BETWEEN:

HELEN D. DAVIS .....APPELLANT;

AND

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

1963
Mar. 20, 21, 22
Apr. 2

1964
Jan. 31

*Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 59, 60(2) and 89 and 90 as amended by S. of C. 1952-53, c. 40, ss. 75 and 76 and by S. of C. 1958, c. 32, s. 36—Order-in-Council P.C. 1954-1734, Rule 1—Interpretation Act, R.S.C. 1952, c. 158, ss. 31(d) and 31(1)(j)—Practice—Appeal to Exchequer Court after withdrawal of irregular appeal to Income Tax Appeal Board—Appeal procedure.*

On February 12, 1960 notices of objection to her income tax assessments for 1950 and 1951 were served on the respondent by the appellant. On December 9, 1960 the appellant sent a combined notice of appeal from the two assessments to the Registrar of the Income Tax Appeal Board with the sum of $15 00, and a copy of the said notice of appeal was sent by the Registrar to the Deputy Minister of National Revenue for Taxation. On the following day, and before the respondent had taken any step in the proceedings, the appellant notified the Registrar that she wanted the appeals withdrawn. Two days later, after receiving a notice of withdrawal from the appellant, the Registrar sent a letter to her enclosing a copy of the judgment of the Tax Appeal Board with respect to her appeal wherein it was stated that her appeal was dismissed, she having filed a Notice of Withdrawal. Subsequently the appellant launched an appeal from her assessments for 1950 and 1951 directly to this Court.

The respondent moved to quash the proceedings on the ground that the appellant had lost her right of appeal directly to this Court when she instituted her appeal to the Tax Appeal Board.

*Held:* That there is nowhere in the *Income Tax Act* any provision for combining returns, assessments or appeal proceedings relating to one taxation year with those relating to another and in the absence of some authority for such a combination appeals can be made only by separate proceedings with respect to each taxation year, and, accordingly, the combined notice of appeal forwarded by the appellant to the Registrar and purporting to institute an appeal from assessments for two years was irregular and ineffective to institute an appeal for the two years or either of them.

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2. That the effect of the withdrawal of the notice of appeal was simply to expressly annul voluntarily and before it had been acted upon by the respondent a proceeding which was invalid and open to the objection that it was not an appeal under the statute and thus to put the matter in a position where no action by the respondent could waive the objection to the form of the proceeding and cure the defect therein.

3. That it had not been established that the appellant appealed to the Tax Appeal Board from the assessments in question and she was accordingly entitled to appeal to this Court.

MOTIONS to quash appeals under the *Income Tax Act*.

The motions were heard before the Honourable Mr. Justice Thurlow at Ottawa.

*R. F. Reid, Q.C.* for appellant.

*G. W. Ainslie* and *D. G. H. Bowman* for respondent.

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

THURLOW J. now (January 31, 1964) delivered the following judgment:

In each of these cases, which purport to be appeals under s. 60(2) of the *Income Tax Act* R.S.C. 1952, c. 148 from assessments of income tax for the years 1950 and 1951 respectively a motion has been made on behalf of the Minister to quash the proceedings on the ground that the appellant has no right of appeal to this Court. The motions were heard together and at the same time as similar motions were heard in two similar cases in which the appellant's husband, W. W. Davis is the appellant.

The motions turn on the application of the words "in place of appealing to the Tax Appeal Board under s. 59" which appear in s. 60(2) by which it is provided that:

> Where a taxpayer has served a notice of objection to an assessment under section 58, he may, in place of appealing to the Tax Appeal Board under section 59, appeal to the Exchequer Court of Canada at a time when, under section 59, he could have appealed to the Tax Appeal Board.

In each case the appellant has served notice of objection to the relevant assessment under s. 58 and is entitled to appeal to this Court under s. 60(2) unless the events to be related show the case to be one in which the appellant exercised her right under s. 59 to appeal to the Tax Appeal Board and thereby lost her right to appeal directly to this Court under s. 60(2).

