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Dec. 1 & 2.
Dec. 28.

THE NORTH PACIFIC LUMBER CO., LIMITED ..... APPELLANT;

AND

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

Revenue—Company in liquidation—Interest on deferred payments—Income—Liquidator—Winding-Up Act

The appellant is a company which was carrying on large lumbering operations and the manufacturing of lumber. In 1914, business being bad owing to the war, the company ceased operating, closed down a large mill, and in 1916 resolved to wind up the company. They sold a number of their assets, partly for cash and partly under deferred payments extending up to 1931. Upon the interest on such deferred payments the appellant paid income tax until 1926 when it was authorized, under the Winding-up Act, to be wound up, and a liquidator was appointed thereunder. The company then refused to pay any further tax on said interest, contending that upon the winding-up taking place under the Winding-up Act, there was a notional change in the character of the company, whereby the distinction formerly existing between capital, profits and interest was lost as to which was left, and all became merely assets.

Held, that the Crown is not bound by a statute unless therein mentioned, and not being mentioned in the Winding-up Act, that Act did not bind it. (*The Queen* v. *Nova Scotia Bank,* 11 S.C.R. 1 followed.)

2. That a liquidator under the Winding-up Act is the agent of the company, and that it is the company which is taxed and not the liquidator; that interest on deferred payments of capital is income, subject to taxation.

3. That the nature and character of the debt did not change by the fact that the affairs of the company had passed under the control and custody of a liquidator.

4. That a company, though not actively engaged in the business mentioned in its charter, is not by reason of that fact necessarily exempt from taxation, and, if it has income, such income is liable to taxation.

APPEAL under the provisions of the Income War Tax Act, from the decision of the Minister of National Revenue.

The appeal was heard before the Honourable Mr. Justice Audette at Ottawa.

C. M. O'Brian for the appellant.

C. F. Elliott for the Minister of National Revenue.

The facts are stated in the reasons for judgment.

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AUDETTE J., now (this 28th December, 1927), delivered judgment.

This is an appeal,—under the provisions of sec. 15 *et seq.* of The Income War Tax Act, 1917, and amendments thereto—from the assessment of the appellant company in the sum of $8,371.14 in respect of alleged income received by it from the date of liquidation, namely, the 29th July, 1926, to 30th November, 1927. This income consists of the sum of $136,563.84 received by the liquidator as interest during the period in question on account of deferred instalment of purchase money from sale of capital assets, after the respondent had credited the sum of $31,216.60 in respect of certain expenses, disbursements, and carrying charges.

The appellant is a duly incorporated company, under a Dominion charter, bearing date the 17th June, 1889, with a fully paid-up capital of $750,000 at the present time, for the purpose of carrying on the business of manufacturing lumber, etc., the whole as more fully set out in the charter, and is and was the owner, for the purpose of its business, of large and valuable timber limits in British Columbia. In 1914 business being bad, the company ceased operations and closed down a mill which it had erected at an approximate cost of $1,000,000. In 1916 it passed a resolution

> to turn into cash as quickly as possible the liquid assets of the company and to apply the same in reduction of the indebtedness, and to bend every energy towards a satisfactory sale of the business, in whole or in part.

Since the year 1920, as set out in par. 6 of the statement of claim,

> all the property and assets of the appellant company have been disposed of, with the exception of one timber lease, namely, Lease 46, Sayward District, Vancouver Island, and some foreshore property situate in and at Burrard Inlet, B.C. The fixed capital assets so disposed of consisted of a sale of provincial lease 50, Vancouver Island, sold on May 1, 1920, for $550,000, on deferred purchase terms, which agreement has been fully performed and completed by the purchaser; a further sale of timber berth and provincial timber lease 439, embracing timber situate near Chilliwack, B.C., sold for $600,000, on deferred purchase terms, which said agreement of purchase has been fully performed and completed by the purchaser; the sale of the company's sawmill, site and plant situate at Barnet, Burrard Inlet, British Columbia, sold on 13th March, 1924, to the Barnet Lumber Company, Limited, for $750,000, of which $250,000 was paid in cash and the balance of $500,000 secured by a purchase money mortgage, instalments of principal to be paid at the rate of $10,000 monthly, the said

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mortgage bearing interest at the rate of six per cent. There remains due on this mortgage the sum of $125,000; and lastly, a sale on 28th January, 1925, to Bloedel, Stewart and Welch Corporation, Limited, of provincial timber leases 47, 48 and 51 for $2,850,000, payable as to $500,000 in cash and the balance $175,000 on 28th January and July, 1927, $200,000 on 28th days of January and July in the years 1928, 1929, 1930, 1931 and 1932, with interest on the unpaid balance at six per cent, payable half yearly on which said agreement there is approximately $1,750,000 accruing due and unpaid.

