THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

1953

May 25

June 27

AND

79 WELLINGTON WEST LIMITED ... RESPONDENT.

Revenue—Income Tax—The Income War Tax Act, S. of C. 1948, c. 52, ss. 11(1)(a), 20 and 127(5)—Capital cost of property—Depreciation —Persons deemed not "to deal with each other at arms length"—An Act to Amend the Income Tax Act and the Income War Tax Act, S. of C. 1949, 2nd Sess. c. 25, ss. 8(1)(a)(i), 8(3)(a)(b)(i)(ii)—Depreciable property, whether acquired before or after January 1, 1949—Property transactions prior to 1949 between persons not dealing at arms length—Interpretation of words "one person"—The Interpretation Act, R.S.C. 1927, c. 1, ss. 21(2) and 31(j)—Appeal from Income Tax Appeal Board allowed.

In 1945 two brothers purchased a property at 79 Wellington St. W., Toronto, and sold it later in the year for a greater price than they had paid for it to the respondent company in which they were the controlling shareholders. As a result of an appeal to the Income Tax Appeal Board from an assessment for the taxation year 1946 the respondent was allowed depreciation under the Income War Tax Act for that year and, also, for the years 1947 and 1948, on the basis of the capital cost of the property to the company. On January 1, 1949, the Income Tax Act came into effect, replacing the Income War Tax Act. Because of its entirely new provisions as to the deductibility of depreciation it was necessary to enact certain transitional provisions which are found in Chap. 25, S. of C. 1949, 2nd Sess, an Act to Amend the Income Tax Act and the Income War Tax Act. In its returns for the taxation years 1949 and 1950 the respondent claimed under s. 8(1) of that Act depreciation on the same basis as that allowed in the three previous years. The Minister contending that respondent came within the provisions of s. 8(3) (which applies only to property transactions prior to 1949 between persons not dealing at arms length) assessed the company on the basis of the actual cost of the property to the two original owners—the two brothers. An appeal from the assessment was taken to the Income Tax Appeal Board which held that s. 8(3) of that Act was inapplicable to the case as the property had belonged to two original owners and not to *one person*. The Minister appealed from this decision.

Held: That the facts of the case bring the parties to that transaction within the provisions of s. 127(5) of the Income Tax Act and, therefore, they must be deemed not to have dealt with each other at arms length.

2. That the word "one" in s. 8(3) of C. 25, S. of C. 1949, 2nd Sess. is not so clear and unambiguous that it must necessarily be interpreted as a numeral. When read in its context it can and does have another possible meaning, namely, that it is used in its partitive sense as the antithesis of another. The nature of the enactment required that reference be made to two distinct classes: the original owner who was the "one person" and a subsequent owner—taxpayer—who was the other.

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3. That the intention of Parliament is better effectuated by giving to the words "une personne" in the French version, the meaning "a person" rather than by construing the words "one person" in the English version as one person only. Such a construction disposes of all cases involving non-arms-length transactions and place all taxpayers whose property has been at the same time transferred on other than an arms length transaction in precisely the same position in determining their capital costs. That must have been the intention of Parliament as disclosed in the legislation itself.

APPEAL from a decision of the Income Tax Appeal Board.

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

George B. Bagwell, Q.C. and T. Z. Boles for appellant.

G. W. Mason, Q.C. for respondent.

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

CAMERON J. now (June 27, 1953) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board dated July 25, 1952 (6 T.A.B.C. 403), by which the Board allowed the appeals of the respondent herein from assessments to income tax for the taxation years 1949 and 1950. The dispute has to do with certain capital cost allowances claimed by the respondent for those years.

The facts are not in dispute. In April, 1945, two brothers named Greisman purchased the lands and buildings at 79 Wellington St. W., Toronto; on June 6 of the same year the respondent company was incorporated and on the same date the brothers sold the property to it for a consideration greatly in excess of what they had paid for it. It is admitted that immediately upon incorporation and at all times thereafter relevant to this appeal, the said brothers were the controlling shareholders of the respondent company, practically all its shares having been issued to them as part consideration for the transfer of the said lands and premises. As apportioned by the respondent, the cost to it of the building (apart from the land) was $155,514.00, and based upon the same method of apportionment, the capital cost of the building to the two brothers was $100,636.85.

