the appeal and cross-appeal are:

For 1952

(1) $1,750.00 received by appellant in 1952 from Park-O-Meter of Canada Ltd. as part of the $3,750 payable under the settlement agreement of October 1, 1951.

1962
MILLER
v.
MINISTER OF NATIONAL REVENUE
Thurlow J.

(2) $12,000.00 received by appellant in 1952 from A. M. I. Distributing Co. Ltd. being part of the consideration for the assignment made in 1952 of amounts payable by Park-O-Meter of Canada Ltd. under the settlement agreement of October 1, 1951.

(3) $1,470.00 received by the appellant in 1952 from A. M. I. Distributing Co. Ltd. representing the 42% payable to him under the assignment referred to in (2) above.

(4) $30 not received by the appellant but representing part of the 58% to be retained by A. M. I. Distributing Co. Ltd. under the assignment referred to in (2) above.

For 1953

(5) $896.27 received by appellant in 1953 from A. M. I. Distributing Co. Ltd. representing the 42% payable to him under the assignment referred to in (2) above.

(6) $5,000.00 received by appellant in 1953 from Park-O-Meter of Canada Ltd. pursuant to the release of October 14, 1953.

The case put forward on behalf of the appellant consisted of three main submissions. First, it was said that the settlement agreement of October 1, 1951, was in fact a settlement of a claim for damages for breach of the agency agreement, that the sums payable to the appellant pursuant to the settlement agreement were in substance and in fact damages for loss of the agency contract and that therefore they were capital and not income.

Secondly, it was contended that even if the sums payable under the settlement agreement and referred to therein as commissions were of an income nature the right to them was contingent on the contract between Park-O-Meter of Canada Ltd. and the City of Toronto being consummated by ultimate purchase of the meters, and that because the appellant's right to such sums at the time he assigned it to A. M. I. Distributing Co. Ltd. was contingent the amount paid by A. M. I. to him for the assignment must be regarded as capital and not as income.

Finally, it was submitted that the $5,000 received by the appellant from Park-O-Meter of Canada Ltd. pursuant to the agreement of October 14, 1953, was received in exchange

for his right to 2½ per cent. on sales made in his former territory, under the agreement of August 1950, which was a capital asset and that the sum so received was therefore capital as well and not taxable as income. In advancing these submissions, Mr. Dryden treated it as immaterial whether the relationship between McCowan and the appellant evidenced by the agreement of August 29, 1950, was one of employer and employee or one of principal and agent wherein the agent was engaged in carrying on a business of his own.

Mr. Goodman on behalf of the Minister took the position that the appellant was not an employee but was carrying on a business of his own. Indeed, in the Minister's amended reply, it is pleaded as the basis of the taxation that the appellant in 1952 and 1953 was in the business of selling parking meters to the City of Toronto and elsewhere in Ontario and that the profit from the business in 1952 and 1953 was not less than $13,500 and $2,110.16, respectively. It is also pleaded as the basis for taxation of the $5,650 that it was received for the cancellation of an agency agreement entered into by the appellant in the course of his business and was therefore income by virtue of the provisions of s. 3 and s. 5 of the *Income Tax Act.*

Mr. Goodman's submission with respect to the $1,750 paid under the agreement of settlement of October 1, 1951, was that while the agreement does not show how the payment was calculated or what it represented, in the circumstances, it would be proper to regard it as a *quantum meruit* for services which had been rendered up to the time of termination of the agency, and that it would accordingly be income. With respect to the $1,200 and the 42 per cent. of the sum over that amount paid by Park-O-Meter, his submission was that the $13.63 per meter sold to the City of Toronto was commission in fact as well as in name and represented profit from the carrying on of the agency, that in fact what the agreement of settlement did was not to completely terminate the agency but to preserve it in respect of the negotiations with the City of Toronto with alterations in the commission arrangement, and that such amounts accrued from the carrying on of the agency relationship under such altered arrangements and were accordingly income; and further that the assignment of the appellant's rights to such sums to A. M. I. Distributing Co. Ltd. has no effect on their

1962
MILLER
v.
MINISTER OF NATIONAL REVENUE
Thurlow J.

character as income. He also submitted that the whole sum representing the \$13.63 per meter was income of the appellant and taxable in his hands under s. 16(1) of the *Income Tax Act* since the assignment to A. M. I. Distributing Company amounted to the conferring of a benefit on the assignee within the meaning of that subsection. He conceded, however, that if s. 16(1) was inapplicable, the cross-appeal must fail. Finally, he submitted that the right to 2½ per cent. on sales of parking meters in Eastern Ontario and Quebec which the appellant was to receive for his life or so long as the patent licence was held by Park-O-Meter of Canada Ltd. was granted for services which he had rendered and was to render and was therefore of an income nature and that the amount of \$5,000 which he received in consideration for the release of such right was income as well.

