1948
Sept. 10
1949
Aug. 25

BETWEEN:

MOOSE JAW FLYING CLUB LTD., APPELLANT;

AND

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

Revenue—Income—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 4(h) and 51—Profits of non-profit company distributed as dividends on liquidation attract income tax—S. 51 of Income War Tax Act includes liquidator—Onus on taxpayer claiming exemption to bring himself within the Act—Appeal dismissed.

Appellant, incorporated in 1928 as a non-profit company, never declared nor paid any dividends from that date until 1942 when a liquidator was appointed for the purpose of winding-up the appellant under the

(1) (1948) 4 D.L.R. 776.
(2) (1947) S.C.R. 157.
(3) (1946) Ex. C.R. 211.

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provisions of the Companies Winding-up Act of Saskatchewan. Appellant paid no income tax during those years. The liquidator made two distributions of the assets of the appellant, in 1943 and in 1944. These assets consisted of paid up capital and money on deposit in a bank. In 1947 the appellant was assessed for income tax for the years 1940 and 1941 and from such assessment appealed to this Court.

The Court found that the objects for which the appellant was incorporated as set forth in the Memorandum of Association, were not solely for civic improvement, recreation purposes or any other of the purposes specified in s. 4(*h*) of the Income War Tax Act, and that it carried on an enterprise which was beyond the scope of the functions of a club coming under that section of the Act.

Held: That the profits made by appellant and paid out as dividends when the club was liquidated are subject to income tax.

2. That s. 51 of the Income War Tax Act includes a liquidator as well as a trustee in bankruptcy or assignee.

3. That the onus rests on one claiming exemption from income tax under a provision of the statute to bring himself clearly within the words of such exemption.

APPEAL under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Angers at Regina.

L. McTaggart, K.C. for appellant.

H. J. Schull, K.C. for respondent.

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

ANGERS J. now (Aug. 25, 1949) delivered the following judgment:

This is an appeal, under the provisions of sections 58 and following of the Income War Tax Act, 1917, and amendments thereto, from the assessment of Moose Jaw Flying Club Limited for the fiscal years ended October 31, 1940 and 1941.

Pleadings were filed. It may be convenient to make a brief recapitulation thereof.

The statement of claim of the appellant, made by its liquidator, namely Executors & Administrators Trust Company Limited, alleges in substance:

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the appellant company, a body corporate incorporated under the Companies Act of the Province of Saskatchewan in 1928, was operated for civil improvement and no dividends or profits were ever declared or paid at any time, inasmuch as it was a non-profit company;

on February 19, 1947, the Deputy Minister of National Revenue for taxation assessed the appellant for income tax in the year 1940 amounting to $1,391.99 and for income tax in the year 1941 amounting to $7,266.24;

officers of the appellant interviewed the inspector of Income Tax at Regina, Saskatchewan, in March 1941, with regard to the assessment of income tax for the years 1940 and 1941, and pursuant to advice received at that time, the appellant claimed exemption from tax under section 4(*h*) of the Income War Tax Act and amendments thereto and were instructed that no assessment for income tax for the said years would be made nor was any assessment made until February 19, 1947;

the notice claiming exemptions was contained in a communication from the appellant's solicitors addressed to the inspector of Income Tax, at Regina, dated March 5, 1941;

by a special resolution passed at a special general meeting of the shareholders of Moose Jaw Flying Club Limited held on June 16, 1942, Executors and Administrators Trust Company Limited was appointed liquidator for the purpose of winding up the appellant company under the provisions of the Companies Winding up Act, being Chapter 119 of the Revised Statutes of Saskatchewan 1940:

Executors & Administrators Trust Company Limited as liquidator distributed the assets of the company to the shareholders on record but at no time were any dividends ever declared or paid to any of the shareholders;

as a result of an interview with the assessor for Income Tax, Regina, in April 1944, one H. H. Bamford, now deceased, was informed by such assessor that a clearance for income tax would be granted to the liquidator of Moose Jaw Flying Club Limited and such information was conveyed by the said Bamford, inspector in the winding up proceedings to the said Executors & Administrators Trust

Company Limited, and the latter, relying upon such information, distributed all the assets of Moose Jaw Flying Club Limited to its shareholders;

wherefore Executors & Administrators Trust Company Limited, on behalf of the appellant claims:

(*a*) that it may be declared that Moose Jaw Flying Club Limited was a non-profit organization operated for civic improvement and should be exempt from payment of any income tax as provided in section 4(*h*) of the Income War Tax Act;

(*b*) in the alternative, inasmuch as any profits made by the company were never distributed until the winding up, such profits are taxable only in the hands of the shareholders and not as earnings of the appellant company;

(*c*) that the surplus paid out to shareholders of the appellant over and above the original paid-up capital stock should be declared taxable as income of the individual shareholders and not as that of the appellant.