For its taxation year 1946 the respondent claimed depreciation on the building on the basis of the capital cost to it. The Minister, however, assessed the respondent on the basis of the capital cost to the two brothers. An appeal was taken to the Income Tax Appeal Board, and by its decision (2 T.A.B.C. 351) the Board, being of the opinion that the first proviso in s. 6(1)(*n*) of the Income War Tax Act did not apply to the facts of that case, found that the respondent was entitled to have any depreciation which might be allowed based upon the actual cost of the building to it. In the result the respondent claimed and was allowed depreciation under the Income War Tax Act for the years 1946, 1947 and 1948, on the basis of the capital cost to it of the said building.

On January 1, 1949, the Income Tax Act came into effect, replacing the Income War Tax Act. It contained entirely new provisions as to the deductibility of depreciation from the income of a taxpayer, basing it on such part of or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation (s. 11(1)(*a*)). The new provisions regarding depreciation were referable to all depreciable property, whether acquired before or after January 1, 1949, and in order that the capital cost of such property as had been previously acquired should be ascertained as of that date, it was necessary to enact certain transitional provisions relating thereto. They are found in s. 8 of c. 25, Statutes of Canada, 1949, 2nd Sess., an Act to Amend the Income Tax Act and the Income War Tax Act.

Subsections (1) and (3) thereof are relevant to this issue and in the English version are in part as follows:

8. (1) Where a taxpayer has acquired depreciable property before the commencement of the 1949 taxation year, the following rules are applicable for the purpose of section twenty of The Income Tax Act and regulations made under paragraph (*a*) of subsection one of section eleven of The Income Tax Act:

(*a*) except in a case to which paragraph (*b*) applies, all such property shall be deemed to have been acquired at the commencement of that year at a capital cost equal to

(i) the actual capital cost (or the capital cost as it is deemed to be by subsection (3) or (4)) of such of the said property as the taxpayer had at the commencement of that year,

minus the aggregate of . . .

(3) Where property did belong to one person (hereinafter referred to as the original owner) and has by one or more transactions prior to 1949 between persons not dealing at arms length become vested in a taxpayer

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who had it at the commencement of the 1949 taxation year (or who acquired it during his 1949 taxation year from a person whose 1948 taxation year had not expired at the time of the acquisition), the capital cost of the property to the taxpayer shall, for the purpose of subparagraph (i) of paragraph (*a*) of subsection one, be deemed to be the lesser of the actual capital cost of the property to the taxpayer or the amount by which

(*a*) the capital cost of the property to the original owner exceeds

(*b*) the aggregate of

(i) the total amount of depreciation for the property that, since the commencement of 1917, has been or should have been taken into account in accordance with the practice of the Department of National Revenue, in ascertaining the income of the original owner and all intervening owners for the purpose of the Income War Tax Act, or in ascertaining a loss for a year when there was no income under that Act, and

(ii) any accumulated depreciation reserves that the original owner or an intervening owner had for the property at the commencement of 1917 and that were recognized by the Minister for the purpose of the Income War Tax Act.

In making its return for the taxation year 1949, the respondent proceeded under s. 8(1) of that Act, computing its capital costs as the actual cost to it of the building in question, less the depreciation claimed and allowed for the taxation years 1946, 1947, 1948, and deducted from its income the rate thereon provided for in Class 3. In its return for the year 1950, the same procedure was followed, due allowance being made for the depreciation claimed in 1949.

In each case, however, the appellant herein, being of the opinion that the respondent came within the provisions of s. 8(3), assessed the respondent on the basis of the actual capital cost of the building to the two original owners—the Greisman brothers—less the actual depreciation previously allowed the respondent.

