THE ROYAL TRUST COMPANY.....APPELLANT;

VS.

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

1930

Mar. 24.
Apr. 30.

Revenue—Income Tax—Contingent Trust—Section 2 of Income War Tax Act, 1917—"Trust"—Residents in Canada—Interpretation

One J., resident in the United States, executed a Trust Deed of Donation in favour of the Royal Trust Company, as Trustee, giving certain Canadian securities unto the Trustee, in trust, for his surviving children, also residing in the United States, to be held by the Trustee until five years after his death, together with all accumulations and additions thereto; when the entire Trust Estate was to be converted into cash, and distributed to his children as in the said Deed provided. The Crown assessed the income accruing from this contingent trust asset for the year 1927. Hence this appeal.

Held, that under the Income War Tax Act, 1917, and Amendments thereto, only the income of residents in Canada is taxable, and that, as none of the beneficiaries under the trust aforesaid resided in Canada, the present appeal was allowed and the assessment was set aside.

2. That the word "Trust", defined in Section 2 of the said Act, must, under the rules of interpretation, *ejusdem generis* and *noscitur a sociis,* be interpreted to mean a corporate or other body, a trust association or merger, combination of companies or interests created for the purpose of carrying on trust business.

APPEAL by the Royal Trust Company, Trustees under Trust Deed of certain assets belonging to an American citizen, from a decision of the Minister assessing the appellant upon the income accruing from this trust for the year 1927.

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

Eugene Lafleur, K.C., and *F. G. Dixon* for appellant.

C. F. Elliott and *S. Fisher* for respondent.

The facts are stated in the head-note and in the reasons for judgment.

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AUDETTE J., now (April 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, on the income received from contingent trust assets belonging to American citizens non-residents of Canada.

John Day Jackson, a resident of the city of New Haven, in the United States of America, executed a Trust Deed of Donation before W. B. S. Reddy, Notary Public, Montreal, on the 19th February, 1918, in favour of The Royal Trust Company, as Trustee, whereby in consideration of the love and affection he bears towards his children, he gave as a donation *inter vivos* and irrevocable, unto the Trustee in trust for the purposes therein mentioned, the Canadian securities described in the schedule to the said Trust Deed.

And it is in the said Trust Deed, among other things, provided, covenanted and agreed that the Trustee shall hold these Canadian Securities upon trust as follows:—

(*a*) For the benefit of the surviving children of the Donor until five years after the death of the Donor, the property described and set forth in Schedule A hereto, together with all accumulations and additions thereto, when the entire *Trust Estate* is to be equally divided amongst his surviving children, and in the event of any or all of his said children predeceasing the Donor or being unable to take, the division shall be made to the survivor or survivors, and the issue of such predeceased child or children, as representing their parent, per stripes;

(*b*) Upon the termination of the said Trust, the said *Trust Estate* shall be converted into cash and distributed as set forth in the preceding paragraph hereof, with all due diligence.

At the opening of the trial the following admission of facts was filed, that is to say:—

1. John Day Jackson and his wife are both alive at this time.

2. The age of Mrs. Jackson is . . . Mr. Jackson . . .

3. There are eight children by this marriage presently living, all minors.

4. The capital of the trust fund set forth in Schedule A is invested in Canadian stocks and bonds, which are held by the trustee in the City of Montreal where the income therefrom is accumulating and being invested in Canadian stocks and bonds by the trustee, the income from the investment likewise accumulating and subject to the same trusts.

5. The trustee is a Canadian Company incorporated under the laws of the Province of Quebec and carrying on business in Canada with the power to act as a trustee.

The respondent rests his contention for making the assessment in question upon section 2, subsection (*d*) of The Income War Tax Act, 1917, where the word *person* is

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declared to cover a *trust,* and on section 4 of 10-11 Geo. V, ch. 49 (1920) amending subsection 6 of section 3 of the Act, dealing with income from an estate or accumulating in trust; but overlooks the provision of section 4 which enacts, as a condition precedent to any taxation being levied, that the person so taxed must be a resident of Canada. (See now for the two last sections sections 9 and 11, R.S.C., 1927, which came into force on the 1st February, 1928).

The definition of the word "person" in the Act of 1917, which is the Act which applies here, reads as follows:

"person" means any individual or person and any syndicate, *trust,* association or other body and any corporate body.

While, in the view I take of the case, the interpretation of the word "Trust" has no practical bearing, I wish to say that this word "Trust" used as it is in that section does not mean a trust such as that constituted by an instrument under the deed of donation above mentioned.

The word "Trust" defined in section 2 must be read under the rule of interpretation, generally known as the *ejusdem generis* rule, or the rule *noscitur a sociis.* That is where several words are followed, as here, by a general expression (such as *"or other body and any corporate body"*), that expression is not limited to the last particular unit of the group, but applies to them all. *Great Western Railway Co.* v. *The Swindon and Cheltenham Extension Ry. Co.* (1). *Craies,* on Statute Law, 3rd Edition, 162.

This rule of construction was thus enunciated by Lord Campbell in *R.* v. *Edmundson* (2):

I accede to the principle laid down in all the cases which have been cited, that when there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified.

If such a rule is not followed it would lead to absurd results. *Craies,* 162, 163.

