
BETWEEN:

1936
 {
 June 25.

PORT CREDIT REALTY LIMITED . . . APPELLANT;

AND

1937
 {
 April 1.

THE MINISTER OF NATIONAL
 REVENUE } RESPONDENT.

Revenue—Income War Tax Act, R.S.C. 1927, c. 97, secs. 2 and 21—Personal corporation controlled by executors and trustees appointed by will of the principal shareholder continues to be a personal corporation after the death of such principal shareholder—"Individual"—"Person"—"Personal corporation"—Interpretation.

Appellant company, capitalized at 10,000 shares, was incorporated in the Province of Ontario for the purpose of holding for and on behalf of

(1) (1876) 3 Asp. N.S. 334. (2) (1880) 5 P.D. 192.

(3) *The Enchantress* (1860) 1 Lush. 93 at 96.

one, James Harris, resident in Ontario, his bonds and securities in corporations located outside of Ontario, he holding 9,995 shares in appellant company, the balance being held by the incorporators.

James Harris died January 1, 1929, and by his will, after providing for certain specific legacies, bequeathed the residue of his estate to the executors named therein upon certain trusts, to pay income therefrom to his wife and children and distribute the corpus to his children on certain conditions. After the death of James Harris, as well as in his lifetime, appellant had no assets other than the securities assigned to it by him and the dividends from these securities constitute the only income appellant receives; this income is immediately turned over to the estate which pays all expenses. Appellant company is controlled by the executors and trustees named in the will of James Harris.

Appellant from the date of incorporation and for five years after the death of James Harris, was assessed as a personal corporation for income tax. In 1935 appellant was assessed as an ordinary corporation, the assessment being confirmed by the Minister of National Revenue from which decision appellant appealed.

Held: That appellant company continued to be a personal corporation for income tax purposes after the death of James Harris.

APPEAL under the provisions of The Income War Tax Act from the decision of the Minister of National Revenue.

The appeal was heard before the Honourable Mr. Justice Angers, at Ottawa.

H. J. McLaughlin, K.C., for appellant.

W. S. Fisher for respondent.

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

ANGERS J., now (April 1, 1937) delivered the following judgment:

This is an appeal from an assessment by the Commissioner of Income Tax affirmed by the Minister of National Revenue, under sections 58 and following of the Income War Tax Act.

The appellant, Port Credit Realty Limited, is a body corporate and politic incorporated by letters patent issued in virtue of the Companies Act of the Province of Ontario on July 4, 1928; it was incorporated as a private company with a capital of 10,000 shares without any nominal or par value and with the power, among others, to buy, sell and deal and invest in, either as principal or agent, stocks, bonds, debentures, mortgages on real or personal property, notes, obligations and securities of all kinds.

The notice of assessment bearing date the 14th of November, 1935, is in respect of income for the year 1932.

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Port Credit Realty Limited was organized for the purpose of holding for and on behalf of one James Harris, in his lifetime of the City of Toronto, Province of Ontario, his bonds, shares and other securities in corporations located outside of the Province of Ontario.

The company was controlled by the said James Harris as long as he lived. Of the 10,000 shares outstanding he owned 9,995. The five remaining shares stood in the names of the incorporators.

James Harris died on January 1, 1929, leaving a will dated March 19, 1928, and a codicil which bears no precise date but appears to have been made sometime in 1928.

The testator, by his will, appointed his wife, his brothers (William Thomas and Joseph) and his friends James Stanley McLean and Robert James McLaughlin as executors and trustees. By his codicil James Harris stipulated that, in the event of Robert James McLaughlin predeceasing him, his son, Hugh Johnston McLaughlin, should replace his father as executor and trustee.

After declaring in his will that the proceeds of all policies of insurance on his life, which may be payable to his wife, shall be paid to his trustees subject to the following trusts, to wit: (a) to pay to his wife the sum of \$20,000; (b) to hold the balance in trust for his wife and children as provided for in the case of the residue of his estate, the testator gives and bequeaths the residue of his property to his executors and trustees upon certain trusts, particularly the following:

(e) To keep the residue of my estate invested and to distribute the income and the capital in the following manner, namely:—

(i) To set aside a fund, which, together with the proceeds of the insurance on my life payable to my trustees in trust for my wife and children, shall amount to Six Hundred Thousand Dollars, and to pay the income thereon to my wife for and during the term of her natural life, such income to be paid to her in monthly instalments, or otherwise as may be most convenient to her. Upon the death of my wife, such fund shall be divided among my children in the same manner as provided for in the case of the balance of the residue of my estate.