For the respondent, it is contended that s. 8(3) has here no application. The first submission is that it has not been proven that the parties to the sale and purchase in 1945 were persons not dealing at arms length. In my opinion, the admitted facts which I have set out above clearly bring the parties to that transaction within the provisions of s. 127(5) of the Income Tax Act, and they must therefore be deemed not to have dealt with each other at arms length.

The main problem, however, is the interpretation of the words "one person" in the opening words of ss. (3): Where property did belong to one person (hereinafter referred to

as the original owner) and has by one or more transactions prior to 1949 between persons not dealing at arms length become vested in a taxpayer. . .

Mr. Fisher of the Income Tax Appeal Board held that the subsection was inapplicable to the instant case as the property in question had belonged to two original owners—the Greisman brothers—and not to *one person.* He held that the words "one person" should be held to mean "one individual," "one corporation" or "one owner," but that they could not be referable to "two or more persons," "two or more corporations," or "two or more individuals." In so holding, he adhered to his dissenting opinion in *Storrar Dunbrik Ltd. v.* M.N.R. (1), in which precisely the same point arose, and in which the other two members of the Board reached the conclusion for the reasons therein given that:

> A careful perusal of the material words leads me to believe that the words 'one person' in the first line were intended to be read in contrast to, or as distinguishable from, the words 'a taxpayer' in the fourth line and as though the subsection read:
>
> 'When property did *belong to one person* (hereinafter referred to as the original owner) and has by one or more transactions prior to 1949 between persons not dealing at arms length become vested in *another person* . . .'
>
> This conclusion lends sense to the wording found in the subsection and, at the same time, avoids an unreasonable interpretation of Parliament's intention.

In the *Storrar Dunbrik* case, Mr. Fisher was of the opinion that the words "one person" were plain and unambiguous, that a taxing Act must be construed with strictness, that in a taxing Act it is improper to assume any governing purpose of the Act, and he therefore reached the conclusion that as the original owner in that case consisted of more than one person, the appeal should be allowed.

Before me counsel for the Minister submitted that 'one' is not here used as a specific numeral, but in its partitive sense as the antithesis of another later referred to—in this case, the taxpayer; that it is equivalent to, and in view of the context should be read as, the indefinite article 'a'; and that therefore, by s. 31(*j*) of the Interpretation Act, it includes the plural.

(1) 6 T.A.B.C. 163.

Counsel for the respondent frankly admits that if the expression "a person" had been used in s. 8(3) of c. 25, Statutes of Canada, 1949, 2nd Sess., the appeal must be allowed. That would necessarily follow in view of the provisions of s. 31(*j*) of the Interpretation Act, by which in every Act, unless the contrary intention appears, words in the singular include the plural. He submits, however, that the word 'one', when given its plain and ordinary meaning, refers to the specific numeral 'one'. The argument is that if the expression were "two persons," the subsection would be applicable only to cases in which "the original owner" comprised two persons. Similarly, he says that when "one person" is used, it cannot refer to two or more. Therefore it is said as the original owner here was comprised of two persons, the provisions of s. 8(3) have no application to this case. He contends, also, that s. 31(*j*) of the Interpretation Act cannot be invoked, the word 'one' being so specific and limiting, that the context requires it to be read as excluding the plural. Finally, he points out that by construing 'one' in this manner, the provisions of the subsection are not rendered abortive but would merely be limited in their application to those cases in which the original owner was "one person."

It may be noted here that by s. 32 of c. 29, Statutes of Canada, 1952, the expression "one person" was deleted and the expression "a person" substituted therefor. It is as follows:

> 32. For greater certainty, it is hereby declared that paragraph (*j*) of subsection one of section thirty-one of the *Interpretation Act* is applicable to the interpretation of the expression 'one person' where it appears in the part of subsection two of section twenty of The Income Tax Act preceding paragraph (*a*) thereof and where it appears in the part of subsection three of section eight of chapter twenty-five of the statutes of 1949 (Second Session) preceding paragraph (*a*) thereof; and the said expression is deleted and the expression 'a person' is substituted therefor; but nothing in this section is applicable in respect of any matter in respect of which an appeal is pending before the Income Tax Appeal Board or before a court when this Act comes into force.