In my opinion, the evidence clearly establishes that the appellant was never an officer or employee in the service of McCowan or of Park-O-Meter. As I view it, from the time of the establishment of the relationship, the appellant simply had an agency contract with McCowan and Park-O-Meter of Canada Ltd. and was independent of and not subject to regulation by McCowan or that company in carrying out his activities within the limits which the contract prescribed. The sums in question are accordingly not taxable as income from an office or employment and if income at all are taxable as income from his business.

I turn now to the sums which became payable under the settlement agreement of October 1, 1951. The question of when sums payable in connection with the termination of business arrangements are to be regarded as profits of a business and when as capital receipts has been considered in a number of English and Scottish cases which were referred to in the course of the argument and the principles applied in them appear from the following extracts. In *Commissioners of Inland Revenue v. Fleming & Co. (Machinery), Ltd.*[1], Lord Russell stated the matter thus, at p. 63:

> The sum received by a commercial firm as compensation for the loss sustained by the cancellation of a trading contract or the premature termination of an agency agreement may in the recipient's hands be regarded either as a capital receipt or as a trading receipt forming part of the trading profit. It may be difficult to formulate a general principle by reference to which in all cases the correct decision will be arrived at since in each case the question comes to be one of circumstance and

[1] 33 T.C. 57.

degree. When the rights and advantages surrendered on cancellation are such as to destroy or materially to cripple the whole structure of the recipient's profit-making apparatus, involving the serious dislocation of the normal commercial organisation and resulting perhaps in the cutting down of the staff previously required, the recipient of the compensation may properly affirm that the compensation represents the price paid for the loss or sterilisation of a capital asset and is therefore a capital and not a revenue receipt. Illustrations of such cases are to be found in *Van den Berghs, Ltd.* [1935] A.C. 431, and *Barr, Crombie & Co., Ltd.* [1945] S.C. 271. On the other hand when the benefit surrendered on cancellation does not represent the loss of an enduring asset in circumstances such as those above mentioned—where for example the structure of the recipient's business is so fashioned as to absorb the shock as one of the normal incidents to be looked for and where it appears that the compensation received is no more than a surrogatum for the future profits surrendered—the compensation received is in use to be treated as a revenue receipt and not a capital receipt. See e.g., *Short Brothers, Ltd.,* 12 T.C. 955: *Kelsall Parsons & Co.* [1938] S.C. 238.

In *Anglo-French Exploration Co., Ltd. v. Clayson*[1], Lord Evershed, M.R., said at p. 766:

If the matter were res integra, I think there is much to be said for the simple view that a sum of money received in consideration for the giving up or destruction of an agreement under which one looks to earn an annual sum is capital and not income; for in such case the sum received might be fairly described as the capitalised equivalent at the present time of incōme prospects. The question remains, however, not whether that sum in some senses or in some contexts might sensibly be called a capital payment, but whether it is a profit or gain arising from the trade of the recipient within the terms of Sch. D.

The matter is not in any case res integra. The line of cases starting from the well known trilogy in 12 Tax Cas., of *Inland Revenue Comrs. v. Newcastle Breweries, Ltd.* (at p. 927), *Short Bros., Ltd. v. Inland Revenue Comrs.* (at p. 955) and *Inland Revenue Comrs. v. Northfleet Coal & Ballast Co. Ltd.* (at p. 1102), in 1927, seem to me to emphasise that sums received for the cancellation of an agency or of other similar agreement which has been entered into by the recipient in the ordinary course of its trade will themselves, prima facie, be regarded as received in the ordinary course of trade *unless* the transaction involves a parting by the recipient with a substantial part of its business undertaking. *Barr, Crombie & Co. v. Inland Revenue* (26 Tax Cas. 406), was a case of that exceptional character.

In *Wiseburgh v. Domville*[2], where the payment in question was one of an agreed amount of damages, Lord Evershed, M.R., said at p. 758:

In *Kelsall Parsons & Co. v. Inland Revenue* (21 Tax Cas. 608), Lord Normand (Lord President), said (ibid., at p. 619):

. . . no infallible criterion emerges from a consideration of the case law. Each case depends upon its own facts . . .

That case is perhaps very much at one end of the line and *Barr,*

[1] [1956] 1 All E.R. 762. [2] [1956] 1 All E.R. 754.

1962
MILLER
v.
MINISTER OF NATIONAL REVENUE
Thurlow J.

Crombie & Co. v. Inland Revenue (26 Tax Cas. 406), very much at the other. In the former the business of the taxpayer company was that of agents for manufacturers. At the relevant date they had far more agency contracts than the taxpayer here, however, and the sum under consideration by the Inner House was paid for cancellation of a contract which would have determined in any event in a relatively short time and in regard to which, as Lord Normand says, the taxpayer had no reasonable expectation of its further continuance.

