

BETWEEN:

MARY M. RIDDELL APPELLANT;

AND

MINISTER OF NATIONAL REV- }
ENUE } RESPONDENT.

1937
May 3.
1938
Mar. 26.

Revenue—Income War Tax Act—Capital or income—Payment of salary to executor of will of deceased partner—Assessment on beneficiary entitled to revenue from estate of deceased—No liability for tax.

R., a member of a partnership, was entitled, under an agreement with the other members of the partnership by which his interest in the firm was established as that of a special partner, to a salary of \$15,000 per year "during his lifetime and to continue for six months after his death." R. died, and the firm paid to the executor of his will the sum of \$3,750 as so much of the greater amount payable for six months after his death, under the terms of the agreement. The

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executor treated this payment as an accretion to the capital of the estate. Under the terms of R's will the revenue from this sum of money was paid to R's widow.

R's widow, the appellant herein, was assessed income tax on the said sum of \$3,750, which assessment was confirmed by the Minister of National Revenue from whose decision she appealed to this Court.

Held: That the assessment was improperly made and must be set aside

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 Angers, at Ottawa.

W. F. Macklaier for appellant.

L. M. Gouin, K.C. and *J. R. Tolmie* for respondent.

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

ANGERS J., now (March 26, 1938) delivered the following judgment:

This is an appeal, under sections 58 and following of the Income War Tax Act (R.S.C., 1927, c. 97 and amendments thereto), by Mary Morris, widow of Alexander F. Riddell, in his lifetime accountant, of the City of Montreal, from the assessment made by the Minister of National Revenue, through the Commissioner of Income Tax, on October 23, 1934, for the taxing year 1932.

The facts are briefly as follows:

By his last will and testament, made on the 3rd day of June, 1932, before Edward W. H. Phillips and Ivanhoe Bissonnette, notaries public, the said Alexander F. Riddell gave, devised and bequeathed unto the Royal Trust Company, a corporation having its head office in the City of Montreal, all his estate and property, real and personal, movable and immovable and wheresoever situated at the time of his death, upon certain trusts which it is not necessary for the purposes herein to relate in detail, with the exception however of the one concerning the testator's wife, the appellant herein, worded as follows:

And as to all the rest, residue and remainder of my estate and property, real and personal, movable and immovable and wheresoever the same may be situate at the time of my death, including the proceeds of all life insurance policies and all property which I may have power to affect by will, I direct my Trustee to pay over all the net income and revenue therefrom to my said wife during her lifetime, * * * *

The clause then provides for the division of the testator's estate at the death of his wife or at his death should his wife predecease him; the last part of this clause has no relevance to the question at issue.

By his said last will and testament the testator appointed his trustee as executor, extending its power and authority over and beyond the year and day limited by law.

The said last will and testament contains, among others, a clause relating to the capital and revenue of the estate, which reads as follows:

In case of doubt as to whether assets or liabilities are to be credited or charged to the capital or revenue of my estate, as the case may be, and in all questions and matters of doubt in connection with my estate, the decision of my said Trustee and Executor in such matters shall be final and binding upon all parties interested.

Alexander F. Riddell was senior partner in the firm of Riddell, Stead, Graham & Hutchison, chartered accountants, of Montreal.

On July 11, 1932, an agreement was entered into by the said Alexander F. Riddell and his then partners, A. C. Stead, James Hutchison and John Patterson, reading as follows:

We, the undersigned, severally agree that, dating from the 1st July, 1932, Mr. A. F. Riddell's share and interest in the firm of Riddell, Stead, Graham & Hutchison, Chartered Accountants, will be that of a Special Partner with a salary of Fifteen thousand dollars (\$15,000) per annum during his lifetime and to continue for six months after his death. It is understood and agreed that from the 1st July, 1932, Mr. A. F. Riddell will not be hable, as a Partner, for any losses of the firm that may hereafter arise.

This Agreement, as regards Mr. A. F. Riddell's interest in the firm, replaces any previous Agreements.

