BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

1954
Jan. 26
April 12

AND

BARBARA A. ROBERTSON ..... RESPONDENT.

*Revenue—Income—Income Tax—The Income Tax Act, S. of C. 1948, c. 52, ss. 4, 13(1)(2)(3)(a)(b) and (4), 127(1)(av), as amended by S. of C. 1951, c. 51, s. 4—Chief source of income of a taxpayer—Farming—Combination of farming and other source of income—Determination of the Minister subject to review on appeal to Exchequer Court—Appeal from Income Tax Appeal Board allowed.*

In her income tax return for the year 1949, respondent who owned a farm property showed a loss on farming operations of $12,702.44 and income from investments of $11,993.99 or a net loss of $708.45 and claimed depreciation on fixed assets amounting to $4,842.97. By the Minister's assessment one half of her farming loss was disallowed on the ground that her chief source of income for that year was neither farming nor a combination of farming and some other source of income and, as a result, she was assessed to income tax in the sum of $809.79. From the assessment an appeal was taken to the Income Tax Appeal Board which allowed the appeal and from the decision the Minister appealed to this Court.

*Held:* That the repeal by the Income Tax Act, c. 52, S. of C. 1948 of the provision to the effect that the determination of the Minister as to what constitutes the taxpayer's chief source of income in a year

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should be final and conclusive indicates that it was Parliament's intention that the decision of the Minister under s. 13(2) of the Act as amended by S. of C. 1951, c. 51, s. 4, is to be reviewed on an appeal to this Court.

2. The only income which respondent had in 1949 was from investments and the only source of that income was the securities in which that portion of her capital was invested. There was no income from farming either from an accounting point of view or within the definition of income in the Act.

3. The taxpayer's farming operations not being a source of income the Minister could not combine something which was non-existent with her only source of income viz. her investments—and decide that the result was income from a combination of farming and some other source of income.

4. That the Minister's determination that respondent's chief source of income for the taxation year of 1949 was neither farming nor a combination of farming and some other source of income was correct.

APPEAL from a decision of the Income Tax Appeal Board.

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

*Peter Wright, Q.C.* and *T. Z. Boles* for appellant.

*Stuart Thom* for respondent.

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

POTTER J. now (April 12, 1954) delivered the following judgment:

This is an appeal by the Minister of National Revenue, hereinafter called the appellant, from a decision of the Income Tax Appeal Board dated the 19th day of November, 1952, and mailed on the 15th day of December, 1952, allowing an appeal from an assessment by the appellant dated the 23rd day of October, 1951, whereby the appellant assessed the respondent to income tax for the taxation year of 1949 in the sum of $809.79 based upon a taxable income determined in the amount of $6,464.83 which was arrived at by deducting from the revised net income of $8,294.26, items of $1,000 by way of personal exemption and $829.43 being charitable donations of the respondent equal to ten per cent of the said revised net income.

The respondent was born in New Zealand, the daughter of the owner and operator of a large farm and during her

early years received considerable training in general farming practices including the raising of animals and agriculture.

After training as a nurse and midwife she came to Canada in the year 1923 and married in 1927; her husband died in January 1932, leaving her with a substantial income.

In the year 1948 she purchased a farm property in the Province of Ontario of about three hundred acres and the following year one hundred acres more. She described the four hundred acres as very dirty, scrub and swale or chiefly woods with very little arable land at all and the first year she was unable to get one load of hay off of it; almost two hundred acres had to be cleared of rubbish, cedar and willow. At the time of the hearing she said that there were still about thirty acres of bush, ten of which would be useful for posts and altogether about thirty acres still to be broken up and cleared of big stones. In this connection it was objected on behalf of the appellant that the situation or condition of the property after the year 1949 was not relevant.

After some further questions, the witness stated that practically all the property is in grass now excepting fifteen or thirty acres of the land which she had been cropping for grain.

It was stated and conceded that the respondent had filed her Income Tax Returns every year since 1948 within the proper time and that the only re-assessment received by her since 1948 was with respect to her 1949 income.

