

BETWEEN:

THE MINISTER OF NATIONAL
REVENUE

APPELLANT;

Toronto
1965
Dec. 6
Dec. 16

AND

MANITOU-BARVUE MINES LTD.RESPONDENT.

Income tax—Revenue—Income Tax Act, R.S.C. 1952, c. 148, ss. 24(1), 106(1)(b), 108(7), 109(5), 123(8)—Non-resident tax—Interest payable to non-residents in terms of U.S. Currency but payable in shares of stock—Security in satisfaction of income debt—Liability of payer to deduct tax.

The taxpayer's debenture indebtedness "payable in lawful money of the United States" amounted to \$1,070,000 on which interest at 5% was payable annually.

It was provided however that this interest, while calculated in terms of U.S. currency at the prevailing rate of exchange, was to be paid in treasury shares, to which the prevailing market value was attributed.

Tax was not deducted by the taxpayer on the ground that the interest was exempted by s. 106(1)(b)(iii) as interest payable in a currency other than Canadian.

The Minister, on the other hand, relying on ss. 24(1) and 108(7) securities in satisfaction of income debt and s. 106(1)(b) assessed on the basis that the exception in subparagraph (iii) thereof did not apply because the interest was not payable in currency but in shares.

The Minister therefore assessed the taxpayer as liable for the tax under s. 109(5) for failure to withhold from payments to non-residents.

Held: That the common shares issued in satisfaction of the interest were "securities" within the meaning of s. 24(1).

2. That the issuance of shares in lieu of payment of interest, pursuant to the express words of the deed of trust and mortgage were not "interest payable in a currency other than Canadian" within the meaning of s. 106(1)(b)(iii).

3. That the Minister's appeal be allowed.

APPEAL from a decision of the Tax Appeal Board.

M. A. Mogan and John E. Sheppard for appellant.

John G. McDonald, Q.C. and M. L. O'Brien for respondent.

GIBSON J.:—This is an appeal from the decision of the Tax Appeal Board dated December 23, 1964 in respect to the income tax assessments of the Respondent for its 1960, 1961 and 1962 taxation years.

The Appellant claims that the Respondent is liable to pay as tax the amounts of \$8,642.56, \$8,642.07 and \$8,990.30 respectively in the Respondent's 1960, 1961 and

1965
 {
 MINISTER OF
 NATIONAL
 REVENUE
 v.
 MANITOU-
 BARVUE
 MINES
 LTD.
 —
 Gibson J.
 —

1962 taxation years, being the amounts the Appellant claims the Respondent should have deducted or withheld pursuant to the provisions of ss. 109(5) and 123(8) of the *Income Tax Act* from amounts paid or credited or deemed to have been paid or credited to non-resident persons.

The circumstances giving rise to the issue in this appeal concerns the issuing of common shares from the treasury of the Respondent to non-resident persons during each of the said years in satisfaction of interest payable on 5% convertible debentures issued by the Respondent under the terms of a deed of trust and mortgage dated as of December 31, 1958 and made between the Respondent and National Trust Company Limited (Trustee).

The details of the issue of such common shares to non-resident persons in each of the said taxation years are as follows:

in 1960 taxation year—84,981 common shares having a value of \$57,617.11

in 1961 taxation year—200,745 common shares having a value of \$57,613.81

in 1962 taxation year—237,368 common shares having a value of \$59,935.32

By the terms of the said deed of trust and mortgage the said 5% convertible debentures which were issued provided for:

- (a) \$2,830,000 of such debentures to be payable in lawful money of Canada; and
- (b) \$1,070,000 of such debentures to be payable in lawful money of the United States.

It is in respect of the payment by way of issuing the said common shares in lieu of interest on these debentures payable in lawful money of the United States during the said taxation years that this appeal is concerned.

The specific provision pursuant to which these said common shares were issued in lieu of interest payable during the said taxation years according to the debentures reads as follows:

Interest at the said rate both before and after maturity and before and after default and interest on overdue interest shall be payable annually on the thirty-first day of December in each year; provided that until all of the Bonds have been purchased or redeemed by the Company interest on the Debentures shall be payable only in fully paid and non-assessable shares of the capital stock of the Company calculated to the nearest full share at a

price per share being the average of the prices of the last trade for said shares on the Toronto Stock Exchange on each of the ten (10) trading days preceding the respective interest payment date; . . .

The issue in this case is what is the true meaning of s. 106(1)(b)(iii) in Part III of the *Income Tax Act* and s. 24(1) in Part I of the *Income Tax Act* in relation to the facts of this case.

Section 24(1) of the *Income Tax Act* is imported into Part III of the Act by reason of s. 108(7).

