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Feb. 4.

IN RE THE INCOME WAR TAX ACT, 1917,

AND

JAMES B. McLEOD ..... APPELLANT;

AND

THE MINISTER OF CUSTOMS AND EXCISE ..... } RESPONDENT.

Revenue—Contingent interests—10-11 Geo. V, c. 49, sec. 4—Tax free bonds —Carrying on business.

C. died in 1912, and by his will left all his property to trustees to sell and convert the same into money. He directed that after payment of debts, etc., the residue and income therefrom, be accumulated for 21 years following his death, in the interval certain annuities to be paid to his children, one son and two daughters, out of this income. At the expiration of this term the accumulated trust fund was to be equally divided among the said children, and in the event of any of them having previously died, his share was to be distributed among the grandchildren, if any, as the trustees thought best. The son died in 1920 without issue, and one sister, unmarried, resided in the United States. The other sister had three children under 21, who would be entitled to the one-third share of the estate which fell into the trust on the death of the testator's son, and, in the event of no other grandchildren being born would receive the whole of this one-third share, etc.

Held, That the income of this accumulating fund was "income accumulating for the benefit . . . of persons with contingent interests" within the meaning of The Income War Tax Act, 1917, as amended by 10-11 Geo. V, c. 49, sec. 4 and was taxable under the said Act.

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2. That there is no principle of law defining what is the carrying on of a trade or business, this being always a question to be decided on the facts in each case. That the sale by trustees of lands in an estate, under the provisions of a will, was a mere accrual of capital and possessed none of the elements of a business, and no part of the proceeds can be called "annual net profit or gain."

3. Dividends from tax-free bonds must be fully deducted and as a class of income cannot be charged with any fractional proportion of other authorized deductions.

APPEAL from the decision of the Minister assessing certain accumulated revenues of estate of the late John Curry.

Ottawa, January 8, 1925.

Appeal now heard before the Honourable Mr. Justice Maclean, President of the Court.

A. C. McMaster, K.C. for the appellant.

C. F. Elliott for the respondent.

The facts are stated in the reasons for judgment.

MACLEAN J., now, this 4th day of February, 1925, delivered judgment.

This is an appeal from an assessment made against the appellant, surviving trustee of the estate of John Curry, deceased, for the year 1921 under the provisions of The Income War Tax Act, 1917.

John Curry, of Windsor, Ontario, died in 1912, and by his last will and testament devised and bequeathed all his real and personal property wherever situate, to three trustees, to sell and convert into money, and after the payment of his debts, funeral and testamentary expenses, and various pecuniary legacies, directed that the residue of his estate and all the income arising therefrom be accumulated for a period of twenty-one years from the date of his death, and out of such income he directed that certain annuities be paid to his three children, Charles Francis Curry, Verene May McLeod and Gladys A. Curry, during the said period, and at the expiration of such period that such accumulated trust fund be equally divided amongst his three children, and in the event of the death of any of them during such period, the share of the one so dying be distributed among his grandchildren, if any, at the time of the division of the estate, and as the trustees should think best.

The testator's widow died in October, 1912, and his son Charles Francis Curry died in March, 1920, leaving him

surviving as his only heirs and next of kin, his widow, and his two sisters, Verene May McLeod and Gladys A. Curry. The latter Gladys A. Curry is now a resident of the United States, living in the city of New York since 1915, and is still unmarried. Verene May McLeod has three children, namely: John C. McLeod, Frances V. McLeod and Gladys E. McLeod, all infants under the age of twenty-one years, who will be entitled to the one-third share of the deceased's estate, which fell into the residuary trust fund on the death of the testator's son Charles Francis Curry, and at the time of the division of the estate, and in the event of no other grandchildren being born during the accumulation period, will be entitled to receive the whole of the one-third share in such proportions as the trustees may decide.

The principal question involved in this appeal is whether or not the income of this accumulating fund is subject to the income tax, and also whether the latter portion of sec. 3, ss. 6 of the Income War Tax Act, as enacted by Chap. 49, sec. 4, 1920, is here applicable.

Every person residing or ordinarily resident in Canada is liable to the income tax (sec. 4), and *person* is defined as

> any individual or person and any syndicate, trust, association or other body or any body corporate * * * and their heirs. executors, administrators * * * or other legal representatives of such person,

sec. 2, ss. (*d*). The only incomes excepted from taxation are to be found in sec. 5. Under sec. 3, ss. 1, *income* includes the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks or from any other investment, and whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source; including the income from, but not the value of property acquired by gift, bequest, devise or descent. Sec. 3, ss. 6, is as follows:—

> The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period. Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests, shall be taxable in the hands of the trustees or other like persons acting in a fiduciary capacity, as if such income were the income of an unmarried person.