In her Income Tax Return for the year 1949, the respondent showed a loss on farming operations of $12,702.44 and income from investments of $11,993.99 or a net loss of $708.45 and claimed depreciation on fixed assets amounting to $4,842.97.

By the appellant's assessment the investment income reported was adjusted as follows:—

| | |
|---|---|
| Investment income reported | $11,993.99 |
| Add refundable portion interest 1943 and 1944 years | 100.00 |
| Steel of Canada preferred extra February 1949 | 100.00 |
| International Paper was $200 gross | 30.00 |
| | $12,223.99 |

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The following calculation was then made:—

| | | |
|---|---|---|
| Adjusted net income | | $12,223.99 |
| Farm loss as claimed | $12,702.44 | |
| Deduct depreciation | 4,842.97 | |
| Cash farm loss | 7,859.47 | |
| Deduct fifty per cent of cash farm loss | | 3,929.73 |
| Revised net income | | 8,294.26 |
| Deduct Personal exemption | 1,000.00 | |
| Charitable donations ten per cent of income | 829.43 | |
| | | 1,829.43 |
| Taxable income | | $ 6,464.83 |

On this taxable income the appellant levied a tax of $809.79.

On December 21, 1951, the respondent gave Notice of Objection to the Minister of National Revenue with respect to the assessment of October 23, 1951, claiming *inter alia* that her chief source of income for the taxation year of 1949 was a combination of her farming and investment income and that the Minister should so determine pursuant to subsection (2) of section 13 of the Income Tax Act and that subsection (3) of said section 13 was not applicable to the facts and that the assessment was wrong in disallowing fifty per cent of the cash farm loss thereunder.

The relevant parts of said section 13 (as amended by section 4 of chapter 51 of the Statutes of Canada, 1951 and applicable to the 1949 and subsequent taxation years) are as follows:—

13. (1) The income of a person for a taxation year shall be deemed to be not less than his income for the year from his chief source of income.

(2) The Minister may determine which source of income or sources of income combined is a taxpayer's chief source of income for the purpose of this section.

(3) Where a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income, his income for the year shall be deemed to be not less than his income from all sources other than farming (after application of the rule in subsection one) minus the lesser of

(*a*) one-half his farming loss for the year, or

(*b*) $5,000.

(4) For the purpose of subsection (3), a 'farming loss' is a loss from farming computed by applying the provisions of this Act respecting computation of income from a business *mutatis mutandis* except that no deduction may be made under paragraph (*a*) of subsection (1) of section 11.

By notification dated April 29, 1952, the appellant, except as hereinafter stated, confirmed the said assessment and by Notice of Appeal dated July 24, 1952, the respondent appealed to the Income Tax Appeal Board against the disallowance of farming losses in the amount of $3,929.73.

The respondent's appeal was heard at Toronto in the Province of Ontario on November 19, 1952, and the said Board forthwith rendered its decision allowing the appeal and the appellant and respondent were notified of the decision of the said Board on December 15, 1952, from which decision this appeal was taken, as already stated.

Counsel for the respondent, in opening his argument after the witnesses called by him had been heard referred to the decision of the President of this Court in *Minister of National Revenue* v. *Simpson's Limited* (1), in which he reviewed his earlier decision in *Goldman* v. *Minister of National Revenue* (2), and said:—

> . . . the hearing of an appeal from a decision of the Income Tax Appeal Board to this Court is a trial *de novo* of the issues of fact and law that are involved. There cannot, I think, be any doubt that this is so where the appeal is by the taxpayer. It must equally be so when the Minister is the appellant. In either event the hearing in this Court must proceed without regard to the case made before the Board or the Board's decision. Consequently, where the Minister appeals from the decision of the Board allowing an appeal from the assessment the fact that the Board found the assessment to be erroneous must be disregarded. To do otherwise would be tantamount to giving effect to the Board's decision which would be inconsistent with the view that the hearing of the appeal from it is a trial *de novo*. Consequently, it was incorrect to say that because the Board found the assessment erroneous the Minister does not come to this Court with any presumption of its validity in his favour and that the onus is on him to establish its correctness. On the contrary, the true position is that on an appeal to this Court from a decision of the Income Tax Appeal Board, whether the taxpayer or the Minister is the appellant, the assessment under consideration carries with it a presumption of its validity until the taxpayer establishes that it is incorrect either in fact or in law. Thus, the onus of proving that it is incorrect is on the taxpayer, notwithstanding the fact that the Income Tax Appeal Board may have allowed an appeal from it. It follows, under the circumstances, that while the Minister, being the appellant, may be called upon to begin he may rest on the assessment so far as the facts are concerned without adducing any evidence. The onus of proving the assessment to be erroneous in fact is on the taxpayer.