In his statement of defence the respondent pleads as follows:

he admits that the appellant is a body corporate incorporated under the Companies Act of the Province of Saskatchewan in 1928;

he admits that on February 19, 1947, the Deputy Minister of National Revenue assessed the appellant for income tax in the year 1940 amounting to $1,391.99 and in the year 1941 amounting to $7,266.24;

he admits that by special resolution passed at a general meeting of the shareholders of the appellant on June 16, 1942, the Executors & Administrators Trust Company Limited was appointed liquidator for the purpose of winding up the appellant company;

he admits that Executors & Administrators Trust Company Limited, in its capacity as liquidator, distributed the assets of the appellant to shareholders on record;

he denies the other allegations of the statement of claim and the respondent specifically says:

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the appellant is not a club, society or association operated solely for social welfare, civic improvement, pleasure, recreation or other non-profitable purposes within the meaning of paragraph (*h*) of section 4 of the Income War Tax Act and is therefore not exempt from payment of income tax on the profit or gain received by it for the fiscal years ended October 31, 1940 and 1941, and such profit or gain is properly taxable in its hands.

A brief resume of the evidence seems to me expedient.

A letter from Grayson & McTaggart, Barristers and solicitors, to the inspector of Income Tax, Regina, dated March 5, 1941, a copy whereof was filed as exhibit 1, contains, among others, the following statements:

> Moose Jaw Flying Club Limited has never paid any dividends nor does it intend to pay any to its members. So that there would be no doubt about the matter this Company, on the 11th day of January 1941, passed a special resolution authorizing an amendment to the Memorandum of Association prohibiting the declaration of dividends. Application has been made to the Court of King's Bench for an Order confirming such Resolution in accordance with the provisions of the Companies Act and for your information we now enclose copy of Amended Memorandum of Association and copy of Order granted by the Honourable Mr. Justice Bigelow on the 19th day of February.
>
> We understood that there was some discussion with your office concerning this matter previously, but we have no correspondence in regard to it. Our advice was that the situation that it was never intended to pay any dividends to members of the Company was communicated to you and that you took the position that if that was the fact then no income tax would be payable. Your records might disclose that situation. In fact, no dividends have ever been paid nor will they be paid now.
>
> Despite this, the requirements of the legislation in question may necessitate the Company filing annual returns. If that is so, then please instruct us and we shall arrange with the Company to file those returns with you.
>
> We should explain to you that on February 20th we forwarded a copy of the Amended Memorandum of Association and of the Order confirming special resolution and the amendment to the Registrar of Joint Stock Companies, but he has not yet returned the certificate of its having been filed with him to us.

A duly certified copy of an Order by Bigelow, J. dated February 19, 1941 (exhibit 2), dealing with the amendment of the memorandum of association of Moose Jaw Flying Club Limited, reads partly thus:

> IT IS HEREBY ORDERED that this Court doth hereby confirm the special resolution passed at the meeting of the shareholders of the company held on the 11th day of January, A.D. 1941, reading as follows:

BE IT RESOLVED that the Memorandum of Association be amended by adding to paragraph numbered 3 thereof the following paragraph, namely,

(*m*) Notwithstanding what is herein set out the payment of any dividends to its members is hereby prohibited pursuant to the provisions of Section 9 of the Companies Act, being Chapter 21 of the Statutes of Saskatchewan 1933.

AND IT IS FURTHER ORDERED that the Memorandum of Association of Moose Jaw Flying Club Limited be altered by adding thereto under paragraph 3 the following provision, that is to say:—

'Notwithstanding what is herein set out the payment of any dividends to its members is hereby prohibited pursuant to the provisions of Section 9 of the Companies Act, being Chapter 21 of the Statutes of Saskatchewan 1933.'

A certificate by the Registrar of Joint Stock Companies dated February 21, 1941 showing that a copy of the memorandum of association of Moose Jaw Flying Club Limited, as altered by the order of Bigelow, J., was registered under the provisions of subsection 2 of section 51 of the Companies Act, 1933, was filed as exhibit 3. Said subsection 2 reads thus:

A resolution under this section shall not take effect until a copy has been filed with the registrar, who shall thereupon issue under his seal of office a certificate showing the alteration effected by the resolution.

A page of the Moose Jaw Times-Herald of August 1, 1942, in which appears a notice by Executors & Administrators Trust Company Limited, as liquidator of Moose Jaw Flying Club Limited, requesting the creditors of the company to send it their claims on or before October 1, 1942, and notifying them that on their failure so to do the liquidator, at the expiry of this delay, shall be at liberty to distribute the assets of the company among the parties entitled thereto, having regard to the claims of which the liquidator will have then received notice, was produced as exhibit 4.

A list of the company's shareholders, to which is attached a page showing the cash on deposit at the Imperial Bank at Moose Jaw ($319.12), the amount retained in the bank to take care of payments of $51 each to six unlocated shareholders whose names are mentioned ($306) and a surplus of $13.12, was filed as exhibit 5.

A statement of receipts and disbursements of Moose Jaw Flying Club Limited, prepared by the liquidator, dated August 31, 1948, from 1942 to 1947 inclusive, was marked as exhibit 6.