By consent this agreement was not filed; it was reproduced at length in the admission of facts hereinafter referred to.

Alexander F. Riddell died on September 24, 1932.

On December 27, 1932, the firm of Riddell, Stead, Graham & Hutchison sent to the Royal Trust Company, executor and trustee under the last will and testament of the said Alexander F. Riddell, the sum of \$3,750, representing one half of the amount payable by the said firm to the latter's estate under the agreement aforesaid.

The only evidence adduced at the trial consists of an admission of facts and a copy of the last will and testament of Alexander F. Riddell, filed respectively as exhibits 1 and 2.

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Leaving aside the facts previously mentioned, the document entitled "Admission of facts" contains in substance the following statements:

On April 28, 1933, the appellant filed her income tax return for the year 1932, reporting her net taxable income as \$1,719.41; on May 1, 1933, the appellant paid \$58.78, which amount was confirmed as the tax assessed and levied upon appellant's income as reported for the year 1932 by income tax assessment notice issued on November 17, 1933; on October 23, 1934, the Inspector of Income Tax at Montreal added to appellant's return of income an item of \$3,750 alleged, in the notice of assessment, as "additional income from estate A. F. Riddell, being amount paid to estate A. F. Riddell under agreement with partners of Riddell, Stead, Graham & Hutchison" and the Inspector levied upon appellant a tax in the sum of \$301.93 in respect of alleged income for the taxation year 1932;

Through her agent, the Royal Trust Company, the appellant objected to the additional tax of \$301.93 at which she was assessed, caused a notice of appeal to be served upon the respondent within the statutory delay and carried on negotiations with the respondent with respect to such appeal;

The agreement referred to in the notice of assessment was the agreement made on July 11, 1932, between the late Alexander F. Riddell and A. C. Stead, James Hutchison and John Patterson (hereinabove quoted);

Under the terms of the will of her husband, Alexander F. Riddell, the appellant is entitled to receive during her lifetime the full amount of the net revenue of the estate after an annuity of \$5,000 per year to the testator's son has been paid and in 1932 the net revenue of the estate, apart from the \$3,750 received from the firm on December 27, 1932, was sufficient to pay the proportionate part of the said annuity due for the remaining 98 days of the year 1932 between the date of the death of Alexander F. Riddell and the end of the calendar year and to leave a surplus;

On December 27, 1932, a payment of \$3,750 was made by Riddell, Stead, Graham & Hutchison to the Royal Trust Company, trustee and executor of the will of the late Alexander F. Riddell, as so much of the greater amount pay-

able for six months after his death under the terms of the agreement aforesaid; the Royal Trust Company has never actually paid to the appellant the said amount of \$3,750; this amount has never been placed by the Royal Trust Company to appellant's credit and the Royal Trust Company has treated it as an accretion to the capital of the estate; the only payment made to the appellant by the Royal Trust Company, as a result of the payment to it of the amount of \$3,750, is the revenue derived from the said amount;

During the year 1932 the Royal Trust Company paid \$413.64 to the appellant, as being the amount of revenue which she was entitled to receive from the estate of her late husband;

The firm of Riddell, Stead, Graham & Hutchison continued to use the name of the late Alexander F. Riddell as part of the firm name from July 1, 1932, until the death of the said Alexander F. Riddell; the said firm continued without interruption to use his name during the six months following his death and is still using it.

It was submitted on behalf of the appellant that the agreement of the 11th of July, 1932, constituted a sale and that Alexander F. Riddell had thereby sold to the partnership the right to use his name as well as his share and goodwill in the firm. I must say that I am unable to adopt this view; the agreement in question has not, to my mind, the character of a sale: see in this connection the decision in the case of *Mackintosh v. Commissioners of Inland Revenue* (1), the head-note of which reads as follows:

A partnership deed provided that in the event of death of a partner the remaining partners might continue to use the firm's name, marks, and goodwill, paying to the executors of the deceased partner for this privilege the sum of £500 quarterly for a period of five years "after which it may be enjoyed without further payment." One of the partners died, leaving one-half of his residuary estate in trust for his widow, the appellant. The value of the deceased's share in the capital and income of the partnership was agreed and paid to the executors in full discharge of all claims except the quarterly payments. These payments were duly made, at first in full, but later under deduction of income tax. The appellant was assessed to Super-tax for the year 1926-27 in respect of her half share of the four quarterly payments received in 1925-26

For Estate Duty purposes the quarterly payments of £500 for five years were valued at £8,584 at the date of death and duty had been paid thereon.

