

Minister of National Revenue (Appellant) v. Braithwaite (Respondent)

Present: Jackett P.—Toronto, December 10, 11, 1969

Income tax—Contributions by Ontario Government to pension plan for M.L.A.'s—Computation of M.L.A.'s income—Amount of deduction for contribution to retirement savings plan—Whether Queen a "person"—Income Tax Act, s. 79B(5)(a) and (b).

In 1965, *B*, a member of the Ontario Legislature, contributed \$561 to a registered retirement pension plan (as defined by s. 139(1)(*ahh*) of the *Income Tax Act*) which had been established by an Ontario statute for members of the Ontario Legislature, and in accordance with that statute an equivalent amount in respect of *B* was contributed by the Ontario Treasury. *B* also contributed \$4,300 in 1965 to two registered retirement savings plans (as defined by s. 79B), and in computing his income for 1965 claimed a deduction of \$2,500 (the maximum allowable) under para. (b) of s. 79B(5) in respect of his contribution to the retirement savings plans, but the Minister contended that his deduction was limited to \$939 by para. (a) of s. 79B(5).

Under s. 79B(5)(a), *B*'s deduction would be limited to \$939 if the Ontario government's contribution to the pension plan in that year was deductible under s. 11(1)(g) [which permits an employer to deduct contributions to an employee's pension plan] "in computing the income of any other person... (or would be so deductible if that other person were a person taxable under s. 2(1)).

Held, reversing the Tax Appeal Board, *B*'s deduction was limited to \$939 under s. 79B(5)(a) because the Ontario government's contribution to the pension plan in 1965 would be deductible in computing the income of the Queen in right of Ontario (who was *B*'s employer by definition (s. 139(1)(*ib*)) if the Queen were taxable. The reference in s. 79B(5)(a) to "other person" is sufficiently broad to include a reference to the Queen in right of Ontario.

Madras Electric Supply Corp. v. Boarland [1955] A.C. 667, referred to.

APPEAL from Tax Appeal Board.

G. W. Ainslie, Q.C., for appellant.

A. K. Crossley, for respondent.

JACKETT P.: This is an appeal by the Minister of National Revenue from a judgment of the Tax Appeal Board dated August 2, 1968, allowing an appeal by the respondent from his re-assessment under Part I of the *Income Tax Act* for the 1965 taxation year and referring it back to the appellant to be varied on the basis that the respondent was entitled to claim in respect of that year the maximum deduction of \$2,500 provided in paragraph (b) of section 79B(5) of the Act.

The appeal was argued on the facts as alleged by paragraphs 1 to 10 inclusive of the notice of appeal as amended by an order dated October 3, 1969, and admitted by paragraph 1 of the reply to the notice of appeal

dated August 18, 1969. (The amendments made to the notice of appeal did not change paragraphs 1 to 10 thereof.) These paragraphs read as follows:

1. The Respondent, during his 1965 taxation year was a member of the Legislative Assembly for the Province of Ontario.

2. There was paid to the Respondent as a sessional indemnity and allowance, pursuant to section 60 of the *Legislative Assembly Act*, R.S.O. 1960, Chapter 208, as amended by Chapter 56, Statutes of Ontario 1965, the sum of \$9,350, from which there was deducted as a member's contribution, the sum of \$561.00, pursuant to subsection (1) of section 4 of the *Legislative Assembly Retirement Allowances Act*, R.S.O. 1960, Chapter 209, which sum was paid to the Legislative Assembly Retirement Allowances account of the Consolidated Revenue Fund of Ontario.

3. The Treasurer of Ontario, pursuant to subsection (2) of section 16 of the *Legislative Assembly Retirement Allowances Act*, paid from the Consolidated Revenue Fund for Ontario into the Legislative Assembly Retirement Allowances account, a sum equal to the contributions made by members of the Assembly and Ministers, and in particular in respect of the member's contribution made by the Respondent, there was paid into the Legislative Assembly Retirement Allowances account by the Treasurer of Ontario, a further sum of \$561.00.

4. The *Legislative Assembly Retirement Allowances Act* was accepted by the Appellant for registration under paragraph (ahh) of subsection (1) of section 139 of the *Income Tax Act*, for the purposes of the *Income Tax Act* in respect of its constitution and operations for the Respondent's 1965 taxation year.

- 5. During the 1965 taxation year, the Respondent paid,
 - (a) \$2,500.00 toward a Canadian Government annuity which had been registered as a retirement saving plan, pursuant to section 79B of the *Income Tax Act*, R.S.C. 1952, Chapter 148;
 - (b) \$1,800.00 under a retirement plan operated by the North American Life and Casualty Company, which plan had been registered pursuant to section 97B of the *Income Tax Act*.