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A certified copy of an order of Mr. Justice Doiron, dated April 6, 1944, in the matter of The Voluntary Winding Up of Moose Jaw Flying Club Limited, was filed as exhibit 7; it reads in part as follows:

IT IS HEREBY ORDERED that Executors & Administrators Trust Company Limited, liquidator under the Companies Winding Up Act of the Province of Saskatchewan of Moose Jaw Flying Club Limited, be and it is hereby authorized to distribute the sum of $2,537.33 less expenses among the known shareholders of Moose Jaw Flying Club Limited as set out in the Stock Register.

A letter dated September 19, 1944, addressed by M. H. Anderson, acting inspector of Income Tax, to George F. Connor, Moose Jaw, inspector in the winding up of Moose Jaw Flying Club Limited, produced as exhibit 8, contains, among others, the following statements:

Ottawa has ruled that inasmuch as the above company distributed income during 1942 period on the basis of $30 per $10 share, it does not come within the purview of section 4(*h*) of the Income War Tax Act, and therefore would be considered as taxable in the years in which it was in operation. This being so, it will be necessary to issue assessment for those years for which a profit was made, namely, 1938, 1940 and 1941.

If the surplus has all been distributed the onus of payment of the company's taxes will be on the shareholders, who will also be taxable on their individual proportion of the undistributed earned surplus of the company at the date operations ceased.

Filed as exhibit 9 is a certified copy of a solemn declaration by James Wilson, dated June 16, 1944, to which are annexed copies of a statement of receipts and disbursements dated June 2, 1944, marked at exhibit A in the declaration, and of a notice by Executors & Administrators Trust Company Limited dated April 20, 1944, marked as exhibit B, regarding a meeting of the shareholders of Moose Jaw Flying Club Limited for the purpose of having the accounts of the liquidator laid before it and hearing any explanation which may be given by the latter. In his declaration, after relating that Moose Jaw Flying Club Limited entered into a voluntary winding up, that H. H. Bamford and George T. Connor were appointed inspectors, that Executors & Administrators Trust Company Limited was appointed liquidator and that the affairs of Moose Jaw Flying Club Limited are fully wound up, Wilson states:—

6. That prior to the resolution winding up the Moose Jaw Flying Club Limited all the assets had been sold and disposed of by the

Company and its only assets consisted of moneys on deposit in the branch of the Imperial Bank of Canada at Moose Jaw, Saskatchewan.

7. That pursuant to the provisions of Section 34 of The Companies Winding Up Act notice of a General Meeting of the Company was published in the issue of the Saskatchewan *Gazette* dated the 1st day of May, A.D. 1944, and now produced and shown to me and marked as exhibit B to this my declaration is a true copy of the Notice which was published in the said issues of the Saskatchewan *Gazette*.

8. That at the general meeting of the company the accounts were all laid before it and an explanation was given at the time and place indicated in exhibit B.

10. That there remains undisposed of the sum of Three Hundred and Twenty and 43/100 ($320.43) dollars as shown in Exhibit "A" and such moneys are on deposit in the branch of the Imperial Bank of Canada at Moose Jaw, Saskatchewan; that all the shareholders have been paid in full and all the debts of the company have been paid in full and there remains six shareholders who cannot be located at the present time and there is due to each such six shareholders the sum of Fifty-one ($51.00) dollars and their names and addresses are appended to Exhibit "A".

11. That Executors and Administrators Trust Company Limited have made an effort to locate the said shareholders but have been unsuccessful in doing so . . .

A review of the oral evidence seems advisable.

James Wilson, who was in June 1942 and is still accountant for Executors & Administrators Trust Company Limited, testified that on June 16 his company was appointed liquidator, under the Companies Winding Up Act of the Province of Saskatchewan, of Moose Jaw Flying Club Limited and that H. H. Bamford and J. T. Connor were appointed inspectors.

He declared that, when his company undertook the winding up of Moose Jaw Flying Club Limited, the assets of the latter consisted of cash in the bank, that, on the date of the resolution authorizing the liquidation, there were $11,804 on deposit and that the paid-up capital represented 213 shares at $10 each. Referring to the copy of the Moose Jaw Times-Herald of August 1, 1942 (exhibit 4), he declared that the notice therein contained was also published in the issues of August 8, 15 and 22. He asserted that his company did not receive notice of any claim from the Income Tax Department prior to the distribution of the assets on April 8, 1943, and April 19, 1944, and that these distributions were the only ones made by the company. He stated that the first distribution was $40 on 207 shares and the second one $11 on the same number of

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shares. He identified and deposited the list of shareholders and the statement of receipts and disbursements marked respectively 5 and 6.

He said that a letter was turned over to his company by George T. Connor, one of the inspectors in the liquidation, received by him from the inspector of Income Tax. Shown a letter dated September 19, 1944, addressed to George F. Connor, signed M. H. Anderson, acting inspector of Income Tax, he acknowledged it as the one mentioned. Counsel for respondent admitted that the letter had been written. Wilson declared categorically that this letter was the first advice received by his company with regard to income tax.

He asserted that the only distributions of assets made by the company were those of April 8, 1943, and April 19, 1944, as disclosed in exhibit 5.