(ii) The balance of the residue of my estate shall be divided into as many equal shares as there may be children of mine living at the time of my decease, and children of mine who have predeceased me leaving issue or widow as the case may be, and such share shall be dealt with in the following manner:—

Share of a minor child: So much of the income as shall in their absolute discretion be considered advisable, my trustees and executors shall pay to the guardian of such infant for his or her maintenance,

support and education until he or she arrives at the full age of twenty-one years; the balance of the income to be added to the principal of such share;

Shares of daughters: The income on the share of each daughter of the full age of twenty-one years or when such daughter arrives at the full age of twenty-one years, shall be paid to her for and during the term of her natural life, and after her death, such share to be divided among her issue in such proportions as she may by will appoint, and subject to such terms as she may direct by will, and in default of such appointment to be divided equally among her issue, and the issue of any child or children of such daughter who may have died, per stirpes, the issue of any deceased child or children to take the share which would have gone to the parent if living.

Shares of sons: The income on the share of each son of the full age of twenty-one years, or after he arrives at the full age of twenty-one years, shall be paid to such son until he arrives at the age of twenty-five years, when one-half of the capital shall be transferred to him, and the income on the other half of the capital shall be paid to him until he arrives at the age of thirty years when the balance of the capital shall be paid to the said son.

In case, however, one or more of my sons should die before he is entitled to receive the whole capital of his share, the said share, or any part thereof which such son has not received or have become entitled to receive, shall go to his widow or children in such proportions as he shall by will appoint, but any appointment to his widow shall only be of the income until her death or remarriage, whichever first occurs, and in case such son should die intestate, then his widow shall be entitled to the income of such share or such part of such share until her death or remarriage, whichever first occurs, and the capital of such share shall be divided among the children of such deceased son and the issue of any deceased issue per stirpes, the children taking the share that the parent would have taken if living; and in case any son should die without issue, then, subject to the provision aforesaid for his widow, such share shall be added to the other shares in equal proportions, the share set aside in respect of any who predeceases me shall be disposed of in the same manner both as to income and principal.

From the date of its organization Port Credit Realty Limited was considered for income tax purposes as a personal corporation; it was so considered not only during the lifetime of James Harris but also after his decease which occurred on January 1, 1929, for the taxation periods of 1929, 1930, 1931, 1932, 1933 and 1934. It was not until November 14, 1935, that the Commissioner of Income Tax decided to assess the appellant as an ordinary corporation and sent a notice of assessment accordingly.

It was submitted on behalf of the respondent that Port Credit Realty Limited ceased to be a personal corporation the day James Harris died (January 1, 1929).

Before dealing with the legal aspect of the case, it will be convenient to see what was the the position of the appellant company after the death of James Harris.

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Arthur E. Allen, a chartered accountant, who is secretary of Port Credit Realty Limited and of the estate of the late James Harris and was at the time of the death of the latter his secretary, examined as witness for appellant, says in substance as follows:

At the beginning as well as at the end of the year 1932 there were outstanding 10,000 shares of Port Credit Realty Limited of which 9,995 were still in the name of James Harris and five in the names of the incorporators;

these shares had been paid for in full by James Harris;
 the widow and five children were the beneficiaries in receipt of all the income of the late James Harris during the year 1932;

from the date of the death of James Harris to the end of 1932 there was no change in beneficiaries in receipt of the income and there has been no change since the end of 1932;

the assets of Port Credit Realty Limited in 1932 consisted of stocks and the entire income of the company during that year was derived from these stocks;

in his capacity of secretary of the company and of the estate, the deponent filed, for the year 1932, income tax returns for the estate of James Harris, for Port Credit Realty Limited and for each of the beneficiaries, namely, the wife and the five children;

the beneficiaries paid approximately \$1,700 for the 1932 taxation period on Port Credit Realty Limited income and the assessment notice of November 14, 1935, shows a further tax of \$1,275 for the same year;

the corporate accounting and office expenses of Port Credit Realty Limited were paid by James Harris to the time of his death and afterwards by his estate;

the same returns as in 1932 were made for the years 1933 and 1934, i.e., a return for the estate of James Harris, a return for the company and a return for the widow and each of the children;

similar returns were also filed for the years 1929, 1930 and 1931; no assessment notices were received for the company, but the usual notices were received for the beneficiaries and receipted in full;

there was no reason for continuing the company's existence when James Harris died but there did not appear to be any object in winding it up at once and it was continued, the idea being that as soon as the securities were sold the company would be wound up; had there been any notion that additional taxes would be claimed the company could have been wound up on January 2, 1929;

the estate could not be wound up at once because there are large real estate holdings and also because there are life interests;

technically the income from the stocks goes into the company, but it is immediately turned over to the estate, before any expenses are paid; all expenses are paid by the estate.

