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Jan. 8.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

THE MONTREAL TELEGRAPH COMPANY ..... } DEFENDANT;

AND

THE GREAT NORTH WESTERN TELEGRAPH CO. OF CANADA, ET AL ..... } THIRD PARTIES.

Revenue—Income Tax—Agreement by a third party to pay same.

By agreement between defendant and the Great North Western Telegraph Company, the latter undertook, *inter alia,* for 97 years, to work, manage and operate the defendant's telegraph system, with right to use and occupy all offices, stations, buildings and property of the defendant, except certain rooms, and obliged "themselves to pay all costs and expenses of operation of every description, including municipal taxes and assessments on the property owned by the company * * * " and bound themselves to pay $165,000 a year out of the proceeds of the operations, the company to receive this during the term whether the earnings amount to that, or less. The defendant claimed that the Great North Western Telegraph Company should pay the income tax upon the same.

Held, that, as between the plaintiff and the defendant, there is nothing in the deed in question which could affect the position of the Revenue, and, even if the third parties had thereby undertaken to pay defendant's income tax, such undertaking could not be pleaded by the defendant in answer to the Crown's claim for income tax under The Income War Tax Act, 1917; furthermore, that the defendant is liable to be assessed upon the sum of $165,000 aforesaid, less exemptions permitted under the Act.

2. That the covenant by the third parties to pay all "expenses of operation of every description including municipal taxes on the property owned by the company," contained in said agreement, did not bind it to pay the income tax levied on the defendant upon the rental or revenue received from the leasing of its telegraph systems, inasmuch as income tax is imposed on the person and not on the property. (*N.B. and Canada Railway Company* v. *N.B.R. Co.* (1924) 4 D.L.R. 962, referred to.)

Semble: Any amount which might be paid by the third parties as income tax upon the rental of $165,000 would form part of defendant's income for income tax purposes.

INFORMATION exhibited by the Attorney General of Canada to recover from defendant the sum of $16,599.69 as income tax.

Montreal, December 12, 1924.

Case now heard before the Honourable Mr. Justice Audette.

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C. F. Elliott for plaintiff.

George Montgomery, K.C. and *Aimé Geoffrion, K.C.* for defendant.

G. Barclay, K.C. for Third Parties.

The facts are stated in the reasons for judgment.

AUDETTE J., this 8th January, 1925, delivered judgment.

This is an information exhibited by the Attorney General of Canada whereby it is sought, *inter alia,* to recover against the defendant company, the sum of $16,599.69, together with statutory interest thereon, as representing the amount of the company's income tax for the year ending the 31st December, 1920.

The defendant company denies any liability for the payment of such taxes and claims to be entitled to relief over against the third parties for the same, under the terms and conditions of a certain deed or articles of agreement, of the 17th August, 1881, between the said defendant (therein called the company), and The Great North Western Telegraph Company (therein called the contractors), and The Western Union Telegraph Company (therein called the guarantors), whereby the contractors (G.N.W. T. Co.), undertook, among other things, for a period of 97 years, to work, manage and operate the system of telegraph of the defendant company with the right to use and occupy all the offices, stations, buildings and property of the company, save and except the board room, with the adjacent secretary's room and part of vault; and furthermore the contractors bound and obliged

(6) themselves to pay all costs and expenses of operation of every description, including municipal taxes and assessments in the property owned by the company, etc.

In consideration of the above, as stated in the operative clauses, the contractors bound and obliged themselves to pay to the company, quarterly, during the continuance of this agreement, the sum of $41,250 on the first of October, January, April and July in each year from out of the proceeds of the operation and use of the said company's lines and property, which proceeds the contractors thereby warranted should amount to the said sum of $41,250 per quarter, or $165,000 per annum. The company is to receive, during the continuance of the agreement, this quarterly payment, whether the earnings and

revenues of the said lines and property shall amount to that sum, or more, or less.

It is contended by the defendant that in addition to this quarterly payment,—this yearly rent of $165,000—the contractors should also pay the income tax collectible on the defendant upon that amount.

It is by clause 6 of the contract that the contractors assumed the liability of certain taxes. They bound and obliged themselves to pay all costs and expenses of operation of every description, including municipal taxes and assessment on the property owned by the company and occupied by them. The contractors did not assume the payment of all taxes but the municipal taxes and assessment upon the property in question. Under the *ejusdem generis* doctrine that would limit the taxes upon the property alone. The income tax which is of a personal nature (see section 4 of The Income War Tax Act, 1917), is based upon the income of the person or corporation—does not come within the purview of the taxes specifically mentioned in the deed. *Expressio unius est exclusio alterius.* Moreover the liability as to income tax was not contemplated in 1881 by any of the contracting parties. Although that fact alone would not be a sufficient answer to the claim, yet it may be a pertinent circumstance bearing upon the intent of the parties, and a strict text is required, under the circumstances, to support the defendant's view,—and no such text is extant. To make the contractors liable for such tax, some specific text would have to be found. *Sharon Ry. Co.* v. *Erie R. Co.* (1).

The words " expenses of operation of every description " do not let in the obligation to pay the taxes. The payment of the municipal taxes is added to such expenses by the word " including." And the taxes payable by the contractors are there clearly defined.

Some stress was laid upon clause 4 of the deed. But that is a clause providing for an increase in the rates, if the contractors have to pay more, and there is no undertaking to pay any taxes of any kind. It is not by paragraph 4, but by paragraph 6 that the question of taxes is settled.