He was asked if Bamford, in his quality of inspector, had made a report of the meeting of the inspectors in April 1944 authorizing the second distribution; an objection was made by counsel for the respondent on the ground that this evidence would constitute hearsay. As Bamford is dead, I am of opinion that the question should be allowed. Wilson's answer was: "The report was that he had interviewed the assessor for the income tax department, and he had informed him that the company being a non profit organization was not liable for income tax". According to him the distribution was made very shortly after. He added that he got the impression at the time that a clearance would follow, although he could not say that Bamford made this statement.

In cross-examination Wilson declared, with reference to the six shareholders who did not receive their share of the distribution, that the money is available to them, if they can be found, and is on deposit in the Imperial Bank of Canada, at Moose Jaw, in the name of the liquidator.

Re-examined, Wilson specified that the account in the Imperial Bank was in the name of Executors & Administrators Trust Company Limited as liquidator of Moose Jaw Flying Club Limited.

Ernest Cullum Bird, chief corporation assessor of the Income Tax Department, at Regina, from January 1941

to September 1946, testified that he had charge of the returns of Moose Jaw Flying Club Limited during that period and that, when the returns for the years 1940 and 1941 were filed, exemption was allowed under section 4(*h*) of the Income War Tax Act. He stated that later on that position was changed, when information was received that a distribution had been made by the liquidator.

Objection was taken to the witness' evidence concerning the allowance or disallowance of the exemption claimed on the ground that exemption can only be allowed by a certificate signed by the Minister; the objection was reserved. After giving the matter due consideration, I have come to the conclusion that the evidence is admissible. Shown a copy of letter (exhibit 8) addressed to George T. Connor, Bird admitted that he had written it. He however did not acknowledge that September 19, 1944, was the date on which the Income Tax Department changed its view. Perhaps I had better quote an extract from the deposition (p. 28):

A. It wouldn't, because this is as a result of—correspondence took place between our office and head office and finally Ottawa rules that this, this company should be assessed as an ordinary company. So that might have been quite long—this may have been correspondence over quite a long period of time—I don't know, I can't tell you now. I have been out of the office two years and if that was all the correspondence kept on the department file,—

Q That is between Ottawa and your branch office at—

A. I can just say that I sent it down to Ottawa under exemption under 4(*h*) until this next came through to our office and immediately it changed the complexion and they were held by Ottawa that they should be taxed as an ordinary corporation.

He thought that the distribution of the assets by the liquidator caused the change of view of the Department about the exemption.

To the question as to whether he had ever had a conversation with Bamford, Bird answered rather evasively (p. 30);

Q Now did you ever have a conversation with Mr. H. H. Bamford, now deceased, with regard to this?

A. Oh, nothing special. I used to call on Mr. Bamford when I was over in Moose Jaw as a personal friend, I mean that is all, and I do recollect saying that the Flying Club was going to be taxable owing to this distribution but I couldn't tell you what the conversation was, it was just a casual remark, I didn't go up to interview him with regard to the thing.

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Q. Well, did you have a conversation with him at any time that exemption had been allowed?

A. No, not to my knowledge.

Q. Under section 4(*h*)?

A. After the original new assessment had been sent back from Ottawa I might have written to him or I might have told him that apparently as this had been accepted by Ottawa a certificate would be issued in due course, but I wouldn't swear to that.

Re-called Wilson asserted that he had sent to the Income Tax Department a complete list of the shareholders of Moose Jaw Flying Club Limited, indicating the number of shares held by each of them as of October 30, 1941.

Counsel for respondent put in evidence as exhibit A a copy of a memorandum dated November 12, 1946, supposedly made by the registrar of Joint Stock Companies, stating that under the provisions of subsection 2 of section 217 of the Companies Act (R.S.C. 1940, chap. 113) the names of certain companies were struck off the register, among which appears "The Moose Jaw Flying Club, Moose Jaw, Sask."

The case is governed by paragraph (*h*) of section 4 of the Income War Tax Act. The relevant part of section 4 reads thus:

> The following incomes shall not be liable to taxation hereunder;
> (*h*) The income of clubs, societies and associations organized and operated solely for social welfare, civic improvement, pleasure, recreation or other non-profitable purposes, no part of the income of which inures to the benefit of any stockholder or member;

Subsection 1 of section 19 enacts:

> On the winding-up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.

It is admitted that no dividends were declared or paid prior to June 16, 1942, date on which Executors & Administrators Trust Company Limited was appointed liquidator of Moose Jaw Flying Club Limited.

The evidence discloses that there were two distributions of the assets of Moose Jaw Flying Club Limited, one on April 8, 1943, and the other on April 19, 1944.

The notices of assessment were only mailed on February 19, 1947; the long delay between the filing of the returns of income by the taxpayer and these notices is difficult to understand. Be that as it may, the Minister of National

Revenue is given very extensive, almost unlimited, powers under section 55 of the Act regarding assessment, re-assessment or additional assessments, which is in the following terms:

Notwithstanding any prior assessment, or if no assessment has been made, the taxpayer shall continue to be liable for any tax and to be assessed therefor and the Minister may at any time assess, re-assess or make additional assessments upon any person for tax, interest and penalties.