Counsel for the respondent submitted that the effect of this decision was that the filing of a Notice of Appeal completely destroyed the findings of the Income Tax Appeal

(1) [1953] Ex. C.R. 93 at 96, 97. (2) [1951] Ex. C.R. 274 at 282.

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Board, which could not have been the intention of Parliament; that the decision was not binding on other judges of this Court and that there should, in this case, be a ruling as to where the onus rests. In reply, counsel for the appellant said he relied on the authority of the *Simpson* case and therefore did not propose to deal with the merits of the argument for the respondent in that connection.

In my opinion that part of the judgment in the Simpson case quoted was a decision on a question of practice, in that it was not in itself a final judgment in the technical sense of those words and the foregoing arguments are not sufficiently exhaustive to warrant a review of the same.

As it stands, the decision referred to gives certainty to the practice on appeals to this Court from the Income Tax Appeal Board and should be followed until the question is fully argued before, and determined by, a higher tribunal.

As much was intimated at the commencement of the hearing and the trial proceeded with a view to deciding the real issues between the parties and on the understanding that neither side would be prejudiced by the procedure followed.

Counsel for the Crown, after outlining the proceedings, filed as exhibits a copy of the respondent's Income Tax Return for the year 1949, the Notice of Assessment, the Notice of Objection, the Notification by the Minister, Notice of Appeal to the Income Tax Appeal Board, reply to Notice of Appeal, certified copy from minute book of Income Tax Appeal Board and, at the request of counsel for the respondent, judgment of the Income Tax Appeal Board, Notice of Appeal to this Court and Reply to Notice of Appeal and after making some explanatory observations stated that such was the case for the appellant.

Counsel for the respondent was then called on and, reserving his rights to argue the question as to where the onus rested, called witnesses and the hearing proceeded.

As already stated, the respondent filed her Income Tax Return for the year 1949 dated March 30, 1950, and by the same showed a loss from farming operations of $12,702.44 and income from investments of $11,993.99, or a net loss of $708.45.

Accompanying the assessment, already referred to, was a letter which stated:—

> In reviewing your return for the year indicated above (31 December 1949), it was found necessary to make certain changes in order that the assessment might be in accordance with the provisions of the Income War Tax Act, and, for your information, these changes are indicated below.

Then followed a statement indicating how the revised net income of $8,294.26 was arrived at, that is before a personal exemption of $1,000 and charitable donations amounting to $829.43 or together $1,829.43 were deducted, which left a taxable income of $6,464.83. Then followed:—

> *FARM LOSS*
>
> Section 13 of the Income Tax Act, subsections 3 and 4 permit the deduction of 50 per cent of the Cash farm loss with a limitation of $5,000. In your case $3,929.73.

This reference to the provisions of section 13 was an indication that the Minister had determined which source of income or sources of income combined was the respondent's chief source of income for the purpose of the section.

Attached to the respondent's Notice of Objection of December 21, 1951, was a memorandum which in effect stated that at all relevant times in the 1949 taxation year the respondent was the proprietor of a farm; that she operated the farm as a business venture with a view to earning profits; that she expended substantially all her time and effort throughout the whole year in active physical farming operations; had no other occupation, trade or business and had no other income except from investments. and gave as reasons for the objection that her chief source of income for the 1949 taxation year was a combination of her farming and investment income and, upon the facts, the Minister should have so determined pursuant to subsection (2) of section 13 of the Income Tax Act; that subsection (3) of section 13 of the Act was not applicable to the facts and that the assessment was wrong in disallowing $3,929.73 of the cash farm loss. The memorandum also contained objections to the pro-rating and reducing of a dividend credit and complained of the pro-rating and reducing of the amount of United States dividends received and the resulting United States tax credit.

