
Montreal 1965 May 20 Ottawa Sept. 28

BETWEEN:

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

AND

ALLAN BRONFMAN ..... RESPONDENT.

Income tax—Indirect payments—Income Tax Act, s. 16(1)—Gifts by company to directors' relatives—Whether directors chargeable—Whether shareholders chargeable.

Four brothers and a brother-in-law were directors of a company which in the years 1950 to 1955 made gifts of $97,000 to their relatives and to retired employees or their dependents. The directors were substantial shareholders of the company but did not control a majority of the company's votes. For the said taxation years each of the directors was assessed to tax on one-fifth of the total of the gifts made.

Section 16(1) of the *Income Tax Act* provides:

> "A payment or transfer of property made pursuant to the direction of, or with the concurrence of, a taxpayer to some other person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to him."

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Held, allowing the appeal in part, whilst s. 16(1) applied to render the gifts taxable, the tax was payable by all of the company's shareholders in accordance with their respective shareholdings.

APPEAL from decision of Tax Appeal Board allowing appeal from income tax assessment.

Paul Boivin, Q.C. and *Raymond G. Decary, Q.C.* for appellant.

Philip F. Vineberg, Q.C. for respondent.

DUMOULIN J.:—The case about to be decided was chosen, at the request of the litigants, as a test applicable in law and in facts to four other similar suits, respectively directed against three brothers and a brother-in-law of the respondent. The amounts in each of the five actions represent one-fifth of the aggregate corporate gifts made by a certain company to third parties, during the 1950-1955 period, divided in five parts imposed as taxable income on each of its directors equally.

This is an appeal from a decision of the Tax Appeal Board, dated February 18, 1958[1], allowing the appeal of Allan Bronfman in respect of the income tax assessments for the taxation years 1950, 1951, 1952, 1953, 1954 and 1955.

Notices of re-assessment, bearing date of December 14, 1956, increased the respondent's declared income by the amounts hereunder:

1950	$2,308.98
1951	2,901.25
1952	4,364.07
1953	2,587.61
1954	6,465.95
1955	868.30

The appellant, in para. 8 of his Notice of Appeal, submits that the additional income above ". . . represent his (i.e. Allan Bronfman's) share of the gifts made by Brintcan Holdings (Canada) Limited to certain persons, which gifts were effectively paid at the direction and with the concurrence of the respondent who was one of the five Directors of Brintcan Holdings (Canada) Limited."

Slight attention only was given at trial to the exact nature and aims of the company itself, and rightly so, since the problem awaiting solution is of a different order. Suffice

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it to say for our purposes that Brintcan Holdings (Canada) Limited was incorporated as a private company, September 9, 1949, under the *Companies Act* of Canada; its main business, supposedly at least, that of investment holdings and management, with a view to concentrating in one corporate organization various interests of the Bronfman family.

Brintcan's capital stock consists, according to the evidence, in 2026 common shares, plus 14,250 non-cumulative redeemable 3 per cent preferred shares, all with voting rights. Allan Bronfman, his three brothers and brother-in-law, Aaron Barnett, each owned 5 common shares, the surplus of these, 2,001, belonging, in the words of Mr. Philip Vineberg, Q.C., respondent's counsel, to "other family companies or trusts composed entirely of members closely or remotely related to the Bronfman clan." The respondent also held 2,707 preferred shares; his brothers, just mentioned, and Mr. Barnett, figure as important owners of the same class of shares, without, however, controlling a majority of company votes.

During the six material years, 1950 to 1955 inclusively, Brintcan Limited made certain gifts to third parties, who were not shareholders of the company, totalling $97,000. Out of these donations, $80,000 consisted in wedding gifts of $10,000 each to children, one of the latter a son of respondent, to grandchildren, nephews or nieces, of the five directors herein concerned. The surplus, $17,000, was doled out to retired employees or their dependents in dire need of financial assistance.

The gist of the matter is neatly outlined in the opening paragraph of the appellant's Notes, from which I quote:

> The issue before the Court is whether or not wedding gifts and other gifts made by Brintcan Holdings (Canada) Ltd. were in fact payments or transfers of money pursuant to the direction or with the concurrence of, the (respondent) as a benefit that the (respondent) desired to have conferred on the donee and, as such, whether or not those transfers of money are taxable in the hands of the (respondent) pursuant to the provisions of Section 16(1) of the Act.

To this allegation, the respondent opposes a categorical denial worded thus in para. 6 of his Reply to the Minister's Notice of Appeal:

> 6. No payment was made pursuant to the direction or with the concurrence of the taxpayer to some other person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person

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Stated in so simple language, the issue narrows down to the interpretation of s. 16(1) of the *Income Tax Act*, R.S.C. 1952, c. 148.