Admittedly, the amended wording is not applicable to this case, this appeal being then before the Income Tax Appeal Board. Counsel for the respondent submits, however, that that amendment was a recognition by Parliament that "one person" was not equivalent to "a person" and that therefore it was necessary to change the language to support the construction of the section now put forward by

the appellant. In my opinion, however, the provisions of s. 21(2) of the Interpretation Act, R.S.C. 1927, c. 1, negative any such inference, that section being as follows:

> 21. (2) The amendment of any Act shall not be deemed to be or to involve a declaration that the law under such Act was, or was considered by Parliament to have been, different from the law as it has become under such Act as so amended.

In my view, the terms of the amendment or the fact that the amendment was made can have no bearing on the question which I have to determine, so far as this case is concerned.

With respect, I am unable to agree that the word 'one' is so clear and unambiguous that it must necessarily be interpreted as a numeral. When read in its context it seems to me that it can and does have another possible meaning, namely, that it is used in its partitive sense as the antithesis of another. The nature of the enactment required that reference be made to two distinct classes, namely, the original owner who was the "one person" and a subsequent owner-taxpayer, who was the other.

But even if there be any doubt that the word 'one' is ambiguous in the English version, there can be no doubt whatever that the corresponding expression in the French version is ambiguous. It is clear that a statute in the English version must be read with the statute in the French version (*Composers, Authors and Publishers Assoc. Ltd. v. Western Fair Assoc.* (1); *The King v. Dubois* (2)).

The French version of the first part of s. 8(3) is in part as follows:

> 8. (3) Lorsque des biens ont effectivement appartenu à une personne (ci-après appelée le proprietaire initial) et qu'à la suite d'une ou plusieurs opérations survenues antérieurement à mil neuf cent quarante-neuf, entre personnes ne traitant pas à distance, ils sont dévolus à un contribuable qui le savait au commencement de l'année d'imposition mil neuf cent quarante-neuf (ou qui les a acquis pendant son année d'imposition mil neuf cent quarante-neuf, d'une personne dont l'année d'imposition mil neuf cent quarante-huit n'était pas expirée au moment de l'acquisition), . . .

It will be noted that in the first line the phrase "à une personne" is used, the corresponding words in the English version being "to one person"; and that in the eighth line the phrase "d'une personne" is used, the corresponding words in the English version being "from a person." The

(1) [1951] S.C.R. 596 at 598. (2) [1935] S.C.R. 378 at 402.

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French word 'un' (and its feminine 'une') is sometimes used as a numeral, meaning in English 'one'; it is also used as an indefinite article, meaning in English 'a' or 'an' (Harraps Standard French and English Dictionary, 1945 Ed., Part One, p. 869). I am of the opinion that the phrase "à une personne", as here used would normally be translated into English as "to a person." It is possible, however, to translate it either as "to a person" or "to one person." In the French version of the subsection the phrase is therefore ambiguous, being capable of more than one interpretation.

It is well settled that when an ambiguous word is used in the statute it is to be interpreted in accordance with the context and object of the statute (Halsbury, 2nd Ed., Vol. 31, p. 481).

In Maxwell on Interpretation of Statutes, 9th Ed., p. 20, the principle is thus stated:

> Where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system. (*Shannon Realties v. St. Michel,* (1924) A.C. 185 at 192).

Reference may also be made to *Caledonian Ry. v. North British Ry.* (1) where Lord Selborne said: The mere literal construction of a statute ought not to prevail if it is opposed to the intention of the Legislature *as apparent by the statute* and if the words are sufficiently flexible to admit of some other construction by which the intention can be better effectuated. (Italics are mine.)