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By the Notification by the Minister of April 29, 1952, it was stated that having considered the facts and the reasons set forth in the Notice of Objection he agreed to some amendment of the tax credits:—

> And hereby confirms the said assessment in other respects as having been made in accordance with the provisions of the Act and in particular on the ground that the taxpayers' chief source of income in the taxation year was neither farming nor a combination of farming and some other source of income within the meaning of subsection (3) of section 13 of the Act.

This was further notice of the Minister's determination under subsection (2) of section 13 of the Act.

The questions for determination are therefore:—

1. Is the Minister's determination under subsection (2) of section 13 of the Income Tax Act open to review?

2. Was the Minister correct in determining that for the taxation year 1949,

(*a*) the respondent's chief source of income was not farming, or

(*b*) the respondent's chief source of income was not a combination of farming and some other source of income?

Beginning with the Income War Tax Act, 1917, the history of section 13 as applicable to the 1949 taxation year, already quoted, is as follows:—

The Income War Tax Act, 1917, chapter 28 of the Statutes of Canada of that year, by section 3 defined income and by subsections (1),(*a*),(*b*),(*c*),(*d*) permitted certain exemptions and deductions therefrom.

Chapter 25 of the Statutes of Canada, 1918, by section 2 made certain amendments and additions to said section 3 which are not relevant to this decision.

Chapter 55 of the Statutes of Canada, 1919, by section 2 made certain additions to said section 3 including the following:—

> (*f*) deficits or losses sustained in transactions entered into for profit but not connected with the chief business, trade, profession or occupation of the taxpayer shall not be deducted from income derived from the chief business, trade, profession or occupation of the taxpayer in determining his taxable income.

By chapter 49, section 2 of the Statutes of 1919 (Second Session) an addition was made to paragraph (*f*) of subsection (1) of section 3 of the original Act which was as follows:—

and the Minister shall have power to determine what deficits or losses sustained in transactions entered into for profit are connected with the chief business, trade, profession or occupation of the taxpayer, and his decision shall be final and conclusive.

By chapter 52 of the Statutes of 1923, paragraph (*f*) of subsection (1) of section 3 was repealed and the following substituted therefor:—

(*f*) In any case the income of a taxpayer shall be deemed to be not less than the income derived from his chief position, occupation, trade, business or calling, and for the purpose of this Act the Minister shall have full power to determine the chief position, occupation, trade, buiness or calling of the taxpayer. Where a taxpayer has income from more than one source by virtue of filling or exercising more than one position, occupation, trade, business or calling, then the Minister shall have full power to determine which one or more, or which combination thereof shall, for the purpose of this Act, constitute the taxpayer's chief position, occupation, trade, business or calling, and the income therefrom shall be taxed accordingly and the determination of the Minister exercised pursuant hereto shall be final and conclusive.

By chapter 97, R.S.C. 1927, these provisions were, in effect, reenacted by section 10 of that Act which was as follows:—

10. In any case the income of a taxpayer shall be deemed to be not less than the income derived from his chief position, occupation, trade, business or calling.

2. Where a taxpayer has income from more than one source by virtue of filling or exercising more than one position, occupation, trade, business or calling, the Minister shall have full power to determine which one or more, or which combination thereof shall, for the purpose of this Act, constitute the taxpayer's chief position, occupation, trade, business or calling, and the income therefrom shall be taxed accordingly.

3. The determination of the Minister exercised pursuant hereto shall be final and conclusive.

On the passing of the Income Tax Act, 1948, chapter 52 of the Statutes of that year, certain of the foregoing provisions were not reenacted and those that remained, with some changes, appeared as section 13 thereof, which was as follows:—

13. (1) The income of a person for a taxation year shall be deemed to be not less than his income for the year from his chief source of income.