It is quite obvious that after the decease of James Harris as well as during his lifetime Port Credit Realty Limited had no other assets than the shares assigned to it by James Harris and that the only income it ever received was the dividends derived from these shares.

It is admitted by the respondent that during the lifetime of James Harris the appellant company was a personal corporation and was recognized as such for the purposes of the Income War Tax Act; it is submitted, however, that upon the decease of James Harris the appellant company ceased to be a personal corporation and that it lost any claim that it might have for special treatment under the Act as such.

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There was no mention of personal corporation in the original Income War Tax Act, 1917 (7-8 Geo. V, chap. 28). The personal corporation was first introduced into the Income War Tax Act by 16-17 Geo. V, chap. 10, assented to on June 15, 1926. Section 3 of this statute reads in part as follows:

Section three of the said Act is amended by adding thereto the following subsections:—

“(10) (a) For the purposes of this Act a ‘personal corporation’ means a corporation or joint stock company (no matter when or where created) controlled directly or indirectly by one person, who resides in Canada, or by one such person and his wife or any member of his family, or by any combination of them, or by any other person or corporation on his or their behalf, whether through holding a majority of the stock of such corporation, or in any other manner whatsoever, the gross revenue of which is to the extent of one-quarter or more derived from one or more of the following sources, namely:—

from the ownership of or the trading or dealing in bonds, stocks or shares, debentures, mortgages, hypothecs, bills, notes or other similar property, or from the lending of money with or without security, or by way of rent, annuity, royalty, interest or dividend, or from or by virtue of any right, title or interest in or to any estate or trust.

(b) The income of a personal corporation, in lieu of being assessed the tax prescribed by subsection two of section four of this Act, shall on the last day of each year be deemed to be distributed as a dividend to the shareholders thereof and shall in their hands constitute taxable income for each year in the proportion hereinafter mentioned, whether actually distributed by way of dividend or not.”

Paragraphs (c) to (g) inclusive have no relevance to the question at issue herein.

When the statutes were revised in 1927, the definition of the personal corporation contained in paragraph (a) of subsection (10) of section 3 became paragraph (i) of section 2 of the new Act (R.S.C. 1927, chap. 97) and the provisions relating to the tax on personal corporations contained in paragraphs (b) to (g) inclusive of subsection (10) of section 3 became section 21 of the new Act.

Paragraph (i) of section 2 of chapter 97 of the Revised Statutes is similar to paragraph (a) of subsection (10) of section 3 of chapter 10 of the statute of 1926 (16-17 Geo.

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V) and subsection 1 of section 21 of said chapter 97 is similar to paragraph (b) of said subsection (10).

By 23-24 Geo. V, chap. 14, s. 1 (assented to on March 30, 1933), paragraph (i) of section 2 of the Income War Tax Act (R.S.C. 1927, chap. 97) was repealed and replaced by the following:

(i) "Personal corporation" means a corporation or joint stock company, irrespective of when or where created, whether in Canada or elsewhere, and irrespective of where it carries on its business or where its assets are situate, controlled, directly or indirectly, by one individual who resides in Canada, or by one such individual and his wife or any member of his family, or by any combination of them or by any other person or corporation or any combination of them on his or their behalf, and whether through holding a majority of the stock of such corporation or in any other manner whatsoever, the gross revenue of which is to the extent of one-quarter or more derived from one or more of the following sources, namely:—

- (i) From the ownership of or the trading or dealing in bonds, stocks or shares, debentures, mortgages, hypothecs, bills, notes or other similar property,
- (ii) From the lending of money with or without security, or by way of rent, annuity, royalty, interest or dividend, or
- (iii) From or by virtue of any right, title or interest in or to any estate or trust.

By section 3 of the same statute (23-24 Geo. V, chap. 14) subsection 1 of section 21 of the said Act was repealed and replaced by the following:

21. (1) The income of a personal corporation, whether the same is actually distributed or not, shall be deemed to be distributed on the last day of each year as a dividend to the shareholders, and the said shareholders shall be taxable each year as if the same had been distributed in the proportions hereinafter mentioned.

By section 4 of the same statute section 21 was further amended by the addition thereto of subsections (7), (8) and (9).

Subsection (9) reads as follows:

(9) The rates of tax applicable to corporations, as in this Act provided, shall not be imposed on any personal corporation.

