CLINTON W. ROENISCH.....APPELLANT;

VS.

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

1930
Sept. 22.
Oct. 30.

Revenue—Income—Sec. 6 Income War Tax Act—British Columbia Taxation Act, 1922—Exemptions

Held, that the amount of Income Tax paid by a taxpayer to the Province of British Columbia, under the British Columbia Taxation Act, 1922 (R.S., B.C., Ch. 254) is not a disbursement or expense "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income," and such amount cannot be legally deducted from the total income of the taxpayer in arriving at the income which is taxable by the Dominion Government under the Income War Tax Act, 1917, and that the appeal herein should be dismissed.

(2) That exemption from taxation is a case of exception which must be strictly construed.

APPEAL by the appellant from the decision of the Minister of National Revenue refusing to allow the appellant to deduct the sum of $459.40 from the total income returned, which sum was paid on income to the British Columbia Government under the British Columbia Taxation Act. The appeal was heard before the Honourable Mr. Justice Audette, at Vancouver.

No oral evidence was adduced, but the appeal was heard upon an agreed statement of the facts, which is given verbatim in the reasons for judgment printed below.

J. K. MacRae, K.C., for appellant, argued: That by Sec. 6, S.S. (*a*) of the Income War Tax Act (Dominion) a taxpayer was permitted to deduct from his total profits or gains all disbursements or expenses "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income." That under the British Columbia

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Taxation Act, 1922, the appellant had been obliged to pay the British Columbia Government a sum of $459.40 as a tax on his income, and that by section 44 of said Act, in order to ascertain the income taxable under said Act, he was allowed to deduct any amount paid to the Dominion Government for income tax on the same income. That in ascertaining the amount of income taxable by the Dominion he should be permitted to deduct the amount paid to the Provincial Government as aforesaid, under the provisions of subsection *a* of section 6, inasmuch as it was necessary for him to pay this amount to carry on business and therefore earn the income. The following authorities were cited by Mr. MacRae in support of his contentions:—

Wallace Realty Co. Limited v. *City of Ottawa* (1930) S.C.R. 387; *Lawless* v. *Sullivan* (1881) 6 A.C. 373; *Stevens* v. *Durban-Roodepoort Gold Mining Co.* 5 T.C. 402; *In re Guarantee Construction Coy's. Appeal,* 2 U.S., B.T.A.R. 1150; *British Insulated & Helsby Cables* v. *Atherton* (1926) A.C. 205; *Smith* v. *Lion Brewery Co.* (1911) A.C. 150; *Ushers Wiltshire Brewery Co.* v. *Bruce* (1915) A.C. 433; *Lothian Chemical Co.* v. *Rogers,* 11 T.C. 508; *Gresham Life Assur. Co.* v. *Styles* (1892) A.C. 309.

C. F. Elliott, K.C., for respondent, argued *contra.*

That Income Tax is a personal tax, and before any income tax can be imposed the income must first have been earned. The above sum was not laid out for the purpose of earning the profit or gain,—That income tax paid to any jurisdiction is not an expense within the meaning of sec. 6, ss. (*a*). The application of profits though compulsory does not reduce income for Dominion Income tax purposes. The following authorities were cited:—

Colville v. *Com. of Inland Rev.* 8 T.C. 442; *Jackson's Trustees* v. *Lord Advocate* 10 T.C. 460; *Ashton Gas Co.* v. *Attorney-General* 1906 A.C. 10; *Dowell's Income Tax* 9 Ed., p. 595; *Jones* v. *Wright* 13 T.C. 221; *Dillon* v. *Corp. of Haverford-West* 3 T.C. 31, at p. 36; *Dublin Corp.* v. *McAdam* 2 T.C. 387, at p. 400; *Attorney-General* v. *Scott* 1 T.C., 55; *Mersey Docks & Harbour Board* v. *Lucas* 1 T.C. 386, at p. 409; *Hudson's Bay Co.* v. *Stevens* 5 T.C. 424, at pp. 436-7.

The facts are admitted and said admissions are set out in the Reasons for Judgment.

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AUDETTE J., now (October 30, 1930), delivered judgment.