The word *Trust* used in section 2 should be interpreted to mean a corporate or other body, a trust association or merger, combination of companies or interest created for the purpose of carrying on Trust business, and *exempli gratia,* such a corporation, or body, as the appellant in this case, and should not be held to contemplate a trust created

(1) (1884) 9 Ap. Cas. 787. (2) (1859) 28 L.J.M.C. 213.

under an instrument which empowers the trustee to hold certain property and to exercise a certain power over it for the benefit of some other person as expressed in the instrument. In a trust created by deed, the trustee is bound to hold the property for the benefit of another, the *cestui que* trust.

Now, the respondent, assuming that the word "Trust" covers the trust created under this instrument of donation further contends that the tax is leviable under subsection 6 of section 3 of The Income War Tax Act, 1917, as amended by section 4 of 10-11 Geo. V, ch. 49, which reads as follows: (see now section 11, R.S.C., 1927):—

> The income, for any taxation period, of a *beneficiary* of any *estate* or *trust* of whatever 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.
>
> 2. Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of an unmarried person.

The income could also have been sought to be taxed, in a proper case, under subsection 1 of section 3, because it

> 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.

What is sought to be subjected to taxation in this case is not the actual property of the trustee, but it is the income of the beneficiary of a trust. While, if such income were liable to taxation, it would be payable in the hands of the trustee, yet, on the other hand, the trustee cannot be made liable therefor if the beneficiary, for any reason, is not taxable under the Act.

In the present case, none of the beneficiaries reside in Canada, a condition which, as I read the Act, is made a precedent to any taxation thereunder.

Section 4 of the Act, as amended, provides that the taxation shall be levied only upon persons residing in Canada. Section 9 of R.S.C., 1927, re-enacts the same provision in a more comprehensive manner and may be referred to for the present purpose.

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The *McLeod* case (1), must be distinguished from the present case, in that all of the beneficiaries there except one resided in Canada.

At page 109 of the Exchequer Court Reports (1925) the trial judge prefaces his decision by stating: "Every person ordinarily resident in Canada is liable to income tax." And in the report of the case in the Supreme Court of Canada, it is stated by Mignault J.:

> The parties also agree that any income to which Miss Gladys A. Curry is entitled or which is vested in her is *not taxable under the Act,* inasmuch as she does not reside in Canada.

Indeed, the principle that the Act only applies to residents in Canada, is there recognized beyond question. The income which is sought to be taxed here in the hands of the Trustee is not his income, but the income of the beneficiaries under the trust who reside outside of Canada. Therefore, the action fails in that respect and for that reason alone.

The corpus of the trust in this case, as well as the income derived therefrom, are not the property of a resident in Canada. A foreigner who is a shareholder of a Canadian company receives his dividend, but is not subject to taxation of the same if he does not reside in Canada.

Under section 11, the trustee, who acts in a fiduciary capacity, is merely the channel through which the income of a beneficiary resident in Canada is duly taxed. This section does not purport to establish a taxation against any new person. The subject matter mentioned in sections 9 and 11 does not come into operation unless a person residing in Canada has first been found.

Before a condemnation to pay a tax is made, a clear and unambiguous enactment must first be found. In the present case the general clause of the Act (section 9) makes it a condition precedent to taxation that a person be a resident of Canada. The test of liability is residence in Canada, that prevails through the whole Act.

The liability to pay taxes, as provided by the deed of donation, can only apply to legal taxes.

The case of *Williams* v. *Singer* (2) has been cited by the respondent in support of his views; but that case is not

(1) 1925 Ex. C.R. 105, at p. 109; 1926 S.C.R. 457.

(2) (1918) 7 Report of Tax Cases, 399.

apposite in that there is special legislation in England covering a case like the present one which does not exist in Canada. That case is decided upon a statute which reads as follows:

For and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of *Her Majesty or not, although not resident within the United Kingdom, etc.* . . .

This legislation is possible in England because the tax is there payable at the source. Failing the Parliament of Canada passing such legislation, such tax is not payable by a non-resident of Canada.

The case of *Kent* v. *The King* (1), cited at bar by the appellant, decided by the Supreme Court of Canada, in the head-note, sets forth, viz:—

Section 155 of the Taxation Act, R.S.B.C. (1911) c. 222, as re-enacted by section 25 of c. 89 (1918) has not the effect of making taxable an income of non-residents, as well as the income of residents, derived from the working of mines. The words thereon as provided in Part I have reference not only to the manner and machinery of taxation of incomes but also as to the persons to be taxed; and, by Part I, the non-residents are expressly not assessable to income tax.

And Duff J., at page 296, says:—

The enactment is a taxing statute, and if construed according to the view advanced by the Crown, imposes a new liability to taxation. In conformity with settled principles, the enactment ought not to receive such a construction unless, on the fair reading of it, its language clearly discloses an intention to create such a liability. Words, which are equally consistent with the absence of such an intention, are not sufficient.

All of this is quite apposite to the present case.

A just appreciation of the circumstances and facts of the case fails to bring the appellant within the scope of the law for imposing a tax upon them. There is no equitable construction of a taxing statute in favour of the Crown, the exact meaning of the words used in the Act must be adhered to. *Partington* v. *Attorney-General* (2).

The word "income" must not be regarded loosely, the words as used in the Taxing Act must be read in conjunction with the meaning of the words used in the context. See per Halsbury L.C., in *Y. and P. Main Sewerage Board* v. *Bensted* (3).

There will be judgment allowing the appeal and with costs.

Judgment accordingly.

(1) 1924, S.C.R. 389.
(2) (1869) L.R. 4 H.L. 100 at 122.
(3) (1907) A.C. 264.