Paragraph (i) of section 2 and subsection 1 of section 21 have not been amended since.

Section 10 of chapter 14 of 23-24 Geo. V dealing with the application of the various sections of the Act says *inter alia*:

10. It is hereby declared and enacted that the provisions of the Income War Tax Act shall be read and construed as if the amendments enacted by sections one, two and three of this Act had been contained therein since the fifteenth day of June, 1926, and the said Income War Tax Act as amended shall apply to the income of the 1925 taxation period and fiscal periods ending in 1925 and all subsequent periods . . .

Section 10 then goes on to say that sections 4, 5, 6 and 7 shall apply to the income of the 1932 taxation period, fiscal periods ending in 1932 and subsequent periods and that section 8 shall apply to the income of the 1917 taxation period, fiscal periods ending in 1917 and subsequent periods; these last provisions are irrelevant.

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The question coming up for determination is whether the appellant company ceased to be a personal corporation when James Harris died. I may say that the question narrows down to a mere interpretation of the definition of a personal corporation, seeing that the operations of the appellant company remained the same after the decease of James Harris as they were prior thereto. Both before and after his death the company's operations were confined to holding shares conveyed to it by James Harris, to draw the income derived therefrom and to hand it over to James Harris during his lifetime or to his estate after his death. Both prior and subsequent to Harris' death the company had no assets other than the shares aforesaid; it did nothing else but hold these shares, receive the income therefrom and remit it to the persons entitled thereto.

A personal corporation, according to paragraph (i) of section 2 of the Income War Tax Act, as amended by 23-24 Geo. V, chap. 14, s. 1, is a corporation or joint stock company controlled, directly or indirectly, by

one individual who resides in Canada, or
 one such individual and his wife or any member of his family, or
 any combination of them, or
 any other person or corporation or any combination of them on his or their behalf.

The substitution of the word "individual" for the word "person" by section 1 of chapter 14 of the statute 23-24 Geo. V, was made, it seems to me, with the intent of avoiding the definition of the word "person" contained in paragraph (h) of section 2 of the Income War Tax Act; this definition reads thus:

Person includes any body corporate and politic and any association or other body, and the heirs, executors, administrators and curators or other legal representatives of such person, according to the law of that part of Canada to which the context extends.

The word "individual" only applies to a natural person whilst the word "person" may also apply, as it does according to said paragraph (h), to an artificial person such as a corporation or association. I may say, however,

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that I do not think that the substitution of the word "individual" for the word "person" in paragraph (i) of section 2 has had the effect of restricting the scope of the definition therein contained; it is clear that the word "person" included in the definition of the personal corporation in paragraph (a) of subsection (10) of section 3 of the Income War Tax Act, as enacted by 16-17 Geo. V, chap. 10, s. 3, applied only to a natural person, seeing that it refers to a person who resides in Canada, or to one such person and his wife or any member of his family; the inclusion of the wife or any member of the family evidently excludes the artificial person. However it may be, the first question for me to determine is whether the word "individual" is intended to apply exclusively to males, thus preventing a widow or spinster from organizing a personal corporation. In common use, the word "individual" applies to either sex; as the word "person," it may mean a woman as well as a man.

Had the definition, on the subject of control, been limited to the first hypothesis, the matter would offer no difficulty; even so, I believe, if the definition had in addition merely mentioned any member of the family. The difficulty arises from the inclusion in the definition of the words "his wife." Does this mean that the word "individual" is used exclusively in the masculine gender? This would imply that a personal corporation could not be controlled by a widow or by a widow and a member of her family or by a spinster. A woman could only control a personal corporation jointly with her husband or with her husband and any member of his family. I must say that this does not seem reasonable to me. I am unable to convince myself that the legislature intended to deprive widows and spinsters of the right to enjoy the convenience of a personal corporation. Be that as it may, if the significance or import of the word "individual" is rather indefinite and doubtful, it seems to me that the insertion in the definition of the phrase "any combination of them" elucidates the subject and removes all doubt. "Any" combination may consist of the individual and his wife, or the individual, his wife and any member of his family, or the individual and any member of the family or the wife and any member of the family.

It may be contended and it was in fact contended that the corporation is not controlled by the wife nor even by the wife and the children or any other member of the family. Apart from particular legacies consisting of a sum of \$20,000, of the household goods, furniture and furnishings and of the free use of the family residence or of another residence at her option, the widow has only a life interest, to wit the income of a sum of \$600,000 during her lifetime.