However, junior counsel for the taxpayer points out that the present case is really distinguishable in a significant degree on its facts. First, the taxpayer here held but two agencies. Secondly, although the present agency was expressed to be determinable at relatively short notice, there would have been no reason to suppose that it would have been if all had gone well. And thirdly, as the commissioners pointed out, the effect of the loss of this contract, quoad the taxpayer's agency business was very substantially to depreciate his earnings: whereas in *Kelsall Parsons & Co. v. Inland Revenue* (21 Tax Cas. 608), the court pointed out that the taxpayer's earnings out of the agency business were not much different from what they had been before the cancellation of the material contract. I agree that this case differs in these respects from *Kelsall Parsons & Co. v. Inland Revenue.* But I am unable to agree that those differences are of such significance as to bring it from the territory, so to speak, of *Kelsall Parsons & Co. v. Inland Revenue* into that of *Barr, Crombie & Co. v. Inland Revenue* (26 Tax Cas. 406). On its facts, the present case more closely resembles *Inland Revenue v. Fleming & Co. (Machinery), Ltd.* (33 Tax Cas. 57), and, as already indicated, I must resist counsel's invitation to refuse to follow the Scottish line of authority.

To bring the case within the *Barr, Crombie* territory the taxpayer must be shown to have parted in truth and in substance, not merely with his rights and expectations under a contract entered into in the ordinary course of his trade, but with one of his enduring capital assets, as it is called. On that sort of consideration this case might well have been different if the £4,000 had been paid because the taxpayer's goodwill had been damaged. In *Barr, Crombie & Co. v. Inland Revenue* the agency cancelled amounted to the substance of the whole business of the taxpaying company. Its receipts accounted for nearly nine-tenths of the total earnings and its loss necessitated the complete reorganisation of the company's business, a reduction in their staff, and the taking of new and smaller premises. In effect, a substantial part of the business undertaking had gone.

In the present case there are a number of facts which appear to me to point to the conclusion that the $3,750 which the appellant received under the agreement of settlement should not be regarded as income from the appellant's business. First, it is apparent that the agency contract between the appellant and McCowan or Park-O-Meter Co. of Canada was not one of a number of agency contracts but was the only one which the appellant had. Not only that but the contract was fundamental to the appellant's operation for there was no operation except what was to be done pursuant to the contract. Nor can the contract be properly characterized as one entered into in the ordinary course of

trade or as an incident of the carrying on of the appellant's business. On the contrary, the making of it appears to have been a preliminary step prior to engaging in a trade. And when that contract finally ceased the appellant's operation was at an end. Nor did he afterwards engage in any business in any way connected with or related to the manufacture or distribution of parking meters. Secondly, it was a long term contract which might have continued for the duration of the patent licence and which was not subject to cancellation except for reasons and on terms particularly defined. The contract thus appears to fall, initially, at any rate, in what Lord Evershed, M.R., referred to as "the Barr, Crombie territory". Next, while the agreement of settlement does not state what the $3,750 was being paid for, it does appear that there were no arrears of commissions due to the appellant nor was there anything due or recoverable by him on a *quantum meruit* basis for any services which he had rendered in endeavouring to promote the sale of meters. The only sales in prospect at the time appear to have been those to the Cities of Kitchener, Hamilton and Toronto, and these were elsewhere particularly dealt with in the agreement of settlement. From these facts I would conclude that the $3,750 to which the appellant became entitled under the agreement of settlement was not a settlement or surrogatum for commissions which he might have expected to reap from the activities which he had carried out but was referable to the loss of the contract itself which was not one of a number of similar contracts entered into in the course of his business but was the "fixed framework" within which he operated. Having regard to these features of the situation, I am of the opinion that the $3,750 so received was not a profit from the appellant's business but a capital receipt. The appeal accordingly succeeds in so far as the $1,750 included in the appellant's income for the year 1952 is concerned and the assessment for that year must be varied accordingly.

It is otherwise, however, with respect to the $13.73 per meter provided for by the agreement of settlement with respect to meters which might be sold to the City of Toronto pursuant to the tender. The agency contract itself contemplated the possibility of sales being made within 30 days after termination of the agency as a result of negotiations initiated prior to its termination and I think there could be no doubt that commissions earned on such sales would