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The Special Commissioners, on appeal, confirmed the assessment.
 Held, that the payments were income assessable to Super-tax

It seems expedient to me to cite a passage from the judgment of Rowlatt J. (p. 18):

In this case the point raised is whether the successive sums of £500 payable quarterly for a period of five years to the trustees—by which I think the parties to the document meant the executors—of a deceased partner in this firm, Mr. Mackintosh, are instalments of purchase money and so capital, or whether they are an annuity or annual sum taxable as income. That is the point, and as has often been said, it is an extremely narrow point.

* * *

But looking at the way this is framed, I do not think this was handled as if it was a purchase by instalments. The executors of the dying partner have not really sold anything that can properly be called a subject of sale. What they have really done is this. When the partnership was dissolved the right to the use of the name, and the goodwill, and these established grade marks, whatever they may be, were all assets of the partnership and ought to have been valued. But these were left in the partnership. The late partner had an interest in them in a way. You might say his executors were obliged to sell them, but what really happened was that they released their right—I think it is more accurate to say—to have these assets valued or included in the liquidation of the partnership. That is really what they did. How is it expressed? I think that really throws a good deal of light upon it; in fact I am not certain it is not the principal thing one has to go upon. The remaining partners may continue the use of the firm name on payment of a quarterly sum for this privilege for five years, after which it may be enjoyed without further payment. I think they are treating it not as paying by instalments for a thing they have got once for all, but I think they are treating it as paying for the use as they are using it, but that is only to go on for five years. I think it is a payment in the nature of income for the use of the firm name, the goodwill and rights, a payment concurrent with the enjoyment of the thing for which the payment is made, running on year after year and therefore prolonging the interest of the deceased partner in the income, although it is merely securing an income for a period of five years. That is the best conclusion I can come to upon a question which I am bound to say is a very narrow one.

It was argued on behalf of appellant that the Commissioner has assessed the wrong party; that, if the Commissioner had a proper right of assessment against anyone, which of course is not admitted, it was not against the appellant but against the estate of Alexander F. Riddell. The argument is based on the fact that the appellant did not actually receive the sum of \$3,750. This sum was paid by Riddell, Stead, Graham & Hutchison to the Royal Trust Company and the latter kept it, treating it as an accretion to the capital. Counsel for appellant contends that this sum of \$3,750 cannot be considered as income to the appellant because income is something that comes in; and, as far as the appellant is concerned, it cannot be said that

the sum in question did come in; it is admitted that the appellant did not receive the sum of \$3,750 and that the only payment which she got, as a result of the payment by the firm of Riddell, Stead, Graham & Hutchison to the Royal Trust Company of the said sum of \$3,750, was the revenue derived therefrom.

The appellant's contention appears to me well founded; the Commissioner has assessed the wrong party; the assessment should have been made against the estate of Alexander F. Riddell.

I may add incidentally that, in my opinion, the sum of \$3,750 paid by Riddell, Stead, Graham & Hutchison to the Royal Trust Company is income within the meaning of section 3 of the Income War Tax Act. On this point the case of *Allen and another v. Trehearne* (1) may be consulted with benefit. The clause of the will authorizing the trustee and executor to decide whether assets or liabilities ought to be credited or charged to the capital or revenue of the estate does not affect the rights of the Crown.

There will be judgment maintaining the appeal and setting aside the assessment and the decision of the Minister affirming it.

The appellant will be entitled to her costs against the respondent.

Judgment accordingly.

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