1958
Jun. 18
Jun. 29

BETWEEN:

C. GEORGE McCULLAGH ESTATE .....APPELLANT;

AND

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

Revenue—Income Tax—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4 and 6(b)—Succession Duty Act, R.S.O. 1950, c. 378, ss. 15, 16 and 20—"Amount received"—Allowance for payment of succession duty in advance of time required by the Succession Duty Act is not an amount received under s. 6(b) of the Income Tax Act—Appeal allowed.

Executors of the will of a deceased person paid the succession duties levied on the estate of such deceased under the *Succession Duty Act*, R.S.O. 1950, c. 378 prior to the expiration of the time limited therefor for payment of duties levied under that Act and claimed and were allowed interest on such sum in accordance with s. 20 of the *Succession Duty Act*. The respondent assessed the estate for income tax on the amount of money thus retained by the executors on payment of the succession duty. The executors appealed from such assessment to this Court.

Held: That the allowance under the *Succession Duty Act* is a statutory reduction of the obligation to pay duty, which when s. 20 of that Act applies, operates in diminution of the amount of the duty which otherwise would be payable and such an allowance is not an "amount received" in any relevant sense within the meaning of s. 6(*b*) of the *Income Tax Act* but is simply an amount which, in the circumstances, the *Succession Duty Act* does not require to be paid.

APPEAL under the *Income Tax Act*.

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

C. H. Walker, Q.C. for appellant.

G. D. Watson, Q.C. and *A. L. DeWolf* for respondent.

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

THURLOW J. now (June 29, 1959) delivered the following judgment:

This is an appeal by the executors of the will of C. George McCullagh, deceased, against an assessment of income tax for the year 1955, by which income tax was levied on an amount of $34,005.71 which had been allowed

pursuant to a provision of the *Succession Duty Act*, R.S.O. 1950, c. 378 on the payment by the executors prior to the expiration of the time limited therefor of duties levied under that Act.

The deceased died on August 5, 1952, and on or about May 28, 1954 the executors of his will received from the Treasurer of the Province of Ontario a statement wherein succession duties totalling $1,352,712.48 were claimed. Of this sum, $983,704.23 was payable, pursuant to provisions of the statute, on February 5, 1953, and the remainder in ten annual instalments commencing on August 5, 1953. Between December 3, 1952 and February 2, 1955, the executors paid several sums on account of the duties and on the latter date made a final payment calculated as the balance of the duties claimed less three per cent per annum on each of the instalments for which the date of payment had not yet arrived from February 2, 1955 to the date when each of them would become payable. The deduction so made amounted to $34,005.71 and was allowed by the Treasurer.

Sections 15 and 16 of the *Succession Duty Act* provided as follows:

15.—(1) Unless otherwise provided, duty shall be due at the death of the deceased and paid within six months thereafter and if the duty or any part thereof is paid within such period no interest shall be chargeable or payable on the amount so paid.

(2) Where any annuity, term of years, life estate or income is created by the will of the deceased or by any disposition, the duty for which any person who benefits by such annuity, term of years, life estate or income is liable with respect thereto shall, unless otherwise provided, be paid in a number of equal annual instalments equal to,

(*a*) the number of years,

(*i*) of expectancy of life of such person, ascertained as provided in subsection 4 of section 2, or

(*ii*) for which such annuity, term of years or income is to run, as the case may be; or

(*b*) ten,

whichever is the lesser, and such instalments shall commence one year after the death of the deceased.

* * *

16.—(1) If the duty mentioned in subsection 1 of section 15, or any part thereof, is not paid within the time provided therein, interest at the rate of five per cent per annum from the date of death of the deceased shall be charged and paid on the amount from time to time unpaid.

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(2) If any instalment of duty mentioned in subsection 2 of section 15, or any part thereof, is not paid within the times provided therein, interest at the rate of five per cent per annum from the date when such instalment became payable shall be charged and paid on the amount of such instalment from time to time unpaid.

* * *

Section 20, pursuant to which the sum in question was allowed, was as follows:

20. Where any duty is paid before the time provided for payment thereof, the Treasurer may allow interest upon the amount so paid at a rate not exceeding three per cent per annum from the time of payment until the time so provided for payment.