(1) [1920] 112 Atlantic Reporter 242.

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Some clause, some enactment very clear in its purport would have to be found in the deed in question to relieve the defendant from its liability respecting its income tax. It cannot evade this payment unless there is a specific text to that effect, and on a fair reading of the articles of agreement, I find that the language does not disclose an intention to create such a liability. *N.B. and Canada Ry. Co.* v. *N.B.R. Co.* (1).

Now looking at the substance of the whole transaction, I must come to the conclusion that the true intent and meaning of the deed (par. 12), is that the contractors shall pay the yearly sum of $165,000 without any guarantee whatsoever as to any dividend to the defendant company. The contractors have thereby undertaken to pay a specific yearly rent and some taxes, clearly defined, but no more; there is no language in the deed under which the contractors could be made liable for the defendant's income taxes.

Neither from the grammatical reading of the agreement, nor from the tenor of that instrument taken as a whole, can there be found any expression or indication of an intention on the part of any of the parties that the burden of the income tax should be borne by the contractors, or any clause lending itself to such interpretation, as importing a liability for taxes of any nature whatsoever. Indeed the taxes mentioned as being payable by the contractors are taxes on the property as distinguished from all other taxes. This rent of $165,000 is to be paid without any deduction. No extraneous evidence is required to properly understand the Articles of Agreement. The deed presents no ambiguity and there is no occasion to refer to the resolution passed ratifying the deed. *N.B. & Canada Ry. Co.* v. *N.B. R. Co.* (*ubi supra*).

The respective position of the parties upon this agreement (call it a lease of real estate, or an emphyteutic lease, or a contract for hire of labour—*G.N.W. Tel. Co.* v. *Montreal Tel. Co.* (2)—as the contractors have a right to sublet, does not much matter) is defined in unambiguous and clear language and cannot lend itself to the interpretation sought here whereby the contractors should pay the de-

(1) [1924] 4 D.L.R. 962 at pp. 964-965.

(2) [1890] M.L.R. 6 Q.B. 257 at p. 261; 20 S.C.R. 170 at p. 172.

fendant company's income over and above the rent paid. This sum of $165,000 is a charge, an expense, a liability upon the contractors, while it is a revenue in the hands of the company, and the covenant by the contractors to pay taxes in the nature mentioned in the agreement cannot be extended to cover income tax levied upon the lessor-company on the rental paid by the lessee. *N.B. and Canada Ry. Co.* v. *N.B.R. Co.* (*ubi supra.*)

It cannot be denied, it admits no doubt, that the sum of $165,000 is a revenue in the hands of the defendant company and is a charge and expense in the hands of the contractors. Their relative position is well defined and there is no partnership between them. Under the provision of sec. 4 of The Income War Tax Act, 1917, the tax is levied upon the income of every *person* (and the word person includes company). The tax is a personal tax upon the person or company. Were the contractors remitting, as contended by the defendant company, this sum of $165,000 together with $16,599.69 and interest, to cover the defendant's income tax, what would be the position of the defendant? Clearly the defendant would receive a higher revenue and would thereby become liable to pay their income tax upon $165,000 and $16,599.69, the amount of their revenue or income. This view is supported by a number of decisions.

In the case of *North British Railway* v. *Scott* (1) the head-note reads as follows:— * * *

The same principle was recognized in the case where the income tax on salaries was voluntarily paid, as the position of the Inland Revenue could not be affected by such arrangements. *Hartland* v. *Diggines* (2).

I have therefore come to the conclusion that as between the plaintiff and the defendant, nothing in the deed in question, can effect the position of the Revenue and that the defendant cannot evade the payment of its income tax to the state, which I find properly assessed, as explained at trial.

In respect to the relation of the defendant company and the third parties I have come to the conclusion, without

(1) [1922] 128 L.T.R. 394; 1923 A.C. 37.

(2) [1924] 158 The Law Times 428-429.

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entering into the detailed position of each third party, considering it unnecessary in the view I take of the case, that the defendant has failed to establish any right to relief over against the third parties and the claim against them is dismissed with costs. However, on the question of costs I do not see why the G.N.W. Telegraph Co. of Canada and the Western Union Telegraph Company should sever in their defence, and the costs upon that issue should be taxed as if these two parties had joined in their defence, making due allowance for the additional allegations in the pleadings covering the individual facts relating to each party. The admission filed of record shows the relative position of the third parties among themselves and further that the Great North Western Telegraph Company in its income tax return for 1920 showed a deduction of $165,000 as a fixed expense.

Therefore there will be judgment as follows:—

1. The court doth order and adjudge that the plaintiff recover against the defendant the said sum of $16,599.69 with the statutory interest thereon from the 30th April, 1921, until payment as provided by sec. 7 of the Act as amended, and costs.

2. The court doth further order and adjudge that the claims made against the third parties herein be and the same are hereby dismissed with costs against the defendant, treating the two distinct issues or sets of pleadings of the Great North Western Telegraph Company of Canada and The Western Union Telegraph Company as if they had not severed in their defence.

Judgment accordingly.

Solicitors for plaintiff: *C. F. Elliott.*

Solicitors for defendant: *Brown, Montgomery & McMichael.*

Solicitors for third parties: *Lafleur, MacDougall, MacFarlane & Barclay.*