James Harris, at the time of his death, left five children, two daughters and three sons. No child had predeceased him. The balance of the residue of the estate, as previously stated, is divided among the testator's children.

Each of the daughters is entitled to the income on her share from the age of 21 years during the term of her life, the capital of such share to be divided among her issue in such proportions as she may by will appoint and, in default of such appointment, equally among her issue and the issue of any child or children who may have died.

The sons get the income on their shares from the age of 21 years until the age of 25 years when one-half of the capital is to be paid to them; the income on the other half of the capital is payable to them until they reach the age of 30 years when they become entitled to the balance of the capital.

It seems obvious that during the lifetime of Mrs. Harris and of her daughters the bulk of the estate and in consequence the control of the appellant company remain vested in the trustees and executors.

The personal corporation, besides being controlled by an individual who resides in Canada or by such an individual and his wife or any member of his family or by any combination of them, may, according to the definition contained in paragraph (i) of section 2, be controlled by "any other person or corporation or any combination of them on his or their behalf." The word "person" for which the word "individual" has been substituted in other parts of the sentence has been left here, intentionally it may be assumed. The definition of the word "person" in paragraph (h) of section 2 here applies. The word "person," according to this definition, includes any body corporate and politic and any association or other body and the

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heirs, executors, administrators and curators or other legal representatives of such person.

This definition is broad; it seems to me to apply to the trustees and executors of the will of the late James Harris. The appellant company is at present controlled by these trustees and executors.

Port Credit Realty Limited has, since the decease of James Harris, preserved all the characteristics of a personal corporation and I see no reason why it ought not to be considered as such.

The appeal is allowed and the assessment of the 14th of November, 1935, is set aside.

The appellant will be entitled to its costs.

Judgment accordingly.

Case No. 16825, *Ernest Gilman, Incorporated v. The Minister of National Revenue*, was also decided by the Honourable Mr. Justice Angers, on April 12, 1937.

J. A. Mann, K.C., for the appellant.

W. S. Fisher for the respondent.

The appellant, a body politic and corporate, was incorporated by letters patent of the Province of Quebec for the purpose of acquiring and holding the personal assets of Ernest W. Gilman, a resident of Montreal, P.Q., who died on February 20, 1934, the appellant continuing to hold and manage the assets transferred to it by Ernest W. Gilman in his lifetime. By his will Ernest W. Gilman provided for certain specific legacies and bequeathed the residue of his estate to his executor in trust to provide for his wife and daughters and for certain other purposes. The executor controls the appellant corporation on behalf of the heirs of Ernest W. Gilman, it having no other assets than those transferred to it by Gilman and its income being wholly derived from such assets.

The learned Judge, holding that appellant continued to be a personal corporation after the death of Ernest W. Gilman, said:

The widow and the daughters have no title to or right of property in the capital of the estate; contrary to the contention of counsel for appellant, I do not think that the widow and daughters are institutes; no substitution is, in my opinion, created by the will of Ernest W. Gilman (see Articles 925 and following of the Civil Code of the Province of

Quebec). During the lifetime of the widow and the daughters the ownership of the estate remains vested in the executor and trustee, National Trust Company, Limited. It is only upon the death of Mrs. Ernest W. Gilman that the estate is to be divided into two shares, one to the lawful surviving issue of each of the testator's daughters. During the lifetime of the latter, the ownership of the estate also remains vested, I believe, in the executor and trustee. The ownership of these two shares passes to the lawful surviving issue of each of the daughters on their attaining the age of majority.

It seems obvious to me that during the lifetime of Mrs. Ernest W. Gilman as well as during the minority of her daughters' children the bulk of the estate remains vested in the executor and trustee; so does the control of the appellant corporation.

The personal corporation, besides being controlled by an individual who resides in Canada or by such an individual and his wife or any member of his family or by any combination of them, may, according to the definition contained in paragraph (i) of section 2, be controlled by "any other person or corporation or any combination of them on his or their behalf." The word "person" for which the word "individual" has been substituted in other parts of the sentence has been left here, intentionally it may be assumed. The definition of the word "person" in paragraph (h) of section 2 here applies. The word "person," according to this definition, includes any body corporate and politic and any association or other body and the heirs, executors, administrators and curators or other legal representatives of such person.

This definition is broad; it seems to me to apply to the trustee and executor of the will of the late Ernest W. Gilman. The appellant company is at present controlled by the said trustee and executor.

Ernest Gilman Inc. has, since the decease of Ernest W. Gilman, preserved all the characteristics of a personal corporation and I see no reason why it ought not to be considered as such.