(2) The Minister may determine which source of income or sources of income combined is a taxpayer's chief source of income for the purpose of this section.

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By section 4 of chapter 51 of the Statutes of 1951, additions were made to section 13, said section 4 being as follows:—

4. (1) Section 13 of the said Act is amended by adding the following subsections thereto:

(3) Where a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income, his income for the year shall be deemed to be not less than his income from all sources other than farming (after application of the rule in subsection one) minus the lesser of

(*a*) one-half his farming loss for the year; or

(*b*) $5,000.

(4) For the purpose of subsection (3) a 'farming loss' is a loss from farming computed by applying the provisions of this Act respecting computation of income from a business *mutatis mutandis* except that no deduction may be made under paragraph (*a*) of subsection (1) of section 11.

(2) This section is applicable to the 1949 and subsequent taxation years.

It will be noted that beginning with the amendment made by chapter 55 of the Statutes of 1919 consideration was to be given to the taxpayer's chief business, trade, profession or occupation and that deficits or losses sustained in transactions entered into for profit, but not connected with the same, were not to be deducted; that beginning with the amendment made by chapter 49 of the Statutes of 1919 (Second Session) the Minister should have power to determine what deficits or losses sustained were connected with the taxpayer's chief business, trade, profession or occupation and that his decision should be final and conclusive; that by the amendment made by chapter 52 of the Statutes of 1923, the income of a taxpayer should be deemed to be not less than that derived from his chief position, occupation, trade, business or calling and where a taxpayer had income from more than one source by virtue of filling or exercising more than one position, occupation, trade, business or calling, the Minister should have full power to determine which one or more or combination thereof constituted the taxpayer's chief position, occupation, trade, business or calling and that his determination was final and conclusive.

Analogous provisions were carried through the revision of 1927 and were contained in section 10 of chapter 97 of the same.

It will also be noted that with the enactment of the Income Tax Act, 1948, consideration was to be given to the taxpayer's chief source of income instead of his chief position, occupation, trade, business or calling and that the provision to the effect that the determination of the Minister should be final and conclusive was not reenacted.

With regard to the first question. It was not objected in the Notification by the Minister; in the appellant's Reply to Notice of Appeal to the Income Tax Appeal Board; in the appellant's Notice of Appeal to this Court or by counsel for the appellant at the hearing that the determination of the Minister under subsection (2) of section 13 was not open to review. And while there may have been decisions to the effect that if there is nothing to indicate that the exercise of a discretionary power has been based on inadequate or inadmissible material or on an erroneous view of the law, a Court is without authority to scrutinize it, the repeal by the Income Tax Act, 1948 of the provision to the effect that the determination of the Minister should be final and conclusive indicates that it was Parliament's intention that the decision of the Minister under subsection (2) of section 13 is to be reviewed on an appeal to this Court.

To proceed to the determination of the second question.

Briefly stated, the legislation began in the year 1917 with a general definition of income; then followed the disallowance of the deduction of losses incurred in transactions not connected with the taxpayer's chief occupation, the Minister's determination of the same to be final; and beginning with section 13 of the Income Tax Act, 1948, a taxpayer's income was to be deemed to be not less than his income from his chief source of income.

It is clear, however, that whether the taxpayer's chief occupation or chief source of income was the governing factor, deductions for losses sustained in transactions not connected therewith were not allowed, and it was only by virtue of the amendment to section 13 made by section 4 of chapter 29 of the Statutes of 1951, that a taxpayer whose chief source of income was other than farming, or a combination of farming and some other source, was entitled to deduct from his income any losses arising out of his farming activities.

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The Minister has determined that the respondent's chief source of income was neither farming nor a combination of farming and some other source of income and an examination of his determination requires a consideration of the meaning of the words "income" and "source" as used in the Act.