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The appellant claims: (1) that the assessment wrongfully assesses him for all the accumulating income in his hands for the year 1921, after the payment of the annuities, mentioned in the deceased's will, as if such income were given to an unmarried person on the grounds that the bequest to the said Verene May McLeod and Gladys A. Curry are vested in the said beneficiaries subject only to be defeated by their death before payment over and, that the income accumulating in trust cannot be said to be for the benefit of unascertained persons nor for the benefit of persons with contingent interests, within the meaning of subsection 6 of section 3 of the Income War Tax Act, 1917: (2) that the one-third share of such accumulated income to which the said John C. McLeod, Frances V. McLeod and Gladys E. McLeod, children of the said Verene May McLeod, will be entitled at the end of the accumulation period, is going to parties who are now in being, and who will receive the whole of such one-third share in such shares as the trustees may appoint, and that such accumulated income cannot be said to be so accumulating for the benefit of unascertained persons, within the meaning of the said section; (3) that in order to make the trustees of a will liable for income being accumulated in trust, the provisions of the will, or other instrument, should be for the benefit wholly for unascertained persons or wholly for persons with contingent interests, and that the provisions of the deceased's will are not for unascertained persons nor for persons with contingent interests; (4) that as such bequests are not wholly for unascertained persons, or wholly for persons with contingent interests, the provisions of sec. 3, ss. 6, should be strictly construed against the Crown and in favour of the subjects sought to be taxed.

Mr. McMaster placed much reliance on *Taylor* v. *Graham* (1) as to what constitutes a vested interest and what a contingent interest. The ruling principle in the construction of testamentary deeds is the testators intention, and that is to be gathered from the words used in the instrument, and that rule applies to the construction of statutes, but an intention must not be assumed apart from the language of the instrument or the statute itself. In

(1) [1878] 3 A.C. 1287.

Taylor v. *Graham* an estate was held to be vested because such was presumed to be the testator's intention, and there was nothing in the testamentary deed to rebut that presumption. Upon that ground a particular interest was held to be a vested interest. I doubt, however, if that decision assists in determining whether the Income War Tax Act makes the income of this fund liable to taxation, that depends upon the proper construction of the whole Act itself. At first I was of the impression that Mr. McMaster's contention as to the construction of sec. 3, ss. 6, was correct, but after consideration I have reached the conclusion that the fund is liable to taxation although I realize that the other view is not without force. The general scheme of the Act is clearly to tax all incomes except such as are by the statute specifically excepted. The question then is, does the statute clearly provide for the taxation of this income. Every person ordinarily resident in Canada is liable to the income tax. "Persons" according to the interpretation clause of the Act includes "trust." It is clear therefore that a trust, such as is here in question, is a "person" within the statute. Disregarding altogether sec. 3, ss. 6, the Act would seem to cover the income of a trust, such as is found in this case. There would not appear, as a matter of policy, any reason why it should be excepted, and there is no statutory provision excepting it. What then was the purpose of sec. 3, ss. 6? Before a tax may be validly assessed there must be a person certain against whom it may be clearly levied. Where income accrues to the credit of a beneficiary of a trust, an ascertained person, he or she is clearly taxable. The first part of sec. 3, ss. 6 was enacted so as to make it clear that the beneficiary was liable even if the income was not received by the beneficiary during a taxation period. It was necessary, however, to provide for the case where the income did not presently accrue to the credit of a beneficiary of a trust, or where it was accumulating for unascertained persons, or persons with contingent interests. It seems to me that the latter part of this section was designed to designate where in such cases the income should be taxed. The section does not, I think, purport to initiate or impose fresh taxation upon a new class of income. A reading of the section would indicate a presumption that this had already been done elsewhere in

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the Act. The Act, prior to this amendment was defective in that it did not provide where the income should be taxed in such cases as the one at bar, and in order to make a valid assessment, it was necessary to designate by statute where the income in such cases should be taxed. This section was meant to make clear where income should be taxed when it was accumulating for unascertained persons, or for persons with contingent interests, or in other words where it was not accruing annually to the credit of known beneficiaries. I think the words " contingent interests " was intended to cover the case where no person had a present and ascertained interest, in the income for any taxation period. It seems to me that all the beneficiaries are persons having a contingent interest in the fund. The surviving children must live until 1933 before they will have a determined interest in the fund. This is a contingent interest. If any of the children of the testator die before 1933, or at the time of the division of the estate, their interest is divided among the grandchildren, the number of which is contingent, as it may be added to by birth or cut down by death, and the manner of division among the grandchildren is even contingent upon the decision of the trustees, who are directed to divide the same among the grandchildren as they see fit. The manner of division among the grandchildren is not controlled by the terms of the will. If the income is vested subject to be divested, as Mr. McMaster contended, this necessarily imports I think, a contingent interest, as contemplated by the statute. I think this is a case of persons holding " contingent interests," within the meaning and intention of the statute, and the section directs where the income shall be taxed, namely in the hands of the trustee, and also that it shall be taxed as if it were the income of an unmarried person.

Further the words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonize with the subject of the enactment, and the object which the legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion in which they are used, and the object to be attained. If there are circumstances in the Act showing that the phraseology is

used in a larger sense than its ordinary meaning, that sense may even be given to it. Maxwell on Statutes at page 95. In dealing with matters relating to the general public, statutes are presumed to use words in their popular sense. If the object of an enactment had reference to the subject of wills, or the distribution of property, the word "contingent" might possibly be construed to have a different meaning than the same word would have in a general statute, such as is under consideration, where it should, I think, be construed in a popular and not technical sense.

