CROWN TRUST COMPANY (Estate of Kenneth J. McArdle) ..... APPELLANT:

1965

*May 25
June 24

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Refund of pension fund contributions upon death of employee—Whether taxable as income of estate or as income of deceased—Income Tax Act, R.S.C. 1952, c. 148, s. 6(1) (a) (iv), 63(1), (4), 64(2), 139(1)(ar).

The deceased died in 1957 and left a will in which he bequeathed the usufruct of his estate to his wife. In 1958, his executor received the sum of $13,844.20, being a refund of contributions made by the deceased and his employer to an employees pension fund, and interest earnings. It was admitted that this sum was received during the 1959 taxation year and was taxable. The Minister added this amount to the income of the estate. The executor contended that it was income of the deceased as the value of "rights or things" under s. 64(2) of the *Income Tax Act*, R.S.C. 1952, c. 148. The executor also contended before this Court that if the amount was income of the estate it was deductable under s. 63(4) of the Act as payable to a usufructuary. A further contention was that credit had not been given to the executor for an amount of $2,728.59 paid in respect of taxes owed by the deceased. The Exchequer Court set aside the decision of the Income Tax Appeal Board and upheld the Minister's contentions. The executor appealed to this Court.

Held: The appeal should be dismissed.

The amount received from the pension fund could never have become payable in the lifetime of the deceased, and it was clearly a death benefit under the articles of the pension plan. There was no difference in principle between this payment and any other pension benefit payable after death from a pension fund or plan to which a deceased person had contributed. Consequently, the right to such payment was not a right or thing "the amount whereof when realized or disposed of would have been included in the deceased's income", had he lived, within the meaning of s. 64(2) of the Act.

As to the other two contentions raised by the executor, the assessment should be referred back to the Minister in order that consideration be given to the possible application of s. 63(4) of the Act and to the payment of $2,728.59 said to have been made by the executor.

Revenu—Impôt sur le revenu—Remboursement de contributions faites à un fonds de retraite lors de la mort d'un employé—Ce montant est-il taxable comme impôt de la succession ou comme impôt du défunt—Loi de l'Impôt sur le Revenu, S.R.C. 1952, c. 148, arts. 6(1), (a)(iv), 63(1), (4), 64(2), 139(1)(ar).

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*PRESENT: Fauteux, Abbott, Martland, Hall and Spence JJ.

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Le défunt est décédé en 1957 et par son testament a légué l'usufruit de sa succession à son épouse. En 1958, son exécuteur a reçu la somme de $13,844.20, comme étant un remboursement de contributions faites à un fonds de pension par le défunt et par son employeur, ainsi que les intérêts. Il est admis que cette somme a été reçue durant l'année d'imposition 1959 et était imposable. Le Ministre a ajouté ce montant au revenu de la succession. L'exécuteur a prétendu que c'était un revenu du défunt comme étant la valeur «de droits ou de choses» sous le régime de l'art. 62(2) de la *Loi de l'Impôt sur le Revenu*, S.R.C. 1952, c. 148. L'exécuteur a aussi soutenu devant cette Cour que si le montant était un revenu de la succession, il était déductible en vertu de l'art. 63(4) de la loi comme payable à un usufruitier. Une autre prétention de l'exécuteur était à l'effet qu'un paiement de $2,728.59 qui avait été payé en rapport avec les taxes dues par le défunt n'avait pas été crédité. La Cour de l'Echiquier a mis de côté la décision de la Commission d'Appel de l'Impôt et a maintenu les prétentions du Ministre. L'exécuteur en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Le montant reçu du fonds de pension n'aurait jamais pu devenir payable durant la vie du défunt, et il était clairement un bénéfice résultant de la mort en vertu des articles du plan de pension. En principe il n'y avait aucune différence entre ce paiement et tout autre bénéfice de pension payable après décès venant d'un fonds ou plan de pension auquel un défunt avait contribué. En conséquence, le droit à un tel paiement n'était pas un droit ou chose «dont le montant obtenu lors de la réalisation ou disposition eut été inclus dans le calcul du revenu du défunt», s'il avait vécu, dans le sens de l'art. 64(2) de la loi.