Before delving into an examination of this none too clear provision of the law, I should say that I am quite indifferently impressed with the lame excuse, legally speaking, that Allan Bronfman would have ". . . exercised a very passive role in relationship to the company. He never received any salary or director's fees. He was not an officer of the company. He did not attend any meeting. He did not participate in the management . . . . He did not, in short, direct the company to do anything or not to do anything." These lines, in the second paragraph of the respondent's Notes, just tend to show that Bronfman, solicited by several other pursuits, took for granted, if in fact he did not ignore, the practically automatic functioning of this family gift distributing "machinery". Nonetheless, he had accepted, as a director, certain statutory duties, the persisting neglect of which does not extenuate but might rather aggravate his personal responsibility.

This point settled, the next step brings us to the crux of the difficulty: s. 16(1), enacting that:

> 16. (1) A payment or transfer of property made pursuant to the direction of, or with the concurrence of, a taxpayer to some other person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to him.

The marginal note, introducing the section, consists in these two words, "Indirect Payments". If it is a truism to say the law must be sought in its text and not in the margins the bare fact remains of the object, correct or not, attributed by the draughtsman to s. 16(1).

I would not disagree with the opinion of many writers, who pondered over this text, that it could endure more clarity and state its aim and purpose with a neater degree of precision; yet, this affords but melancholy comfort and does not ease my task of trying to decipher the incipient riddle.

Fortunately, and properly so, all things duly weighed and considered, the parties at bar seem to have tacitly reached the understanding that the solution depends upon whether

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or not the taxpayer should be the owner of the money paid or the property transferred, pursuant to his direction or with his concurrence.

This view is contradictorily propounded in the Notes produced, at my request, on behalf of the appellant and respondent.

On pp. 4 and 6 of his memorandum, respondent's counsel argues that:

> Before an assessment can be levied against Mr. Allan Bronfman with respect to any diversion of income, it is necessary to find that this is income to which he was legally entitled. No one has suggested, or could possibly suggest, that he had any right to the income, or any rights to the moneys that were paid as gifts. If there had not been the alleged diversion, it wouldn't have been Allan Bronfman who would have received the moneys that were paid. Quite apart from everything else, the payment was a payment by Brintcan and not a payment from Allan Bronfman. The moneys paid were moneys of Brintcan and not the moneys of Allan Bronfman.

And on p. 6, this assertion is renewed with some elaboration:

> It is trite law that the assets of a company are separate and distinct from the assets of the shareholders . . . . Section 16, whether under sub-section (1) or sub-section (2), applies where the taxpayer diverts to a third party that which would have been his. It is first necessary, however, that it should have been his, and also that it should have been taxable income to him had he received it.

The appellant, on p. 5 of its own Notes, acknowledges Brintcan's ownership of the sums donated, but rejects the proposition that the taxpayer becomes assessable only if he is personally entitled to the money or property comprised in the gift or transfer. I quote the entire passage since it definitely joins the issue:

> During the course of his argument, my learned friend stressed the fact that in order that Section 16 be applicable, the taxpayer concerned must be the owner of the money, rights or things.
>
> We respectfully submit that such a construction would render Section 16(1) meaningless because the owner of the income does not need the concurrence nor the direction of anybody else in order to transfer such income. The cases of transfer of money owned by the taxpayer are provided for at sections 21, 22 and 23 of the Act and also at Section 111 dealing with gift tax.
>
> In the present instance, the money that has been transferred belonged to the company and it is through the concurrence and the direction of the appellant, who was and still is a director of the company that such transfers of money were made by the company to the different donees.

Before extending its corporate generosity to relatives of its five directors, the company had duly paid the full tax on

its yearly income, so that the gifts and gratuities came out of its residual capital, all taxes acquitted.

What should be construed as the more plausible meaning and intent of this none too limpid text of our fiscal law? After some hesitation, I take the view that a literal interpretation offers the truer course. Independently of its marginal note, s. 16(1) would operate as a prohibition of "indirect payments" of whatever form or shape. Otherwise, the inventive ingenuity of the tax evading incentive would ceaselessly devise means and ways of diverting a considerable proportion of the government's revenue. Accordingly, the legislator seeks to prevent this tax-evading attempt.

Scarcely tenable also is the respondent's contention that s. 16(1) contemplates assessing delegated payments as in the instance mentioned on p. 3 of respondent's Notes:

> If a payment is owing to me, . . . by virtue of a law fee, and I direct that it should be paid to another, then, of course, Section 16 would require that I be taxed thereon personally. If I recommend to my client that he pay my Ottawa correspondent a fee for the latter's services, and my client complies with my recommendation or request, it should be equally clear that . . . I should not be taxed thereon at all.

Certain things, as the two latter examples, are self-evident to a point that they defy the need of legal recognition. For that reason I cannot detect in the disputed section anything beyond the current, every day meaning of the words used.