6. The Respondent in computing his income, deducted from his total income the following amounts:

| | |
|---|------------|
| Member's contribution to Legislative Assembly Retirement Allowances account | \$ 561.00 |
| Registered retirement saving plan premiums | 939.00 |
| | \$1,500.00 |

and estimated his federal tax payable for 1965 to be \$7,197.59 and his provincial tax payable for 1965 to be \$1,961.13.

7. The Appellant on the 29th of June 1966, assessed a federal tax of \$7,197.57 and a provincial tax of \$1,961.15.

8. On the 21st of September 1966, the Respondent filed a Notice of Objection to the assessment, wherein he claimed the right to deduct, pursuant to paragraph (b) of subsection (5) of section 79B, in computing his income the sum of \$2,500.00.

9. The Appellant, on receipt of the Notice of Objection, reconsidered the assessment and confirmed the assessment on the ground that the Respondent was only entitled, pursuant to paragraph (a) of subsection (5) of section 79B, to a deduction of \$939.00, and that the Respondent was not entitled to any deductions under paragraph (b) of subsection (5) of section 79B of the *Income Tax Act*.

10. On receipt of the confirmation, the Appellant appealed the assessment to the Tax Appeal Board, and Mr. Weidon, by a decision dated the 2nd of August 1968, allowed the appeal.

To appreciate the point in issue on this appeal, the application of the *Income Tax Act* to a person who was a member of the Legislative Assembly and who had made investments such as those made by the respondent in the year in question must be considered in three stages.

In the first place such a member is taxable on his remuneration (indemnity) as a member. Section 3 of the *Income Tax Act* provides that income of a taxpayer includes income from "offices and employments" and "office" is defined to include the office of a member of a legislative assembly (section 139(1)(ab)).

In the second place, as the *Legislative Assembly Retirement Allowance Act* was accepted by the appellant for registration under paragraph (ahh) of section 139(1) of the *Income Tax Act* for the year in question, the respondent was entitled to make a deduction in respect of his contribution thereunder by virtue of section 11(1)(i) of the *Income Tax Act*, which reads, in part, as follows:

11. (1) Notwithstanding paragraphs (a), (b) and (h) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:

* * *

(i) amounts contributed by the taxpayer to or under a registered pension fund or plan, . . .

On the other hand, although the Province of Ontario (Her Majesty in right of Ontario) falls within the meaning of the word "employer" in relation to such a member when the word "employer" is found in the *Income Tax Act* (section 139(1)(lb)), no occasion would arise for any deduction in respect of contributions made by that government in respect of the respondent under the *Legislative Assembly Retirement Allowances Act*, under section 11(1)(g) of the *Income Tax Act*, which reads, in part, as follows:

11. (1) Notwithstanding paragraphs (a), (b) and (h) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:

* * *

(g) an amount paid by the taxpayer in the year or within 120 days from the end of the year to or under a registered pension fund or plan in respect of services rendered by employees of the taxpayer in the year, . . .

The reason why there would be no such deduction in respect of the "employer's" contribution is, of course, that the Government of Ontario is not liable to pay tax under the *Income Tax Act*.

In the third place, having paid premiums under retirement savings plans registered under section 79B(3) of the *Income Tax Act*, the respondent was entitled to deductions in respect thereof as determined by section 79B(5) thereof, which reads as follows:

(5) There may be deducted in computing the income for a taxation year of a taxpayer who is an annuitant under a registered retirement savings plan or

becomes, within 60 days after the end of the taxation year, an annuitant thereunder, the amount of any premium paid by the taxpayer under the plan during the taxation year or within 60 days after the end of the taxation year (to the extent that it was not deductible in computing his income for a previous taxation year), not exceeding, however,

- (a) in the case of a taxpayer in respect of whom any amount is deductible under paragraph (g) or (h) of subsection (1) of section 11 in computing the income of any other person for that taxation year (or would be so deductible if that other person were a person taxable under subsection (1) of section 2), or in the case of a taxpayer who is an employee of a life insurance corporation and is a beneficiary, contingently or otherwise, under a registered pension plan instituted or established by the corporation, an amount that, when added to the amount deductible under subparagraph (i) of paragraph (i) of subsection (1) of section 11 in computing the income of the taxpayer for that taxation year, does not exceed the lesser of \$1,500 or 20% of his earned income for that taxation year; and
- (b) in the case of any other taxpayer, the lesser of \$2,500 or 20% of his earned income for that taxation year.

It is common ground in this case that, if the respondent falls within the terms of paragraph (a) of section 79B(5), he cannot fall within paragraph (b) thereof and this appeal must succeed. If, on the other hand, he does not fall within paragraph (a), he does fall within paragraph (b) and this appeal must fail.