These said sections of the Act read as follows:

106 (1) Tax. Every non-resident person shall pay an income tax of 15% on every amount that a person resident in Canada pays or credits, or is deemed by Part I to pay or credit, to him as, on account or in lieu of payment of, or in satisfaction of,

(b) Interest—interest except

(iii) interest payable in a currency other than Canadian currency to a person with whom the payer is dealing at arm's length, on

24. Securities in satisfaction of income debt.

(1) Where a person has received a security or other right or a certificate of indebtedness or other evidence of indebtedness wholly or partially as or in lieu of payment of or in satisfaction of an interest, dividend or other debt that was then payable and the amount of which would be included in computing his income if it had been paid, the value of the security, right or indebtedness or the applicable portion thereof shall, notwithstanding the form or legal effect of the transaction, be included in computing his income for the taxation year in which it was received; and a payment in redemption of the security, satisfaction of the right or discharge of the indebtedness shall not be included in computing the recipient's income

108 [Application of tax]

(7) Securities. Where, if section 24 were applicable in computing a non-resident person's income, that section would require an amount to be included in computing his income, that amount shall, for the purpose of this Part, be deemed to have been, at the time he received the security, right, certificate or other evidence of indebtedness, paid to him on account of the debt in respect of which he received it.

It is common ground between the parties that this was an arm's length transaction.

In brief, the Appellant submits that the interest on the debenture certificates payable to these non-residents during these taxation years was not payable "in a currency other than Canadian currency" but rather was payable, as required by the trust agreement, and actually paid, only in fully paid and non-assessable shares of the capital stock of the Respondent (calculated to the nearest full share at a price per share being the average of the prices of the last trade for the said shares on the Toronto Stock Exchange on

1965

MINISTER OF
NATIONAL
REVENUE
v.
MANITOU-
BARVUE
MINES
LTD.

Gibson J.

1965

MINISTER OF
NATIONAL
REVENUE

v.
MANTOU-
BARVUE
MINES
LTD.

Gibson J.
—

each of the ten trading days preceding the respective interest payment date).

The Respondent submits that interest was payable and paid in United States currency, "a currency other than Canadian currency", within the meaning of s. 106(1)(b)(iii), and the fact that it was paid in stock instead of cash does not alter the conclusion that it was payable as first described. The Respondent submits that it could have been paid in anything in kind for example goods etc. and still qualify as aforesaid, and the fact that the directors were required pursuant to the trust agreement to make such payment in common shares does not derogate from the fact that it was in fact payable and paid "in a currency other than Canadian currency".

The Respondent also submits that s. 106(1)(b)(iii) is not an exempting provision but instead is an area carved out of the charging provision; and that in respect to s. 24(1) that the *ejusdem generis* rule should apply in interpreting it, and that in applying this rule it is submitted that "indebtedness" in that section refers to a liability and such common shares are not an indebtedness, and therefore the section has no application to the facts of the issuance of the said common shares above referred to. If it were otherwise, the Respondent submits, for example, that there would have been no necessity for enacting s. 105(c)(1a) of the Act.

The Appellant, on the other hand says that s. 24(1) should be read disjunctively.

I am of opinion, firstly, that the *ejusdem generis* rule does not apply in interpreting the meaning of s. 24(1) of the *Income Tax Act*, in that there is no genus. Instead four different things are referred to in the section, namely (1) "a security", (2) "other right", (3) "a certificate of indebtedness" and (4) "other evidence of indebtedness".

The common shares issued to non-residents in this matter in lieu of interest payable in lawful money of the United States, I am of opinion, were securities within the meaning of "a security" in said s. 24(1). The word "security" so used is capable of being construed either in its popular sense, which I do in this case, or as a word of art. I do so because there was no evidence adduced to establish that it was used as a word of art in this sub-section and

there is nothing in the sub-section, there is no interpretation clause in the Act, and there are no words elsewhere in the Act which establish it as a word of art.

Secondly, I am of opinion that this case falls to be decided upon the express words of the said deed of trust and mortgage above quoted. By these words it is provided that until the prior encumbrance is paid in full, the holders of these said 5% debentures payable in lawful money of the United States will be paid (as they have been paid in the relevant years, namely 1960, 1961 and 1962) in common shares in lieu of the payment of interest in lawful money of the United States and until these non-residents receive payment of interest in United States currency pursuant to their contractual rights as contained in the said deed of trust and mortgage and specifically as referred to above, they will not be receiving "interest payable in a currency other than Canadian currency" within the meaning of s. 106(1)(b) of the Act.

The appeal is allowed with costs.

1965
MINISTER OF
NATIONAL
REVENUE
v.
MANITOU-
BARVUE
MINES
LTD.
Gibson J.