On the 29th July, 1926, the company was authorized to be wound up and on the 10th September, 1926, Robert Maclaren Kenney was appointed permanent liquidator of the company.

From 1914 to 1926—the year of the liquidation—the company had ceased operating and was only engaged in the business or occupation of disposing of its assets and paying its debts.

The debts of the company—with the exception of the claim for income tax herein—have all been paid and satisfied, and it stands to make large profits and surplus out of the sale of its assets.

While the company was not operating since 1914 to the date of the appointment of a liquidator, it was yet paying income tax to the crown upon the interest earned by the deferred payments of the capital; but it now refuses to do so, since the appointment of the liquidator.

We have had in this case, on behalf of the appellant, every argument that could conceivably have been urged with great ingenuity, and, among others, it was contended that when a winding-up takes place under the Winding-Up Act, that there is a notional change in the character of the company, so that the distinction between what was formally capital, profits, interest, is lost with regard to what is left and it becomes only assets, and that accordingly a company in liquidation is not, under the term of The Income Tax Act, that which connotes to be a person carrying on business or a person under the Act.

This contention would seem to postulate some undisclosed text of law.

The claim of the Crown rests upon the Taxing Act and it is for interest earned on deferred payment for the sale of capital assets under contract passed before the liquidation.

Assuming that under the Winding-Up Act equality of the rule of distribution had been established (a questionable matter since that Act deals with secured and preferred claims) the Crown is not bound thereby.

The general rule of construction of statutes—as held by the Supreme Court of Canada in the case of *The Queen* v. *Nova Scotia Bank* (1) is that the Crown is not bound by a statute unless therein mentioned, citing in support Maxwell on Statutes (2nd ed. 161 *et seq*):

> When a statute is general and thereby any prerogative, right, title or interest, is diverted or taken away from its King, in such case the King shall not be bound, unless the statute is made by express words to him . . .

And the Court in that case expressly decided that the Crown was not bound by the Winding-Up Act.

Section 16 of the Canadian Interpretation Act (ch. 1, R.S.C., 1906) is also to the same effect as the finding in the *Nova Scotia* case (ubi supra).

Nowhere in the Winding-Up Act is the Crown named and accordingly there is no pretence for saying that the Crown should be bound thereby; therefore the respondent's rights are free from any restraint that might be invoked under the provisions of the Winding-Up Act and in respect of the liquidator appointed thereunder.

The rights of the Crown cannot be altered to its prejudice by mere implication. However, in the present case, the Crown rests upon the Taxing Act which superabundantly justifies the present claim.

Even if the Winding-Up Act applied to the Crown it would seem that the appellant could not succeed in its contention. Indeed, the Winding-Up Act was primarily instituted to protect the creditors and a just and legal claim cannot be defeated thereby under a mere notional or imaginary conception. The denial of the Crown's claim is repugnant to the very character of the Winding-Up Act. To deny the claim because the company appears to have passed into the hands of a liquidator, would moreover amount to reading the taxing act against its very intent, meaning and spirit. (Sec. 15, Interpretation Act.)

Under sec. 33 of the Winding-Up Act the liquidator, upon his appointment, receives, takes under his custody

(1) (1885) 11 S.C.R. 1.

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and controls all the property, effects and choses in action of the company.

What is a chose in action, if not a right to receive or recover a debt or money, which can be enforced by action. The interest due on the deferred purchase price and earned by that capital is a revenue of the company subject to the income tax, and which becomes a debt due to the Crown, for which the company is liable. It is not sought here to collect the same from the liquidator personally, but as the agent of the company, as the person who administers the company, receiving and paying moneys.

The effect of the Winding-Up Order is explained by sec. 20 of the Act. The company from the date of the winding-up has continued, through the liquidator, to do what it was doing from 1914 to 1926, that is, not carrying on the business mentioned in its charter, but the business of adjusting and winding up the business of the company. A company which is not actively engaged in business is not by reason of that fact necessarily exempt from taxation. If it has income, it becomes liable to taxation. Plaxton and Varcoe, Dominion Income Tax Law and cases therein cited.