Section 4 of the Income Tax Act, 1948 is as follows:—

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

Section 127, subsection (1)(*av*) of the Act is as follows:—

127(1)(*av*) a taxpayer's income from a business, employment, property or other source of income or from sources in a particular place means the taxpayer's income computed in accordance with this Act on the assumption that he had during the taxation year no income except from that source or those sources of income and was entitled to no deductions except those related to that source or those sources;

The Shorter Oxford English Dictionary gives the following meanings of the word "source" viz.—

1. A support or underprop. 3. The fountain-head or origin of a river or stream; the spring or place from which a flow of water takes its beginning. 4. The chief or prime cause of something, of a non-material or abstract character; the quarter whence something of this kind originates. *c.* The originating cause or substance of some material thing or physical agency.

The following is found in volume 58, Corpus Juris, page 811:—

Source. First cause; first or primary cause; first producer; head; origin; original; the originator; that from which anything comes forth, regarded as its cause or origin; the person from whom anything originates.

In *Nathan* v. *Federal Commissioner of Taxation* (N.S. Wales), (1), Isaacs J. said:—

The legislature in using the word 'source' meant, not a legal concept, but something which a practical man would regard as a real source of income.

The word "source" as used in the Act is a correlative term and there can no more be, at its inception, income without a source of income than there can be a child without a mother, and the converse. There can, of course, be a potential source of income and, it is conceivable that a taxpayer may ordinarily have a chief source of income which is farming but in a particular year suffer losses in his farming operations instead of profits and consequently have no income therefrom in that year.

(1) 25 Austr. C.L.R. 183 at 189.

In the case under consideration the only income which the respondent had was from her investments and the only source of that income was the securities in which that portion of her capital was invested.

Section 127, subsection (1)(*av*), in effect, requires that a taxpayer's income from a source of income shall be computed in accordance with the Act on the assumption that he had during the taxation year no income except from that source and was entitled to no deductions except those related to that source.

In the memorandum attached to her Notice of Objection, and in her Notice of Appeal to the Income Tax Appeal Board, the respondent stated that her chief source of income for the 1949 taxation year was a combination of her farming and investment income and in her Reply to the appellant's Notice of Appeal to this Court that her sources of income were a farming business and property and securities for money and specifically, in the year 1949, her chief source of income was a combination of the business and property aforesaid. But she does not expressly refer to her income from farming for, in fact, there was none either from an accounting point of view or within the definition of income contained in the Act.

The respondent's farming operations not being a source of income the Minister could not combine something which was non-existent with her only source of income, viz.—her investments, and decide that the result was income from a combination of farming and some other source of income.

The respondent suggested no such combination of farming and some other source of income as probably could be done, for example, in the case of a farmer who owns a large acreage of land, part of which is under cultivation and part under growing timber, and who carries on his farming operations seasonably and his lumbering operations in some part or parts of a year, and no evidence was given that the respondent's farming operations were in any way related to the only source of income which she had, viz.—her investments.

While the respondent's expenditures of monies in the development of her farm may have been made in the course of the creation of a potential source of income, they may be considered to be capital expenditures analogous to

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expenditures made in the erection of a factory or the development of a mine and, notwithstanding that in the course of their construction or their development some products thereof may be sold, cannot be considered sources of income until their receipts exceed their operating and fixed charges and profits are made. That question is, however, not before the Court.

Consideration has been given to the cases cited on behalf of the respondent, viz.—*Hatch* v. *M.N.R.* (1); *Low* v. *M.N.R.* (2); *Partridge* v. *M.N.R.* (3) and *McLaughlin (Executor of)* v. *M.N.R.* (4).

The first three of these cases are decisions on circumstances which arose before the enactment of the Income Tax Act, 1948, the last being a decision as to whether farming losses were prohibited deductions as being personal and living expenses and they are therefore not applicable.

For the foregoing reasons it must follow that the Minister's determination that the respondent's chief source of income for the taxation year of 1949 was neither farming nor a combination of farming and some other source of income was correct.

The appeal will therefore be allowed and, subject to the agreements contained in the Notification by the Minister of the 29th of April, 1952, the assessment restored, and the appellant will have his costs.

*Judgment accordingly.*

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(1) [1938] Ex. C.R. 208.
(2) (1950) 2 Tax A.B.C. 131.
(3) (1951) 4 Tax A.B.C. 99.
(4) [1952] Ex. C.R. 225.