Reference was made by counsel for appellant to section 51, which is worded as follows:

Every trustee in bankruptcy, assignee, administrator, executor or other like person, before distributing any assets under his control shall obtain a certificate from the Minister certifying that no unpaid assessment of income tax, interest and penalties properly chargeable against the person, property, business or estate, as the case may be, remains outstanding.

Distribution without such certificate shall render the trustee in bankruptcy, assignee, administrator, executor and other like person personally liable for the tax, interest and penalties.

I do not think that this section has any relevance to the question at issue.

The evidence discloses that after the two distributions of assets made by the liquidator on April 8, 1943, and April 19, 1944, there remained in the bank, in the name of the liquidator, a sum of $319.12 intended to take care of payments of $51 each to six unlocated shareholders, whose names appear on page 2 of exhibit 5.

Counsel for appellant submitted that the distribution by the liquidator of the company's assets did not constitute a dividend and in support of his contention relied on the case of *Gagné* v. *Minister of Finance* (1). The facts therein are briefly as follows: The Canadian Rattan Chair Company Limited was incorporated in 1911 with a capital of $43,500, made up of 435 shares of the par value of $100 each. Gagné had been its manager since 1912 and up to 1920 he held 11 shares of the stock. On April 27, 1920, he bought 424 shares at figures running from $90 to $200 a share, being the remaining issued capital stock of the company, thereby becoming the owner of all the shares. On the same day the company declared a dividend of 92 per cent payable in the month of May following. This dividend amounted to $40,020. On the portion of the accumulated profits earned since the inception of the Act, namely $18,936.62, the tax was levied but the balance

(1) (1925) Ex. C.R. 19.

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($21,083.38) was not taxed. The dividend was paid out of the accumulated profits. Gagné contended that, when he purchased these shares, the taxable profits of the company were apportioned to the former shareholders in the purchase price paid to them for their stocks and that the dividend paid to him represented a return of his capital or a refund of the moneys he had paid to purchase with the capital its inherent proportion of accumulated profits, as the value of his investment was, by the payment of the dividend, reduced by the amount it represented and that in the interval such investment could not have produced such revenue. The appellant further contended that this dividend is not a revenue but a replacement of capital.

Audette J. could not agree with these contentions. I deem it convenient to quote an extract of his judgment (p. 21):

> The dividend before being declared did not exist and it is quite a fallacy to contend that before he purchased the shares and before the company had declared their dividend the latter ever existed, or that in this transaction the vendors were realizing the profits that the company had apportioned to them, and that such profits formed part of the price of the stock. How could that be if the dividend did not exist at that time. How also could that be applied when he purchased for $90 a par value share of $100, thus establishing a discrimination among the old shareholders.
>
> These a priori contentions of the appellant rest neither upon law, upon trade customs or upon sound logic. The unsound principles involved therein are subversive to stable and logical structure, and eliminating them is leaving the determination of the question at bar a task free from difficulty.
>
> The appellant's contention is neither equitable nor meritorious and seems to challenge common sense.
>
> The dividend paid to the appellant—although of a large percentage—was declared and paid in the usual course in 1920 and I fail to see any reason to distinguish it from the every day business transactions.

I do not think that this judgment can be of much assistance to the appellant.

It was argued on behalf of appellant that there is no liability on the part of a company to pay tax until the money on hand is distributed. It was further urged that the sums paid to the shareholders by the liquidator did not constitute a dividend but were in fact a return of the capital invested. Counsel relied on the decision in *Inland Revenue Commissioners* v. *Burrell* (1).

(1) (1924) 2 K.B. 52.

The headnote reads thus (p. 52):

On the winding up of a limited company the undivided profits of past years and of the year in which the winding up occurred were distributed among the shareholders, of whom the respondent was one:

Held, that super tax was not payable on the undivided profits as income, because in the winding up they had ceased to be profits and were assets only.

At page 62 Pollock, M. R. says:

These sums have not been distributed to the shareholders as dividends. The voluntary liquidation has deprived the directors of the power of declaring a dividend.

Counsel acknowledged that by virtue of section 19 of the Income War Tax Act such distribution "shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income". He submitted however that the appellant had never declared any dividends and that, while the accumulated income was in the treasury, it was not assessable. He intimated that once it was subtracted from the treasury and distributed to the shareholders it became dividends and that the Crown in such a case must follow these assets into the hands of the shareholders. He added that the Crown was supplied with a list of the shareholders after September 1944 and accordingly knew what each of them received. Counsel then cited definitions of the word dividend. I do not think it necessary to deal with this question at great length; subsection 1 of section 19 is clear and unequivocal; I will merely refer briefly to the authorities cited.

In the case of *Henry* v. *Great Northern Railway Company* (1), dividend was defined by the Lord Chancellor thus (p. 15):

It was argued that the word "dividend" must be taken, *ex vi termini*, to apply merely to one fund to be divided, and that it could not in its true meaning be extended to any fund afterwards to be brought into division. But it must be observed that the word "dividend", as used in this and similar cases, is never used with strict accuracy, if strict accuracy depends upon its primary meaning. The word "dividend", if we look to its derivation, means obviously the fund to be divided, not the share of any particular partner or person in that fund, and strict language would require us to speak, not of the dividend which each shareholder is entitled to receive, but of his aliquot portion of the dividend.