Quant aux deux autres points soulevés par l'exécuteur, la cotisation devait être retournée au Ministre pour que considération soit donnée à l'application possible de l'art. 63(4) de la loi et au paiement de $2,728.59 qui aurait été fait par l'exécuteur.

APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier du Canada[1], renversant une décision de la Commission d'Appel de l'Impôt. Appel rejeté.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], reversing a decision of the Income Tax Appeal Board. Appeal dismissed.

Robert H. E. Walker, Q.C., for the appellant.

Paul Ollivier, QC., and *Paul Boivin, Q.C.*, for the respondent.

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal from a judgment of the Exchequer Court of Canada[1], setting aside a decision of the Income Tax Appeal Board and confirming an assessment of the

[1] [1964] Ex. C.R. 941, 64 D.T.C. 5104.

Minister whereby a pension benefit in the sum of $13,844.20 was added to the income of the estate of the late Kenneth J. McArdle for the taxation year 1959.

The facts are not in dispute. The late Mr. McArdle died on February 7, 1957, leaving a will in which he bequeathed the usufruct of his estate to his wife, during her lifetime, and the capital to his three children. His solicitor and the Crown Trust Company were appointed executors.

At the time of his death, McArdle was an officer of Public and Industrial Relations Limited and, as such, was a participant in a pension plan set up in 1946 under an Agreement between (1) Vickers & Benson Limited and its subsidiary Public and Industrial Relations Limited, (2) the employees of these two companies, and (3) R. H. Vickers and others as Trustees, which is hereinafter referred to as "the Agreement". The Agreement related to both insurance and pension benefits but we are here concerned with the pension benefits alone.

Upon McArdle's death, his executors became entitled to receive, and did receive on April 9, 1958, under the terms of the Agreement, the said sum of $13,844.20.

For the purposes of this appeal it is admitted that this sum was received during the 1959 taxation year and that it is taxable. The question at issue is whether the amount is taxable as income of the estate or as income of the deceased.

By Notice of Re-Assessment dated January 31, 1961, the Minister added the amount in question to the income of the estate. The appellant filed a Notice of Objection on the ground that the money received was income of the deceased by virtue of subs. 2 of s. 64 of the *Income Tax Act*. That was the sole point in issue before the Income Tax Appeal Board and the Exchequer Court.

Under the terms of the Agreement, the deceased, during his lifetime, had two principal rights namely (1) to receive a pension if he continued in the employ of the company and reached the stipulated retirement age and (2) to elect, if he left the employ of the company prior to reaching retirement age, to receive a lump sum payment "equal to the aggregate of all *his* contributions or to the cash surrender value at the date of termination of employment of that portion of the contract or contracts paid for by *his* contributions".

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Employer and employee contributed equally to the premiums required under the Agreement. The pension benefit, which is in issue here, was bound to be greater than the lump sum payable on leaving the employ of the company, since under the Agreement such pension benefit was equivalent to the "aggregate of premiums paid prior to death" which would include the contributions made by both employer and employee.

The $13,844.20 received by appellant was clearly an amount "received out of or under a superannuation or pension fund or plan" and as such was income by definition, under the provisions of ss. 6(1)(a)(iv) and 139 (1)(ar) of the Act. Indeed this is conceded by appellant.

Appellant's submission however, both here and below, has been that the amount should have been taxed as income of the late Kenneth J. McArdle under the provisions of subs. 2 of s. 64 of the Act, and not as income of his legal representatives.