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From the material filed on the motions it appears that the appellant's notices of objection under s. 58 to the assessments in question, both of which were dated December 14, 1959, were served on the Minister on February 12, 1960, and that on Friday, December 9, 1960, more than 180 days having elapsed and the Minister having in the meantime failed to notify the appellant pursuant to s. 58(3) of his disposition of the objections, the appellant through her agent, W. W. Davis, sent by registered mail addressed to the Registrar, Income Tax Appeal Board, at Ottawa three copies of a combined notice of appeal from the two assessments together with a bank money order for $15 payable to him. These documents were received by Mr. W. O. Davis, the Registrar of the Tax Appeal Board, on Monday, December 12 and on the same day the Registrar sent one copy of the notice by post to the Deputy Minister of National Revenue for Taxation. The Minister had not, however, taken any step in the proceeding and in particular had not filed with the Board under s. 89(4) copies of the documents relevant to the assessments, when on the following day, for reasons which it is unnecessary to set out, the appellant's agent having come to the conclusion that the appeal could not succeed on the grounds set out in the notice, contacted Mr. W. O. Davis by telephone and later requested him by letter to withdraw the notice of appeal. It appears from the letter that in doing this the appellant's agent was under the impression that the withdrawal of the appeal would put the appellant in the same legal position as she had been in immediately before the notice was sent and that she could await the Minister's notification under the statute and have a right of appeal in the meantime. Two days later on December 14, 1960, the Registrar sent to the appellant a letter stating that he was enclosing a copy of the judgment of the Board with respect to her appeal and with the letter he enclosed what purports to be a copy of judgment of the Tax Appeal Board in her appeal dated December 14, 1960, and stating that:

> The appellant through her Agent having filed with the Board a Notice of Withdrawal of her appeal herein;
>
> The said appeal is hereby dismissed.
>
> *Chairman.*

No formal proof of a judgment of the Board was made but whether or not a judgment was in fact rendered is in

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my view not material. For if what occurred amounted in point of law to appealing to the Board what happened to such appeal is irrelevant to the question arising on the motions now before the Court. On the other hand if what occurred did not amount in point of law to an appeal under the statute the purported dismissal of the proceedings by a judgment reciting its withdrawal could not in my opinion convert the proceeding into such an appeal.

The procedure for an appeal to the Tax Appeal Board is governed by ss. 89 to 92 of the Act and by rules made pursuant to s. 87. Sections 89 and 90 as amended by S. of C. 1952-53, c. 40, ss. 75-76 and S. of C. 1958, c. 32, s. 36 read as follows:

89 (1) An appeal to the Board shall be instituted by filing with the Registrar of the Tax Appeal Board or by sending by registered mail addressed to him at Ottawa three copies of a notice of appeal in such form as may be determined by the rules.

(3) When the three copies of the notice of appeal have been filed, and the filing fee of $15 has been paid as required by section 90, the Registrar of the Income Tax Appeal Board shall forthwith transmit two copies of the notice of appeal to the office of the Deputy Minister of National Revenue for Taxation.

(4) Immediately after receiving the notice of appeal the Minister shall forward to the Board copies of all documents relevant to the assessment.

90 (1) An appellant shall pay to the Registrar of the Tax Appeal Board a fee of $15 upon the filing of the notice of appeal and if the appellant receives any of the relief sought on the ultimate disposition of the appeal by the Income Tax Appeal Board, the Exchequer Court of Canada or the Supreme Court of Canada, as the case may be, the fee shall be returned to the appellant after the ultimate disposition of the appeal but not otherwise.

(2) Subject to subsection (1), no costs may be awarded on the disposition of an appeal and no fees may be charged the appellant by the Board.

(3) Subject to subsection (1), fees received under this section shall be retained in the Consolidated Revenue Fund.