(1) (1858) 27 L.J. Ch. 1.

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Lord Justice Knight Bruce made the following comments (p. 18):

> The word "dividend" carries no spell with it. Applicable to various subjects, it is not intelligible without knowing the matter to which it is meant as referring, and, of course, where there is a context, it is liable to be affected by that context.

In the case of *Dupuis Frères Ltée* v. *Minister of Customs and Excise* (1), the definition of the word dividend, taken from the Oxford Dictionary, reads thus (p. 211):

> According to the Oxford Dictionary, a dividend is the sum payable as the profits of a joint stock company and received as (by) an undivided holder as his share.

It may be apposite to note that, before setting forth this definition, the Honourable Mr. Justice Audette made the following observations (p. 210):

> The dividend paid upon these preferred shares is clearly and distinctly from the earned profits. The dividend in question was actually paid out of the profits and for all purposes remains a dividend. And notwithstanding any agreement, arrangement, or contract between the company and its shareholders—allowed under the law of the province—it is obvious that a provincial law could not *ex proprio vigore* operate in derogation of the right of the Federal Crown to tax under the B.N.A. Act. The federal Act gives the right to tax profits and that right is paramount. Sec. 3 of the taxing Act defines the taxable "income" as the net profit or gain . . . whether such gains are divided or distributed.

The judgment in *Waterous* v. *Minister of National Revenue* (2), is not, to my mind, pertinent. Waterous Limited, having accumulated profits, declared a dividend and paid in Victory Bonds. The appellant, a shareholder, in his income return, claimed that he should not pay income tax on this dividend because it was paid in Victory Bonds, which were exempt from Income Tax. It was held (*inter alia*) by Audette, J. that (p. 110): "the payment of the distributed dividend in question in *bonds* does not bring the transaction within the *obligation* of the bond above recited which introduces the exemption in taxes "and" it is not the payment of the bond at maturity and it is not the payment of interest upon presentation and surrender of coupons."

Further on (p. 111):

> The dividend paid and distributed from the gains and profits of the company remains a gain and profit in the hands of the shareholder, whether that dividend is paid in kind, specie or in bond; because it is all through a dividend from, and of, profit and gain; it remains of such nature in the hands of both the company and the shareholder. What you cannot do directly, you cannot do indirectly.

(1) (1927) Ex. C.R. 207. (2) (1931) Ex. C.R. 108.

In re *Hill* v. *Permanent Trustee Co. of New South Wales* (1), Lord Russell of Killowen, who delivered the judgment of the Judicial Committee of the Privy Council, expressed the following opinion (p. 731):

> A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorized reduction of capital. Any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called "dividend" or "bonus" or any other name, it still must remain a payment on division of profits.

In the case of *Commissioners of Inland Revenue and Blott* (2), the report discloses that an assessment to super-tax under the Finance (1909-10) Act, 1910, was made upon respondent for an allotment to him of bonus shares in a limited company, that in the previous year the company had passed a resolution declaring that out of its undivided profits a bonus should be paid to its shareholders and authorizing, in payment of that bonus, a distribution among them of certain of its unissued shares credited as fully paid and that the said shares had been allotted pursuant to the said resolution.

It was held by Viscount Haldane, Finlay and Cave, Lords Dunedin and Sumner dissenting, "that for the purposes of the super-tax the shares so allotted to the respondent could not be treated as part of his 'total income from all sources for the previous year' within the meaning of s. 66, sub-s. 2, of the Act, inasmuch as they were not part of his income but were an addition to his capital in that year."

The next case relied upon by appellant is that of *Commissioners of Inland Revenue* v. *Fisher's Executors* (3). The headnote, exact and fairly comprehensive, reads thus:

> A limited company with large undistributed profits resolved to capitalize part of these profits and to distribute them pro rata among its ordinary shareholders as a bonus in the form of 5 per cent debenture stock. The stock was duly issued, the conditions providing that the company might redeem the stock after a certain time and in certain events.
>
> The respondents, who had received their due proportion of the above debenture stock, were assessed to super tax under the Finance (1909-10) Act, 1910, for a certain year in respect of their stock:
>
> *Held*, that the bonus paid in debenture stock was not income in the hands of the respondents and was therefore not liable to super tax.

(1) (1930) A.C. 720.
(2) (1921) A.C. 171.
(3) (1926) A.C. 395.

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In the matter of *Commissioner of Income Tax, Bengal* v. *Mercantile Bank of India Limited et al* (1), investment company, carrying on business in India, which had capitalized its accumulated profits, issued to its shareholders bonus debentures; these were subsequently redeemed. The Judicial Committee of the Privy Council, affirming the judgment of the High Court, held that the shareholders did not thereby receive any taxable income, profits or gains.