The question to be determined is whether or not the sum in question was liable to tax as income under the provisions of the *Income Tax Act*, R.S.C. 1952, c. 148. By s. 3 of that Act, the income of a taxpayer for a taxation year is declared for the purposes of Part I of the Act to be his income from all sources inside or outside Canada and to include income for the year from all businesses, property, and offices and employments. By s. 4 it is provided that, subject to the other provisions of Part I, income for a taxation year from a business or property is the profit therefrom for the year. By s. 6, it is further provided:

6. Without restricting the generality of s. 3, there shall be included in computing the income of a taxpayer for a taxation year

* * *

(*b*) amounts received in the year or receivable in the year (depending upon the method regularly followed by the taxpayer in computing his profit) as interest or on account or in lieu of payment of, or in satisfaction of interest;

In my opinion, it is clear that the sum in question is not income in any ordinary sense, either as profit from a business or property or otherwise, and the question to be determined is at once narrowed down to whether or not it was an amount received as interest or on account or in lieu of payment of or in satisfaction of interest, within the meaning of s. 6(*b*). The submission put forward by counsel for the Minister in support of the assessment was that the sum was interest (it is calculated as interest and is called interest by s. 20 of the *Succession Duty Act*), that it was received by the appellants when it was allowed by the Treasurer, and that accordingly it became subject to tax as income.

It may, I think, be assumed from the use of the word "interest" in s. 20 to describe the allowance thereby permitted, as well as from the nature of the situation in which the allowance may be made, that the purpose of such allowance is to compensate the payer for the loss of the opportunity he would otherwise have of using the money pending arrival of the time for payment of the duties. But even if such is the purpose, I find it impossible to regard the allowance either as a payment for the use of the money or as an amount earned or gained by the prepayment of the duty. There is no element of earning or gain about it. The obligation to pay succession duty is created entirely by the statute, which prescribes, as well, both the amount to be paid and the time or times for payment. If duty is not paid by the time prescribed, the statute imposes a further obligation. But if it is paid before the required date, an allowance may be made. This, when made, is made pursuant to the statute by which the obligation to pay duty is raised, and in my opinion it is allowable simply because the statute so states, without regard for the reasons which may have prompted the legislature to provide for it and regardless, as well, of the executors' purpose in making the payment. In my opinion, the allowance is, in fact and in law, nothing more nor less than a statutory reduction of the obligation which, when s. 20 applies, operates in diminution of the amount of the duty which otherwise would be payable. See *In Re Bronson.*[1] Such an allowance, in my opinion, is not an "amount received" in any relevant sense within the meaning of s. 6(*b*) of the *Income Tax Act* but is simply an amount which, in the circumstances, the *Succession Duty Act* did not require to be paid.

Nor, in my opinion, can it make any difference that the executors, by retaining and investing the money pending arrival of the times for payment of the duties, might have earned income on it. One is not obliged by the *Income Tax Act* to invest his money or to obtain income therefrom, and the argument advanced on this line is sufficiently answered by the fact that no such investment was made. Nor was the

[1] [1958] O.R. 367.

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payment of the duties such an investment. It was nothing but the discharge of an obligation at the amount payable at that time.

In *Tennant v. Smith*[1] Lord Macnaghten said at p. 164:

> No doubt if the appellant had to find lodgings for himself he might have to pay for them. His income goes further because he is relieved from that expense. But a person is chargeable for income tax under Schedule D, as well as under Schedule E, not on what saves his pocket, but on what goes into his pocket.

The principle so expressed does not conflict with s. 6(*b*), and it is, I think, applicable in the present situation. Indeed, for my part, I should have thought this a clear case but for the opinion expressed by the late chairman of the Income Tax Appeal Board in *No. 390 v. M.N.R.*[2], a case where an allowance under the same section of the *Succession Duty Act* was involved. With great respect for the late chairman, I find myself unable to agree with his opinion. It was suggested in argument that that case was distinguishable, since there the allowance under s. 20 was made by way of refund to the taxpayer, rather than by deduction from the duty, as was done in this case, but I regard that difference as quite immaterial, for I am of the opinion that in each case the nature of the allowance is the same and is determined by s. 20 itself, rather than by the procedure by which the allowance is obtained.

The appeal will be allowed and the assessment vacated. The appellants are entitled to their costs.

Judgment accordingly.