By s. 22 of S. of C. 1958, c. 32 it was enacted that upon and after the coming into force of that Act, the Income Tax Appeal Board should be known as the Tax Appeal Board. Rule 1 of the Rules contained in Order in Council P.C. 1954-1734 which were in force at the material time provided:

1. An appeal to the Board shall be made in writing, signed by the appellant or his solicitor or agent, and shall as closely as may be follow the form set forth in the Schedule hereto, and shall set out

a statement of the allegations of fact and the reasons which the appellant intends to submit in support of the appeal.

and the Schedule therein referred to read thus:

SCHEDULE

FORM OF NOTICE OF APPEAL:

In re the Income Tax Act and .....
(Name of Appellant)

of the .....of.....
(City, Town or Village) (Name of City, Town or Village)

Province of .....

.....
(Appellant)

Notice of Appeal to the Income Tax Appeal Board is hereby given from the assessment dated the .... day of .... 19.... wherein a tax in the sum of $..... was levied in respect of income for the taxation year 19.....

Then complete the Notice of Appeal with

(1) A statement of allegations of fact,

(2) A statement of the reasons to be advanced in support of appeal, and

(3) Address for service of notices, etc.

Dated at ..... this ..... day of ..... 19.....

.....
(Signature)

It will be observed that the procedure for instituting an appeal as prescribed in these provisions is not complicated but it is well to bear in mind that as the right to appeal to the Tax Appeal Board is simply that provided by the statute it can be enforced only by proceeding as the statute prescribes. All that is required to institute an appeal is that the appellant file with the Registrar, or send to him by registered post, three copies of a notice of appeal in writing signed by the appellant or his solicitor or agent following as closely as may be the form in the schedule to the rules and setting out a statement of the allegations of fact and the reasons which he intends to submit in support of the appeal. At the same time the appellant must pay the Registrar a fee of $15. Since the statute refers to the $15 as a fee, it may be that the institution of an appeal is accomplished by the mere filing of the notice, or the sending of it by registered post, within the prescribed time regardless of whether the fee is paid at the time or not but on the

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other hand as the fee is not simply one for filing the notice but is in some respects more like a deposit, since in certain events it is returnable, it may be that the payment of it is also one of the requirements of the valid institution of an appeal. I do not find it necessary for the purposes of these motions to express an opinion on this question but whatever may be the true view as to the nature of the required payment the provisions of the statute with respect to it suggest to me that it is payable for each taxation year an assessment in respect of which is the subject of an appeal. The provision for repayment of it in the event of the appellant receiving any of the relief sought in my opinion must refer to the kind of relief for which a taxpayer may appeal that is to say "to have the assessment vacated or varied" and this appears to me to contemplate only an assessment for a particular taxation year. Were it otherwise a taxpayer having a right to variation of an assessment in respect of one year might obtain a free appeal of one or more other assessments simply by including all the appeals in a single proceeding and paying a single $15 fee. His right to do this might then depend on the mere chance that the time limits had not barred his right to appeal the other assessments and when the appeal was disposed of it would become equally arguable that he was entitled to return of his $15 because he had succeeded in having one assessment varied and that he was not entitled to return of the money because he had not succeeded in obtaining relief from any of the other assessments. It must, I think, be borne in mind that the *Income Tax Act* contemplates a separate application of the Act with respect to each taxation year. It creates liability for tax for that year, and prescribes a procedure which culminates in an assessment of tax for that year and gives the taxpayer a right to object and subsequently to appeal from the assessment. Nowhere is there any provision for combining returns or assessments or appeal proceedings relating to one taxation year with those relating to another and in the absence of some authority for such a combination I am of the opinion that appeals can only be made by separate proceedings with respect to each taxation year.