The report in *Swan Brewery Co. Ltd.* v. *The King* (2), reveals the following facts. Section 6 of the Dividend Duties Act, 1902 (of Western Australia) provides that a company carrying on business in Western Australia and not elsewhere which declares a dividend shall pay a duty equal to one shilling for every twenty shillings of the amount or value of such dividend. Section 2 of said Act, as amended by the Dividend Duties Amendment Act, 1906, provides that "dividend" shall include "every dividend, profit, advantage or gain intended to be paid or credited to or distributed among any members or directors of any company except the salary or other ordinary remuneration of directors". The appellant passed a resolution that (1) the capital of the company be increased by £101,450 divided into 81,160 shares of £1 5s each; (2) that the sum of £101,450, being a portion of accumulated profits standing to the credit of the reserve fund, be transferred to the credit of the share capital account; (3) that the shares be allotted as fully paid up among the shareholders prorata. It was held by the Judicial Committee of the Privy Council: "that those transactions were in effect a declaration of a dividend amount to £101,450 within the Dividend Duties Act, 1902, and that the appellant company was liable to pay duty upon that amount under that Act."

I fail to see how this decision can be of any benefit to the appellant.

It was argued by counsel for appellant that section 51 of the Income War Tax Act does not apply to a liquidator under the Winding Up Act as he is not included in the phrase "and other like person". He relied on re *Ollman* (3), *Halsbury's Laws of England*, second edition, volume

(1) (1936) A.C. 478.
(2) (1914) A.C. 231.
(3) (1925) 57 O.L.R. 340.

31, page 495, paragraph 631, and *The Thames and Mersey Marine Insurance Company Limited* v. *Hamilton, Fraser & Co.* (1).

In *re Ollman* Mr. Justice Riddell held that the words "or for some other cause" should not be construed as "other such like" according to the *ejusdem generis* rule. I do not think that this decision has any relevance herein.

In Halsbury's Laws of England, second edition, volume 31, page 495, paragraph 631, we find the following observations:

> As a rule, general words following specific words are limited to things *ejusdem generis* with those before enumerated, although this, as a rule of construction, must be controlled by another equally general rule, that statutes ought, like wills or other documents, to be construed so as to carry out the objects sought to be accomplished by them, and general words may be limited with respect to the subject-matter in relation to which they are used.

In the case of *The Thames and Mersey Marine Insurance Company Limited* v. *Hamilton, Fraser & Co.* (*supra*) Lord Halsbury expressed the following opinion (p. 489 in fine):

> If understood in their widest sense the words are wide enough to include it; but two rules of construction now firmly established as part of our law may be considered as limiting those words. One is that words, however general, may be limited with respect to the subject-matter in relation to which they are used. The other is that general words may be restricted to the same genus as the specific words that precede them.

The *ejusdem generis* rule is well established; Maxwell, Interpretation of Statutes, 9th ed., p. 336; Craies, Treatise on Statute Law, 4th ed., p. 165; Beal, Cardinal Rules of Legal Interpretation, 3rd ed., p. 355; *Regina* v. *Edmundson* (2); *Rex* v. *Special Commissioners of Income Tax* (3); *Trustees of Psalms and Hymns* v. *Whitwell* (4); *Ystradyfodwg and Pontypridd Sewerage Board* v. *Bensted* (5).

I believe that the wording of section 51, which mentions a trustee in bankruptcy and an assignee, is wide enough to comprise a liquidator.

It was submitted by counsel for respondent that a person claiming exemption from income tax under some provision of the statute must bring himself clearly within the word of the exemption and that the onus to do so rests on him.

(1) (1887) 12 A.C. 484.
(2) (1859) 28 L.J.M.C. 213.
(3) (1922) 8 Reports of Tax Cases 367, 373.
(4) (1890) 3 Reports of Tax Cases 7, 11.
(5) (1907) 5 Reports of Tax Cases 230, 241.

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Exemption provisions must be construed strictly. This, in my opinion, is well settled law: *Baymond Corp. Ltd.* v. *The Minister of National Revenue* (1); *Lumbers* v. *The Minister of National Revenue* (2); *Roenisch* v. *Minister of National Revenue* (3); *The Credit Protectors (Alberta) Ltd.* v. *The Minister of National Revenue* (4); *Wylie* v. *City of Montreal* (5); *Cox* v. *Rabbits* (6); *Versailles Sweets Ltd.* v. *Att'y-Gen'l for Canada* (7).

It was urged on behalf of respondent that, before a company can claim the exemption, it must establish that it was organized solely for one of the purposes mentioned in section 4(*h*). These purposes are, as usual, described in the Memorandum of Association. Among them are the following:

(*a*.1.) To carry on the business of instructors and teachers of the methods and arts of aviation and to recommend to the proper authorities, pupils and pilots for grants of certificates of standing and of proficiency and for such purposes to conduct such lectures, classes, experiments and flying tests as may be necessary and as may lawfully be carried on and to arrange for the services of such instructors and or air engineers and or other experts as may be approved by the Department of National Defence or other lawful authority where approval is necessary.

(*a*.2.) To acquire by gift or lease or purchase or in any other lawful way such aeroplanes, airships, balloons, or other form of air craft and such equipment and such aerodromes and hangars and other buildings lands or premises as may be reasonably necessary for any of the purposes of the company.