The company, under the provisions of sec. 20, retains its corporate state until its affairs are wound up, and under sec. 69 all claims against the company, present or future, must be considered. The liquidator must maintain an impartial hand between all persons interested and has no right to deny a creditor his just claim without justification. The nature and character of a debt does not change from the fact that the affairs of the company have passed under the control and custody of the liquidator. The main function of a liquidator is to collect and realize all the assets of the company to be applied in discharge of its liabilities. 5 Hals. 445.

Some stress was laid at trial upon the state of the law in England of a liquidator under similar circumstances and cases cited; but all of this must be cast aside. There is no analogy whatsoever between the English and the Canadian law with respect to income tax under similar circumstances. In fact, a case like the present could not arise in England for the obvious reason that the tax is payable at

the source. In other words when the interest on the deferred payments would come into the hands and control of the liquidator, the tax would have already been paid. The party who paid such interest would have been obliged to deduct therefrom the income tax and pay it to the Government. The party paying the interest must remit the tax.

The obligation to pay interest—which is income under the Taxing Act—*Hudson's Bay Company* v. *Thew* (1)—was duly discharged before the liquidator was appointed, and that obligation has passed into the hands of the liquidator. The tax is the debt of the company and the liquidator is the agent of the company clothed with the obligation to discharge it; the company and not the liquidator is responsible for the debt. They are two distinct entities. One is the principal, the other is the agent. *Knowles* v. *Scott* (2); *In re Anglo-Moravian, etc., Ry Co.* (3); *Pulsford* v. *Devenish* (4); *John Hood & Co., Ltd.* v. *W. E. Magee* (5).

Under the Canadian Taxing Act it must be found that the liquidator is truly an individual and a person who represents a corporate body, also a person under the Act, residing in Canada. The word corporate body in the interpretation of the word " person " covers a company. Yet it is contended that as the name of " liquidator " is not mentioned in the interpretation clause of the Act defining the word " person,"—that both the liquidator and the company escape taxation. But it must first be clearly borne in mind that it is the company which is sought to be taxed in this case and not the liquidator and the company clearly comes within the definition of " persons." That is quite sufficient for the purposes of this case. The company is only approached through the liquidator because he happens to be the agent who administers the company and in whose hands the assets, the annual profits and gains of the company are, under a special Act, administered by him.

It cannot be contended that because the interpretation clause defining the word " person " does not mention the word " liquidator " that he must escape. Does it mean

(1) (1919) 7 R.T.C. 206.
(2) (1891) 1 Ch. D. 717 at 723.
(3) (1875) 1 Ch. D. 130 at 133.
(4) (1903) 2 Ch. D. 625 at 636.
(5) (1918) 7 R.T.C. 327, at p. 350.

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that the clause must cover all classes of persons to bring them under the Act and that because the words "lawyer," "notary," etc., are not in that clause that they become free from taxation? Yet the liquidator must be a person just as much as a lawyer or a notary.

Moreover, an interpretation clause in an Act of Parliament which extends the meaning of a word does not by any means take away its ordinary meaning.

As I had occasion to say in a recent judgment, in the interpretation of statutes it is the duty of the court to ascertain the real intention of the legislature by carefully regarding the whole scope of the statute to be construed. And in each case the court must look at the subject-matter, consider the importance of the provisions and the relation of that provision to the general object intended to be secured by the Act. *Liverpool Borough Bank* v. *Turner* (1).

Light on the true meaning of the words used in the statute has to be sought from the context and the scheme of taxation with reference to which they are used.

There is no occasion, by specious argument, to endeavour beclouding the question at issue by endeavouring to exempt the appellant company from paying its just and lawful taxes, because the word "liquidator" is not in the interpretation clause. The liquidator is only there to settle the business of the company and to carry on the winding-up of its affairs and the company is the one which has been found liable to pay and not the liquidator; but the liquidator is there to pay the debts of the company out of the company's assets. The liquidator is however mentioned in some clauses in the act, establishing by necessary implication that he is considered as a person accessible to the arm of the law under the act. See sec. 9 and also sec. 8, subsec. *c*. And the word "winding-up" is also to be found in sec. 3, subsec. 9.

The true test of the controversy is solved from the very facts that the appellant, the party lawfully taxed, is a company; that its capital assets have earned annual profits or

(1) (1861) 30 L.J. Ch. 379-380.

revenues in the nature of interest on deferred payment of capital and that such profits are taxable under the Taxing Act.

The appeal is dismissed with costs.

Judgment accordingly.

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