This is an appeal, under the provisions of The Income War Tax Act, 1917, and Amendments thereto, from the assessment of the appellant, for the year 1927, upon the ground of the respondent's refusal to allow a deduction of $459.40, representing the amount of the Income Tax, paid by the appellant, to the province of British Columbia, on the net income arising therein for and in respect of the 1927 Provincial Income Tax Assessment.

Under the British Columbia Taxation Act, 1922, Ch. 254, R.S.B.C., provision is made for taxing the income of the individual; but by section 44 thereof, for the purpose of ascertaining such income, a deduction is allowed of all income tax payable to the Crown in the right of the Dominion. There is no such corresponding text in the Dominion Income War Tax Act respecting Provincial Income Tax and the appellant under the circumstances of the case seeks a similar relief or remedy under section 6*a* of the said Act.

There is, indeed, nothing to prevent either one legislature, or two legislatures, if they have jurisdiction over the subject matter, imposing different taxes upon the same subject matter. *Stevens* v. *The Durban Roodepoort Mining Co. Ltd.* (1); *Colville* v. *Commissioner of Inland Revenue* (2).

The parties filed, at trial, the following admission viz:

STATEMENT OF FACTS AGREED UPON BETWEEN COUNSEL

1. That the Appellant was in 1927 and is now presently resident in Canada.

2. That the Appellant filed a Return of Income on the prescribed form for 1927 with the Dominion Government. That the income of the Appellant was determined to be in the sum of $19,905.78 for the said taxation period, and that Notice of Assessment was issued on the 22nd March, 1929, assessing the Appellant in respect of said income in the sum of $1,019.94.

3. That in assessing income the Minister disallowed as a deduction the sum of $459.40, being amount of Income Tax paid to the Province of British Columbia on the net income arising therein for and in respect of 1927 Provincial Income Tax Assessment.

4. That the Appellant had an interest in a partnership—the partnership fiscal period ending the 30th June, 1927.

5. That in respect of the said fiscal period of the partnership, the income derived from the partnership was assessed by the Province in the said sum and $459.40 was paid on the 6th December, 1927, by the Appellant to the Provincial Government . . .

(1) (1909) 5 T.C. 402, at p. 407. (2) (1923) 8 T.C. 442.

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Now subsection (*a*) of section 6 of the Dominion Income War Tax Act, upon which the appellant rests his claim in seeking to obtain this deduction of $459.40, reads as follows:

> 6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of:
>
> (*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income.

The appellant contends that this provincial income tax was paid to earn the profits and gains shewn in his total income return filed under the provisions of section 33 of the Dominion Act.

These statutory provisions of section 6, like those in the English Act, do not affirmatively state what disbursements and expenses may be deducted and there is in words no deductions allowed at all unless indirectly. They merely furnish negative information, that is, they direct that after having ascertained the amount of the profits and gains there may be deducted therefrom only such disbursements or expenses as were *wholly, exclusively* and *necessarily* laid out or expended for the purpose of *earning the income.*

However, the taxation is the rule and the exemption is a case of exception which must be strictly construed. *Wylie* v. *Montreal* (1); *Endlich, Interpretation of Statutes,* No. 356; *Cooley on Taxation,* 146; *Ville de Montréal-Nord* v. *Commission Métropolitaine de Montréal* (2); *O'Reilly* v. *Minister of National Revenue* (3); *Sanders, On Income Tax in England,* 83, 85 and 86.

It is self-evident that the amount of the income tax paid to the province is not an expense for the purpose of earning the income, within the meaning of 6*a*. When such payment of taxes is made to the province, it is not so made to earn the income, it is paid because there is an income showing gain and profit. The word profit is to be understood in its natural and proper sense, in the sense in which no commercial man would misunderstand it. And when a person has ascertained what his profits are, the use or destination of these profits is immaterial. *Gresham Life Assurance Co.* v. *Styles* (4); *Alianza Co. Ltd.* v. *Bell* (5).

(1) (1885) 12 S.C.R. 384 at p. 386.
(2) (1927) Q.O.R. 43 K.B. 453.
(3) (1928) Ex. C.R. 62.
(4) (1892) A.C. 309.
(5) (1906) A.C. 18.