(*a*.6.) To carry on any other business which may seem to the company capable of being conveniently carried on in connection with its business or calculated directly or indirectly to enhance the value or render profitable any of the company's rights or properties.

(*a*.7.) To establish and maintain lines or regular services of aircraft of all kinds and carry on the business of carriers of passengers and goods by air, sea, river, canal, railway and otherwise, and to enter into contracts for the carriage of mails, passengers, goods and cattle by any means and either by the company's own aircraft and conveyances or by or over the aircraft, vessels, conveyances and railways of others; and to enter into contracts with any person or company as to interchange of traffic, running powers or otherwise and in connection with any of the objects aforesaid to carry on the business of railway contractors, shippers, shipbuilders, omnibus proprietors, engineers, manufacturers of machinery and railway cars, omnibus, and coach builders; and to carry on the business of ware-housemen and storers of goods, wares and merchandise of every kind and description whatsoever or any other trade or business what-

(1) (1945) Ex. C.R. 11.
(2) (1943) Ex. C.R. 202 at 211.
(3) (1931) Ex. C.R. 1, 4.
(4) (1947) Ex. C.R. 44.
(5) (1885) 12 S.C.R. 384, 386.
(6) (1878) 3 A.C. 473, 478.
(7) (1924) 3 D.L.R. 884.

soever which can in the opinion of the company be advantageously carried on by the company in connection with it as ancillary to the general business of the company.

(*d*) To enter into partnership or into any arrangement for sharing profits, union of interest, reciprocal concessions or co-operation with any person or company.

Paragraph (*m*), added pursuant to the order of Bigelow, J., reads thus:

(*m*) Notwithstanding what is herein set out the payment of any dividends to its members is hereby prohibited pursuant to the provisions of Section 9 of the Companies Act, being Chapter 21 of the Statutes of Saskatchewan 1933.

It was urged by counsel for respondent that these objects cannot be said to be solely for civic improvement, recreation purposes or any other of the purposes specified in the exempting clause, namely clause 4(*h*). I agree with this contention.

In answer to his opponent's intimation that clause (*m*), added to the Memorandum of Association pursuant to the order of Mr. Justice Bigelow, converts the appellant company into a non-profit company since it is prohibited from declaring dividends, counsel for respondent submitted that the profits of the appellant company, which are reflected in the value of its shares, will ultimately inure to the benefit of the shareholders through a winding up proceeding. He pointed out that we have a company capitalized at $2,130 which gathered profits of over $11,000 in 1941 and of $3,895.57 in 1940, that there is nothing in the order of Mr. Justice Bigelow dealing with the final distribution of capital upon a winding up of the company and that, as long as the capital and accumulated income of the company will inure eventually to the benefit of the shareholders upon a winding up, the appellant company cannot come within the provisions of section 4(*h*). Counsel for respondent drew the attention of the Court to the fact that the appellant was authorized by the order of Mr. Justice Doiron to distribute its accumulated income and that, in fact, it did distribute it among its shareholders.

Reverting to the proposition that the purpose for which a company is organized is to be found in its memorandum of agreement, I wish to refer to two decisions wherein the

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question has been fully expounded; *Bowman* v. *Secular Society Ltd.* (1) and *Corporation of the City of Toronto* v. *Bell Telephone Co. of Canada* (2). As the present notes are rather extensive, I do not think that commentaries on these two judgments are apposite.

I may note incidentally that the declaration made by Bamford, inspector of Income Tax, at a meeting of the inspectors in April 1944, to the effect that he had interviewed the assessor for the Income Tax Department and informed him that the appellant, being a non-profit organization, was not liable for income tax, cannot bind the Crown: *Jacques Cartier Bank and The Queen* (3); *Kennedy* v. *Minister of National Revenue* (4); *Mayes* v. *The Queen* (5) *National Dock and Dredging Corp. Ltd.* v. *The King* (6); *The King* v. *McCarthy* (7); *The King and Vancouver Lumber Co.* (8), affirmed by the Supreme Court and the Judicial Committee of the Privy Council; *Western Vinegars Ltd.* v. *Minister of National Revenue* (9).

The appellant carried on an enterprise which was beyond the scope of the functions of a club coming under paragraph (*h*) of section 4. See *Carlisle and Silloth Golf Club* v. *Smith* (10).

After a careful perusal of the evidence and an attentive study of the law and of the precedents, I have reached the conclusion that the appeal must be dismissed and that the assessments made under the provisions of the Income War Tax Act and the decision of the Minister affirming them must be affirmed.

The respondent will be entitled to his costs.

Judgment accordingly.

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(1) (1917) A.C. 406.
(2) (1905) A.C. 52.
(3) (1895) 25 S.C.R. 84.
(4) (1929) Ex. C.R. 36, 38.
(5) (1891) 2 Ex. C.R. 403.
(6) (1929) Ex. C.R. 40, 42.
(7) (1919) 18 Ex. C.R. 410.
(8) (1914) 17 Ex. C.R. 329; (1920) D.L.R. 6.
(9) (1938) Ex. C.R. 39, 41.
(10) (1913) 3 K.B. 75.