The words in paragraph (a)¹ which, in the view of the appellant, apply to the respondent, are

- (a) in the case of a taxpayer in respect of whom any amount is deductible under paragraph (g) . . . of subsection (1) of section 11 in computing the income of any other person for that taxation year (or would be so deductible if that other person were a person taxable under subsection (1) of section 2), . . .

Clearly the words immediately preceding the parentheses have no application to the respondent's case. Paragraph (g) of section 11(1) gives a deduction to a taxpayer in respect of contributions made by him in respect of services rendered by his employees. Here the Government of Ontario, as the person who paid the member's stipend, is deemed to be his employer for the purpose of the *Income Tax Act* and, in fact, did make contributions in respect of him under a registered pension fund or plan, but is not liable to pay income tax under the *Income Tax Act* and so would have no occasion to make deductions under section 11(1)(g). The appellant's contention is, however, that the words in the parentheses in section 79B(5)(a), read with the preceding words, do apply to the respondent's case because, it is contended, an amount would have been deductible in respect of the respondent under paragraph (g) of section 11(1) in computing the income of the Province of Ontario for the purposes of the *Income Tax Act* if the Province of Ontario were "a person taxable under subsection (1) of section 2".

¹ of section 79B(5) *supra*.

The Tax Appeal Board dealt with the point in issue as follows:

Minister's counsel then referred to section 2(1) of the Act which reads: "An income tax shall be paid as hereinafter required upon the taxable income for each taxation year of every person resident in Canada at any time in the year", and maintained that, regardless of the fact that the Province of Ontario (which is, in fact, an emanation of the Crown) is, admittedly, not like an ordinary employer in that it is not taxable under above section 2(1), it should still be regarded as an employer for the purpose of the related sections 11(1)(g) and 79B(5)(a). In other words, while it really seems to follow from Mr. Olsson's argument that the Province of Ontario is not a "person" for the purpose of section 2(1), he persisted in arguing that it should be treated as a taxpayer for the purpose of section 11(1)(g) because of the words in brackets in paragraph (a) of section 79B(5) which read: "(or would be so deductible if that other person were a person taxable under subsection (1) of section 2)". It should be mentioned that the term "person" is defined in section 139(1)(ac) of the Act as follows:

"139. (1) In this Act,

- (ac) "person", or any word or expression descriptive of a person, includes any body corporate and politic, and the heirs, executors, administrators or other legal representatives of such person, according to the law of that part of Canada to which the context extends;"

On the basis of the above definition, the term "person" appears to embrace an individual and an incorporated company, but it clearly does not include, in my view, the Province of Ontario which takes its legislative powers and authority directly under the *British North America Act, 1867*, 30 Victoria, chap. 3. Incidentally, the words "body corporate and politic" which appear in the above definition of "person" are used in section 5 of the Canada Corporations Act, R.S.C. 1952, Chap. 53 as follows:

"5. (1) The Secretary of State may, by letters patent under his seal of office, grant a charter to any number of persons, not less than three, who apply therefor, constituting such persons,—a body corporate and politic—"

From my standpoint, Mr. Olsson's argument is not maintainable because he had no choice but to rest his case entirely on characterizing the Province of Ontario, first, as a "taxpayer" under section 11(1)(g), and secondly, as a "person for the purpose of the words in brackets, quoted above, which are contained in paragraph (a) of section 79B(5). It was not suggested to me what situations the said words—"or would be so deductible if that other person were a person taxable under subsection (1) of section 2)" were intended to cover, but they could, conceivably, be applicable, for example, to a charitable corporation which would qualify as a "person" under the definition of that term contained in section 139(1)(ac) of the Act, quoted above, and still not be taxable by reason of section 62(1)(e) of the Act which provides an exemption for a charitable organization, whether or not incorporated. Charitable corporations do, of course, have employees and, no doubt, it is not unusual for them to contribute to registered retirement savings plans on behalf of such employees. Be that as it may, the words in brackets, quoted above, plainly do not operate, in my view, so as to identify the Province of Ontario as a "taxpayer" under section 11(1)(g) of the Act. Under the definitions of "office" and "employee" contained in paragraphs (ab) and (1a), respectively, of section 139(1) of the Act, which were reviewed by the appellant in the course of his argument, he is, obviously, an employee of the Province of Ontario for the purposes of the Act. However, that conclusion does not appear to help the Minister's case because the definition of "employer" set

out in section 139(1)(b) of the Act contains the term "person" which, as already mentioned, is inapplicable to the Province of Ontario. The definition of "employer" reads as follows:

"139. (1) In this Act,

(b) "employer", in relation to an officer, means the *person* from whom the officer receives his remuneration;"

(The italics are mine).