As was said, in the case of *The Crown* v. *D. and W. Murray Ltd.* (1), the remarks made by Sir Henry James, when Attorney-General, in the case of *Last* v. *London Assurance Corporation* (2), apply to the present case. He says:

> The test is this—if there is an expenditure which would be made in any case, from which profits may accrue, the expenditure may be deducted; but an expenditure which will not be incurred unless there is a profit is not an expenditure in order to earn a profit.

This provincial income tax is not an expenditure which was necessary to earn a profit. Profits must be shewn before the tax is imposed. There is no tax if there is no assessable profits. *Wallace Realty* v. *City of Ottawa* (3); *Lawless* v. *Sullivan* (4). The profit of a trade is the surplus by which the receipts from the trade exceed the expenditure necessary for the purpose of earning those receipts. This tax is not an expenditure for the purpose of earning income; but it is an expenditure which is made necessary by statute, and chargeable upon and out of profits earned without it. The profits must be made before the tax can come into existence and the tax is the Crown's share of the profits which have been made.

In the ordinary sense and meaning, "profit" would be what could be properly described as "profit of the concern" and that surely would be all the net proceeds of the concern after deducting the necessary outgoings without which those proceeds could not be earned or received. *Mersey Dock and Harbour Board* v. *Lucas* (5).

In the case of *Harris, Scarfe Ltd.* v. *Commissioner of Taxation* (6), it was held

> that the income tax, or tax paid under the Dividend Duties Act, 1902, is not expenditure for the purpose of earning receipts. The profits must be made before the tax can come into existence and the tax is the Crown's share of the profit which has been made.

That view and the reasons supporting it seem to have been taken from the case of *The Crown* v. *D. and W. Murray Ltd.* (7), which also considered and determined, in like manner, this question of "an expenditure necessary to earn profits."

And as was said, in a manner most apposite to the present case, by the Earl of Halsbury, Lord Chancellor, in the

(1) (1909) 11 W.A. Law Reports 92, at p. 95.
(2) (1885) 10 A.C. 438.
(3) (1930) S.C.R. 387.
(4) (1881) 6 A.C. 373.
(5) (1883) 2 T.C. 25, at p. 28.
(6) (1923) 26 W.A.L.R. 96.
(7) (1909) 11 W.A.L.R. 92.

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case of *Ashton Gas Company* v. *Attorney-General et al* (1):

> The fallacy has been in arguing as if you can deduct from the income tax which you have got to pay something which alters what is the real nature of the profit. Now the profit upon which the income tax is charged is what is left after you have paid all the necessary expenses to earn that profit. Profit is a plain English word; that is what is charged with income tax. But if you confound what is necessary expenditure to earn that profit with the income tax, which is part of the profit itself, one can understand how you get into the confusion which has induced the learned counsel at such considerable length to point out that this is not a charge upon the profit at all. The answer is that it is. The income tax is a charge upon the profits; the thing which is taxed is the profit that is made, and you must ascertain what is the profit that is made before you deduct the tax—you have no right to deduct the income tax before you ascertain what the profit is. I cannot understand how you can make the income tax part of the expenditure.

And further on, after citing the case of *Last* v. *London Assurance Corporation* (2), the Lord Chancellor adds. "You must ascertain first the income, you must ascertain what the income tax is levied upon; that is to say, the profit of the undertaking is first to be ascertained, and when you have found out what the profit of the undertaking is, you have then to tax that as profit. Really the whole question comes back to the definition of the word 'profits.' When once you have defined what the word 'profits' means, it is perfectly clear what the result of the case must be."

The position is indeed quite different under the federal and the provincial tax Acts, because there is a text, a provision, in the provincial statute allowing a deduction of this kind; but there is no similar provision in the federal tax Act. All deductions and exemptions are specifically mentioned in the latter Act and no such deduction or exemption as those claimed in this case are therein mentioned.

I have therefore come to the conclusion, relying on the authorities above mentioned and upon what I think the proper construction and interpretation of the federal Act, that the amount of provincial income tax is not an expenditure for the purpose of earning the income and should not be deducted in arriving at the amount of the tax payable under the federal Act.

The appeal is dismissed with costs.

Judgment accordingly.

(1) (1906) A.C. 10, at p. 12.

(2) (1885) 10 App. Cas. 438, 445.