Both parties agree that all the wedding gifts made and financial assistance extended came from Brintcan's residual capital. How then could those occasional withdrawals of money be effected in the material form of "a payment" to "some other person" if not "pursuant to the direction of, or with the concurrence of..." Allan Bronfman and his four co-directors?

The respondent testified that the family custom of paying wedding donations to close relatives out of Brintcan's of Canada and its predecessor company's funds dated back to 1930. This regular practice presupposes, at its start, an active concurrence of the directors, tacitly continued, possibly, throughout the years, else the paying officers of the companies concerned would have lacked authorization to issue the requisite cheques. It goes without saying that the motivation of such outlays foresaw "a benefit the taxpayer desired to have conferred on the other person...", one of

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whom was the respondent's son, also the recipient, at the time of his wedding, of an additional monetary present from his father.

So far, three or four conditions into which the relevant section can be subdivided have been met, namely:

1. A payment or transfer of money;
2. Pursuant to the direction or with the concurrence of the respondent, even though implicit;
3. As a benefit respondent desired to have conferred on some other persons, his own relatives or dependants of former employees.

One fourth and paramount requirement remains to be satisfied: does the inclusion of the payments so made "in computing the taxpayer's income to the extent that it would be if the payment . . . had been made to him", entail correlatively the personal ownership of the moneys thus paid out?

I would think not, because, firstly, the section's clear enough purpose is the taxation of indirect payments under circumstances such as the instant ones. If so, then, a norm or basis of assessment must be set, and this was done by Parliament assimilating the payer's funds, corporate body or third party of any other description, to the personal income of the taxpayer directing these payments or merely concurring in their performance, to the extent that they would have increased his income had they been made to him.

Secondly, the practical objective of the Legislature's foresight shows up at once in the words of the learned member of the Tax Appeal Board, whose conclusion, however, I cannot adopt. Mr. Fisher, Q.C., (appeal No. 494, *supra,* p. 464) writes:

> It is true that, by payments of the amounts in question herein, the amount of the distributable surplus of the company which might be on hand for some future distribution is thereby reduced, and to that extent the company may be "avoiding" ultimate taxation of a part of such surplus. However, that is quite permissible under the provisions of the taxation legislation, as "avoidance" of taxation is entirely legal, although "evasion" of taxation is not.

The simple reason of my dissenting opinion is that my interpretation of s. 16(1), mandatory in its intent, renders,

if disregarded, indirect payments a form of tax evasion and not a condoned method of tax avoidance.

In the matter of *C. A. Ansell Estate* v. *M.N.R.*[1], a precedent relied upon by the respondent, the facts, totally different, offer no useful analogy to the case at bar, as the suit was adjudged according to s. 63(2) of the Act, dealing with "Trusts, Estates and Income of Beneficiaries and Deceased Persons".

One final question now comes to the fore, as it did in the decision of Mr. Fisher, Q.C., with whom, this time, I agree. Why were the five Brintcan directors the sole parties taxed for the $97,000 paid during the material years, exclusive of the shareholders? The learned member of the Tax Appeal Board expressed his opinion as follows (at p. 462):

> And why the directors of X Company Limited (the case being heard *in camera*) should be singled out for taxation under the provisions of that subsection—as has been done in the present instance—when they are very minor shareholders in so far as the common shares of X Company Limited are concerned, (and indeed are only minority shareholders when all the common shares of the five directors and the non-cumulative preferred shares held by three of the directors hereinbefore set forth, both types of shares having full voting rights, are added together and taken into consideration), is a question which raises the further query as to why, since all of the shareholders eventually approved and concurred in the various gifts in question over the years at the annual meetings of X Company Limited, all of the shareholders should not have been taxed on their proportionate shares of the gifts.

Shareholders possessing voting rights could have, had they so wished, objected to and voted down at annual or specially convened meetings their directors' generosities. And, of course, they also might have resorted to the radical remedy of voting out of office the entire Board and elected a more thrifty slate of directors. Their abstention or indifference, unbrokenly maintained, becomes tantamount to an approval of their administrators' gift distributing policies, and they should, with the latter, have shared proportionately to their individual holdings, the burden of taxation decreed by s. 16(1). Since the shareholders were not impleaded no conclusion can affect them nor their eventual right of full defence. Whether or not due to lapse of time, the Minister of National Revenue would be estopped by s. 46(4)(*b*) of the Act from legal recourse against the shareholders is of no interest presently.

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For the reasons above, this appeal is allowed as follows: The respondent will be assessed for a portion of the income tax attaching to the $97,000 donated, rateably with the number of shares he owned, during the material years, of the total capital stock of Brintcan Holdings (Canada) Limited. In consequence, the record will be referred to the Minister for revision accordingly.

The appeal being but partially successful, no costs are granted to either party.

Appeal allowed in part; no costs.