Altogether I am of the opinion that this income is taxable, and in the manner and at the rate provided in sec. 3, ss. 6.

The testator described himself in his will as a banker. He carried on a private banking and insurance business at Windsor. This would appear to have been his chief business. During his lifetime he bought large tracts of land in or near the city of Detroit, in the state of Michigan, U.S.A., and had contracted from time to time for the sale of lots comprised within such tracts, under articles of agreement for sale, by which the purchase money and interest were payable in monthly or other periodical instalments over a period of years. For the purpose of properly conducting and managing this part of his affairs, the deceased opened an office in the city of Detroit, and the trustees under his will having taken out ancillary letters probate, in the state of Michigan, continued such office, but with a much reduced staff of employees, for the purpose of collecting the purchase money and interest derivable from the lots so sold by the deceased in his lifetime, and for the purpose of effecting the sale of lands unsold at the time of deceased's death. For the purpose of accelerating the sale of some lots of land, the trustee built a few houses, and he also built sewers and sidewalks for the same purpose. A considerable number of lots of land and some buildings still remain unsold, but I am satisfied the trustee is disposing of the same as rapidly as purchasers are found for the same.

The Crown contends that in connection with these lands the trustee is carrying on a business, and the annual net profits arising therefrom are taxable. Under the provisions of the will the trustees are not bound to sell the property coming into their hands immediately, or within any particu-

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lar time, but it was left to their discretion to sell from time to time, as they deemed prudent and in the financial interest of the estate. They are permitted to sell for cash or credit, or to take mortgages on account of the purchase money and which may be held as investments to form part of the accumulating fund. They are permitted also to improve any real estate either by building or other improvements on the land, or by repairing existing structures on the land, or by altering the character of the property so as to maintain the value or prevent depreciation thereof.

Since the property came to the trustees by bequest, with the general directions to sell and convert the same into money, and at the end of a stated period to distribute the estate, I do not think it can be said that the trustee is carrying on a business with a view to profit. The business of the trustee is to close and distribute the estate, and he is thus required to dispose of the real estate, as quickly as possible and as prudence dictates. There is no principle of law defining what carrying on a trade or business is, and it is always a question of fact to be decided by the particular facts of each case. It appears to me that the sale of the testators' lands is a mere accrual of capital, and possesses none of the elements of a business and no portion of the proceeds from sales of land can hardly, in the circumstances, be called annual net profit or gain. According to the evidence the properties sold are usually paid for by instalments, with interest, and these instalments can hardly be claimed to be in part profits or gains, but merely the payment of a debt by instalments, or payments of money due as capital, and the Act has made no provision for such a case. Neither has the Act made any provision for computation of profits for the case where capital is found in company with profits, if any, such as in this case. *Foley* v. *Fletcher* (1). Whatever might be said in support of the Crown's contention if the testator were still alive, and doing in this connection what the trustee is now doing, it can hardly be said that it is part of the business of the trustee, to deal in lands for profit. I am not sure that even in the lifetime of the deceased it could be said that it was part of his business to deal in lands or that the annual profits

(1) [1858] 3 H. & N. 769, at p. 777.

from the same could be regarded as annual income, and taxable. It looks more like an investment of capital by the deceased, and the profits on appreciation of capital. The trustee is not making further investments in real estate, and any expenditures made as already stated, with the view of accelerating the sale of lands cannot in view of all the facts of the case, be said to modify the essence of this statement. *Tebrau* v. *Farmer* (1); *Inland Revenue Commissioners* v. *Korean Syndicate Ltd.* (2); *Von Baumach* v. *Sargeant* (3). Therefore I am of the opinion that profits, if any, arising from the sale of these lands are not taxable.

Certain Canadian Government Victory Bonds, which are tax free, are among the assets of the estate, the annual dividend from which amounts to $1,650. The trustee has not been allowed a deduction for the full amount of such dividend, but only for $1,335.82. This result is produced by apportioning the two annuities of $8,000 each paid to Verene May McLeod and Gladys Curry, among the three classes of income received by the estate, that is to say, from the tax free bonds, from shares held in Canadian corporations and where the normal tax is paid by the corporation, and all other income where the normal tax and surtax is paid by the taxpayer. The manner in which the proportions are worked out need not be explained. The appellant claims he is entitled to a deduction for the full amount of income received from the tax free bonds. In the method of apportionment adopted, a deduction of $314.18 is made from the full amount of this income. This is clearly wrong. The appellant is by statute entitled to the full deduction, and any attempt to cut it down in this way is manifestly against the explicit provisions of the statute.

It was agreed upon the hearing of the appeal, that I need only decide the three foregoing points. If the remaining points raised in the appeal cannot be agreed upon between the parties, the right is reserved to refer the same to me later.

There will be no order as to costs.

Judgment accordingly.

(1) [1910] 47 Sc. L.R. 816 at p. 819.
(2) [1920] 1 K.B. 598, Rowlet J. at p. 603.
(3) [1917] 242 U.S. 503, at p. 516, par. 2.