What then is the intention of the Legislature as disclosed by the statute itself? The overall intention of the transitional provisions was to establish the capital cost of such property as had been acquired before the new Act came into effect on January 1, 1949. For the purpose of establishing the values required to implement s. 20 and s. 11(1)(*a*) of the Act, para. (*a*) of this s. 8(1) sets out the formula for the determination of the capital cost of depreciable property then on hand. Subject to one exception, it provided that all such property should be deemed to have been acquired at January 1, 1949, at a capital cost equal to its actual capital cost (less the depreciation stated) or the capital cost as it is deemed to be by subsection (3) or (4). Subsection (4) is not here relevant.

(1) (1881) 6 A.C. 114 at 122.

Subsection (3) is designed specifically to provide a similar formula, but applicable only to a special class, namely, that in which there had been at some stage a change in ownership of the depreciable property and in which the vendor and purchaser were not dealing at arms length. In such a case the capital cost of the property to the taxpayer was to be deemed to be the lesser of its actual cost to him, or the amount by which the capital cost to the original owner exceeded the aggregate of the deductions for depreciation mentioned in ss. (3)(*b*)(i) and (ii). Its purpose, I think, is to prevent a taxpayer for tax purposes in such a case from setting up a capital cost which exceeds the net book value of the asset as such book value would have existed had the asset been retained by the original owner and depreciated in accordance with standard depreciation practices.

Careful perusal of s.s. (3) leads me to believe that Parliament was here dealing with the entire problem of non-arms-length transactions in relation to depreciation. It laid down the general principle that such transactions were to be dealt with in a manner differing from that accorded to other transactions which were between persons dealing at arms length. Parliament must have known that there are cases in which "the original owner" consisted of one person and others in which "the original owner" comprised two or more persons. In this subsection the primary object was to place in a special category those cases in which the depreciable property had changed hands and in which the parties were not dealing at arms length in order that the capital cost should be based on a fair market value, such as would be the case in a transaction between persons dealing at arms length. The emphasis is on the nature of the transaction—a transfer of depreciable property from one person to another in circumstances involving a non-arms-length transaction—and not on the number of parties participating in the sale.

It is obvious that if "one person" be interpreted as meaning "one person only," the result would be that when the original owner comprised two or more persons, the taxpayer would be exempt from the limitations provided for in s. 8(3) and placed at a very distinct advantage in relation to similar cases involving a non-arms-length transaction in which the original owner was but a single person.

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By which of the two interpretations advanced by the appellant and respondent respectively can the intention of the Legislature be better effectuated? I can find nothing in the transitional provisions which would suggest that Parliament was not dealing with *all* non-arms-length transactions as a whole, except for the meaning which respondent's counsel urges should be placed on the word 'one' in the English version. I know of no reason—and counsel did not suggest any—why any distinction should be made between cases in which the original owner was one person and others in which the original owner comprised two or more persons. The Courts in dealing with taxing Acts will not presume in favour of any special privilege of exemption from taxation. In Craies on Statute Law, 5th Ed., p. 109, reference is made to *Hogg v. Parochial Board of Auchtermuchty* (1), where Lord Young said:

I think it proper to say that, *in dubio,* I should deem it the duty of the Court to reject any construction of a modern statute which implied the extension of a class privilege of exemption from taxation, provided the language reasonably admitted of another interpretation.

For these reasons I have reached the conclusion that the intention of Parliament, as I conceive it to be, is better effectuated by giving to the words "une personne" in the French version, the meaning "a person," rather than by construing the words "one person" in the English version as one person only. Such a construction disposes of all cases involving non-arms-length transactions and places all taxpayers whose property has been at the same time transferred on other than an arms length transaction in precisely the same position in determining their capital costs. That I believe to have been the intention of Parliament as disclosed in the legislation itself.

The appeal of the Minister will therefore be allowed, with costs, the decision of the Board set aside, and the assessments made upon the respondent affirmed.

Judgment accordingly.

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(1) (1880) 7 Rettie (Sc) 986.