have been income. What the agreement of settlement appears to me to provide is that in the case of the tender to the City of Toronto the 30-day limit provided in the agency contract is waived and the appellant is to have the right to pursue the matter to a conclusion but is to have a commission of $13.73 for each meter sold pursuant to the tender rather than the commission provided for in the agency contract. Such an alteration in my opinion has no effect on the income nature of the amount to which the appellant was to be entitled for his services as agent and the amount was accurately referred to as "commission" in the agreement of settlement. Nor, in my opinion, did the amount received by the appellant from A. M. I. Distributing Co. Ltd. in exchange for his right to such commissions, partake of any other character. I am quite unable to see what difference it can make that there was still a possibility that no commission would become payable. What the appellant had at the time of the assignment was a contingent right of an income nature. He exchanged it for $12,000 and a certain proportion of the commissions over that amount. If the City of Toronto had cancelled the purchase he would have been under obligation to return the $12,000 and any other sums which he had received in which case the receipts would have been offset by the deduction of what he would have had to repay. But this did not happen and I can see no reason why in the circumstances the amount received by the appellant should for income tax purposes be regarded as having a different nature from the income right which he exchanged for it. In respect of the sums of $12,000 and $1,470 in 1952 and $896.27 in 1953 received by the appellant from A. M. I. Distributing Co. Ltd., the appeal accordingly fails.

Turning now to the cross-appeal—because it arises out of the facts which I have been discussing—as previously mentioned this turns entirely on whether s. 16(1) of the *Income Tax Act* applies to render the 58 per cent. of the commissions retained by A. M. I. Distributing Co. Ltd. pursuant to the assignment agreement taxable as income of the appellant. This section provides that

> A payment or transfer of money, rights or things made pursuant to the direction of, or with the concurrence of, a taxpayer to some other person for the benefit of the taxpayer or as a benefit that the taxpayer

desired to have conferred on the other person shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to him.

It was argued that the payment of the commissions by Park-O-Meter of Canada Ltd. to A. M. I. Distributing Co. Ltd. was made pursuant to the direction of the appellant within the meaning of this subsection as a benefit which he desired to have conferred on A. M. I. Distributing Co. Ltd. In my opinion, s. 16(1) is intended to cover cases where a taxpayer seeks to avoid receipt of what in his hands would be income by arranging to have the amount received by some other person whom he wishes to benefit or by some other person for his own benefit. The scope of the subsection is not obscure for one does not speak of benefitting a person in the sense of the subsection by making a business contract with him for adequate consideration. Here, I see no reason to think that the 58 per cent. which A. M. I. Distributing Co. Ltd. was to retain was anything but the consideration for the risk which it took in paying out $12,000 to the appellant on the strength of a contract which might be cancelled and the mere liability of the appellant to repay it if that event occurred. In my opinion, s. 16(1) has no application to such a transaction and the cross-appeal accordingly fails.

There remains the issue respecting the $5,000 received by the appellant on the release of his right to 2½ per cent. on sales to be made after termination of the agency contract. As previously mentioned, the basis for the taxation of this sum put forward by the Minister in his reply was that it was received for the partial cancellation of an agency agreement entered into by the appellant in the course of his business. If the sum in question had in fact been received for the partial cancellation of the agency agreement, it would in my opinion be of the same nature as the $3,750 which, as already stated, I regard as a capital receipt.

But on the evidence, I do not think the sum can be said to have been received for the cancellation or the partial cancellation of the agency agreement. The 2½ per cent. was provided for in the first agreement and was to accrue only in the event of premature termination of the contract and then not on sales which the appellant might make but on sales which others might make after he had ceased operating. The nature of the appellant's right to such commissions in

1962
MILLER
v.
MINISTER OF NATIONAL REVENUE
—
Thurlow J.
—

my opinion appears from the agreement of August, 1950, and the circumstances attending its execution. In that agreement, the consideration for these commissions is stated as "the introduction of McCowan to McGee-Hale, and the information and assistance already freely given and to be given by Miller to McCowan". The agreement is silent as to just what "the assistance already freely given" was, but it does appear that McCowan could not obtain the patent licence without the appellant's consent whether because McGee-Hale was protecting his position in that respect or because of McCowan's undertaking which is referred to in the second recital of the agency contract, not to negotiate with McGee-Hale for a period of five years, or both. Nor does it appear what was to be included in "assistance to be rendered". Provision was made in the agreement for commissions at specified rates for making sales of meters and so it appears to me that this is not included in the consideration for the 2½ per cent. commissions. The substantial consideration for the 2½ per cent. commissions, in my opinion, was the waiver by the appellant of his rights under the earlier agreement with McCowan and his consent to McCowan negotiating for a licence under the patent and this, I think, was the giving up by the appellant of a right of a capital nature in exchange for the right to the agency and the 2½ per cent. commissions. In this view, the right to such commissions was also a right of a capital nature whether or not the commissions when actually paid would have been income—a question which does not arise in these proceedings—and the $5,000 received by the appellant for the release of such right was also capital and not income. The appeal accordingly succeeds with respect to this item as well.

In the result, the appeal will be allowed with costs and the re-assessments varied to the extent indicated in these reasons. The cross-appeal will be dismissed with costs.

Judgment accordingly.