The Board's judgment does not appear to refer to section 139(1)(a) of the *Income Tax Act*, which says that, where the word "taxpayer" is used in that Act, it includes "any person whether or not liable to pay tax".

In my view, there is no question that Her Majesty is a "person" and that the references in this appeal to the Province of Ontario are references to Her Majesty. Compare *Perepelytz v. Department of Highways*.² Cases where there have been discussions as to whether the Sovereign was a "person" within a particular statutory provision have been, almost always, if not always, cases where what was being discussed was whether Her Majesty was bound or adversely affected by the statute in question having regard to the well-known common law and statutory rules of interpretation in that regard. I should have thought that confusion would be avoided if the problem were thought of as one of interpreting the effect of the statute in the light of the relevant rules of interpretation rather than as a question of whether the Sovereign is a person, a question concerning which there can, in my opinion, be no possible doubt. See *Madras Electric Supply Corp. v. Boarland*³ and *The Queen v. Murray*.⁴

The reference in section 79B(5)(a) to the "other person", giving that word its ordinary sense, is sufficiently broad to include a reference to Her Majesty in right of Ontario. Furthermore, its use in the context is to describe a factual situation that is relevant to a tax privilege being conferred on an ordinary person in such a way that the statutory provision in question cannot be regarded as imposing any liability on the Crown or as in any way affecting the Crown's prerogatives or property. In my opinion, there is no room here for application of the rules of interpretation that exclude the inclusion of Her Majesty in a statutory provision in the absence of express reference or necessary implication. See *Madras Electric Supply Corp.* case, *supra*, and *Forbes v. Manitoba*.⁵

Counsel for the respondent argued that the reference in the parentheses in section 79B(5)(a) to an amount that would have been "deductible" by any other person under section 11(1)(g) "if that other person were a person taxable under subsection (1) of section 2" must be read as being limited to the case where that other person would have been taxable under section 2(1) if it were not for a statutory exemption such as those found in section 62. The argument, if accepted, would have the advantage of excepting from section 79B(5)(a) any reference to the Government of Ontario, but I can find nothing in the words used in the paragraph to

² [1958] S.C.R. 161.

³ [1954] All E.R. 52 (C.A.) [1955] A.C. 667.

⁴ [1965] 2 Ex.C.R. 663, [1967] S.C.R. 262.

⁵ [1937] A.C. 260.

justify such a distinction. Her Majesty is just as capable, at least in modern times, of being a "person taxable" as is an ordinary person, provided the legislation so requires, as is evidenced by the fact that there are various federal statutes that do impose direct and indirect taxes on Her Majesty in one way or another.

It was also argued that the purpose of the distinction between paragraphs (a) and (b) in section 79B(5) was to allow to an employee a maximum of \$1,500 for the combined deduction where the employer was making deductions from income for employer contributions so as to reduce the income tax collections from the employer and to allow to an employee a maximum of \$2,500 when there were no such employer contributions and therefore no such reduction in employer taxes. On that view there would be no reason why the respondent should be deprived of the \$2,500 deduction.

As it seems to me, the more obvious explanation of the two different ceilings on the combined deduction for employee contributions to a pension plan and contributions to a retirement savings plan is that, where a person has the advantage of a pension scheme under which his employer makes contributions, the statute allows to him a maximum deduction of \$1,500, but where a person does not have the advantage of a pension scheme to which contributions are made by an employer for his benefit, he is allowed a maximum deduction of \$2,500. This seems to be the general result flowing from the words used and represents a rough attempt to compensate the individual who is in the less advantageous position.

Counsel for the respondent also relied strongly on the fact that section 139(1)(m) contains an express reference to the Crown. That paragraph reads:

139. (1) In this Act,

* * *

(m) "employment" means the position of an individual in the service of some other person (including Her Majesty or a foreign state or sovereign) and "servant" or "employee" means a person holding such a position;

The argument made on this definition was that, the statute having, in this case, spelled it out that "person" includes Her Majesty, in other cases where the word "person" is used, it must be assumed that Her Majesty was being excluded. The argument is attractive but I do not accept it. An assumption of consistency in the use of language or drafting devices in a statute cannot rightly be made, or at least put to excessive use, in construing a taxing statute. The fact that, out of an abundance of caution, a reference to the Crown was inserted in section 139(1)(m) does not justify, in my view, a conclusion that other references to persons in the statute do not include Her Majesty. A somewhat similar argument was rejected in *Province of Bombay v. Municipal Corp. of Bombay*.⁶

I am therefore of opinion that the appeal should be allowed with costs and that the assessment under appeal should be restored.

⁶ [1947] A.C. 58 at p. 65.