It was argued that s. 31(1)(*j*) of the *Interpretation Act* R.S.C. 1952, c. 158, which provides that "in every act unless the contrary intention appears words in the singular include

the plural and words in the plural include the singular", applies to the word "assessment" in s. 59(1) of the *Income Tax Act* and requires that s. 59(1) be interpreted as authorizing a single appeal from several assessments but if this rule of interpretation is to be applied so as to authorize the combining in one proceeding of appeals from assessments for several taxation years it would seem to be equally logical to read the word "taxpayer" as well in s. 59(1) in the plural and the section as authorizing several taxpayers having nothing in common to appeal several assessments for several years in a single proceeding for which they would then pay a single fee of $15. This I think would be manifestly contrary to the intention to be gathered from the section and from the statute as a whole and I think it also appears from the scheme of the statute applying as it does to separate taxation years that the intention is simply to authorize a single taxpayer to pursue an appeal procedure the object of which is to obtain an adjudication of the issues which have arisen between him and the Minister as to his liability or liabilities under the statute for a particular taxation year but that a single appeal from assessments for more than one taxation year is not contemplated.

Turning now to the combined notice of appeal for both 1950 and 1951 which the appellant forwarded to the Registrar it follows from what I have said that the forwarding of this document purporting as it did to institute an appeal from assessments for two years was a procedure which was not authorized by the statute or the rules and that at least in the absence of consent by the Minister, it was irregular and ineffective to accomplish that dual purpose. But the question then remains whether it could nevertheless have been effective to institute an appeal from the assessment for one of the taxation years to which it refers. In my opinion it could not. When one attempts to regard it as an appeal from the assessment for a single year, for example 1950, it is found to follow the prescribed form in the sense that it states with respect to the 1950 assessment all that is necessary to apepal from that assessment but that instead of confining itself to stating what is necessary to appeal from the 1950 assessment it goes on to state as well all that is necessary to appeal from the assessment for another year and to purport to be a notice of appeal from that assessment as

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well, thereby including not mere immaterial surplusage but surplusage which affects the substance of the document by rendering it uncertain whether it is a valid notice of appeal from a 1950 assessment or from a 1951 assessment. *Vide* s. 31(1)(*d*) of the *Interpretation Act*. Because of the presence in it of this surplusage which renders the legal purport uncertain the notice in my opinion did not "as closely as may be" follow the form prescribed as required by Rule 1 and s. 89(1) of the Act and it was therefore ineffective to institute an appeal to the Board from the assessment for the year 1950. Moreover for similar reasons the notice cannot be regarded as having effectively instituted an appeal to the Board from the assessment for the year 1951.

At the time when this notice of appeal was sent to the Registrar the legal position was accordingly one in which the appellant was purporting to institute an appeal to the Board by a procedure not authorized by the statute or by the rules and which was accordingly open to objection upon which in my opinion the purported proceeding might properly have been quashed. If such a motion had been made and the appeal had been quashed, I think it is clear that there would have been no legal impediment to the appellant starting over again by asserting her rights to appeal in the prescribed form. *Vide Wilson v. Village of Long Branch*[1]. However, before any such motion was made on behalf of the Minister and, more important, before any step in the proceeding was taken by him from which a waiver of his right to object to the form of the proceeding might be inferred, the appellant withdrew her notice of appeal by a letter which clearly indicates that she was not doing so with a view to abandoning her right of appeal but on the contrary that she intended to await the Minister's notification and that she believed that the withdrawal would return the matter to the status quo. In my opinion the effect of this withdrawal of the notice was simply to expressly annul voluntarily and before it had been acted upon by the other party to it a proceeding which was invalid and open to the objection that it was not an appeal under the statute and thus to put the matter in a position where no action by the other party to the appeal could waive the objection. I know of no principle which would

[1] [1957] O.R. 346.

require the appellant to await a motion to quash on the part of the Minister or to continue to provide the Minister with an opportunity to waive the objection and I see no legal reason why she could not at that stage withdraw the objectionable notice to clarify the existing legal position and ensure its continuance. However, even if she had no right to do so the fact is that, for the reason indicated, the forwarding of the notice to the Registrar did not amount to the institution of an appeal and it has not been shown that the defect in the purported proceeding was ever cured by waiver on the part of the Minister of his right to object thereto.

It follows that it has not been established that the appellant appealed to the Tax Appeal Board from the assessments in question and that under s. 60(2) she is entitled to appeal to this Court. The motions therefore fail and they will be dismissed with costs.

*Judgment accordingly.*