The general rule under the *Income Tax Act* is that tax is payable on income actually *received* by the taxpayer during a taxation period. There are exceptions to this general rule and one of them is to be found in s. 64(2) which reads:

> Where a taxpayer who has died had at the time of his death rights or things (other than an amount included in computing his income by virtue of subsection (1)), the amount whereof when realized or disposed of would have been included in computing his income, the value thereof at the time of death shall be included in computing the taxpayer's income for the taxation year in which he died, unless his legal representative has, before the tax for the year of death has been assessed, elected that one of the following rules be applicable thereto:
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> (*a*) one-fifth of the value shall be included in computing the taxpayer's income for each of his last 5 taxation years including the year of death but the resulting addition in the amount of tax payable for any year other than the year in which he died is payable 30 days from the day of mailing of the notice of assessment for the year in which he died; or
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> (*b*) a separate return of the value shall be filed and tax thereon shall be paid under this Part for the taxation year in which the taxpayer died as if he had been another person entitled to the deductions to which he was entitled under section 26 for that year,
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> in which event, the rule so elected is applicable.

The said $13,844.20 unquestionably became payable by reason of covenants contained in the pension plan Agreement but it was not received nor was it receivable prior to McArdle's death and indeed the amount could be definitely

ascertained only upon the happening of that contingency. In fact, the amount was not paid to the appellant until April 9, 1958. The sum involved was derived from three sources namely, payments made to the trustees by (1) the deceased (2) his employer and (3) interest earnings. It could never have become payable in the lifetime of the deceased and in my view it was clearly a death benefit under article XI of the Agreement. I can see no difference in principle between such payment and any other pension benefit payable after death from a pension fund or plan to which a deceased person has contributed.

It follows that in my opinion the right to such payment was not a right or thing "the amount whereof when realized or disposed of would have been included in his (McArdle's) income", had he lived, within the meaning of s. 64 (2).

Counsel for appellant made another submission before this Court, which he stated had not been raised before the Income Tax Appeal Board or the Exchequer Court, and which is not referred to in his factum. It was based upon s. 63 (4) of the *Income Tax Act* which reads:

> For the purposes of this Part, there may be deducted in computing the income of a trust or estate for a taxation year such part of the amount that would otherwise be its income for the year as was payable in the year to a beneficiary or other person beneficially interested therein or was included in the income of a beneficiary for the year by virtue of subsection (2) of section 65.

I find it difficult to understand this submission. The T-3 Income Tax Return filed by appellant as executor, for the taxation year February 8, 1958, to February 7, 1959, reported all the net income of the estate as having been allocated to the widow. This return, of course, did not report the sum of $13,844.20 as income. That amount was added by the assessment of January 31, 1961, which is in issue on this appeal.

In paragraph 10 of its Reply to the Notice of Appeal to the Exchequer Court, when dealing with the said assessment, appellant stated:

> 10. Later, the appellant (the Minister) issued an assessment in respect of the taxation year 1958 claiming tax on the said refund as pertaining to the income of Mary I. McArdle, widow of the deceased and income beneficiary under his Will. On Notice of Objection, the Appellant decided, amongst other things, that said refund, as income of the said Mary I. McArdle, appertained to her income for the 1959 taxation year instead of 1958. A new, similar assessment was then issued in respect.

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of the year 1959. Notice of Objection was rejected, but was maintained by a judgment of the Tax Appeal Board, which judgment is the subject of the present appeal to this honourable Court.

It would seem therefore that the provisions of s. 63 (4) were recognized. Under the terms of that section, income payable in a given year by the executor to a beneficiary is not of course taxable in the hands of the executor.

Appellant also stated that credit had not been given to the executor for a payment of $2,728.59 made in August 1957 with a return of income of the late Kenneth J. McArdle for the period from January 1, 1957, to February 7, 1957, the date of his death. This return was not produced. The payment is not dealt with in the judgment below and is not referred to in the assessment of January 31, 1961, in issue on this appeal. The record does not contain tax returns made by the executor on behalf of the estate for the years 1957 or 1958 or any of the personal returns of the income beneficiary. It does indicate that another appeal with respect to 1958 income is pending before the Income Tax Appeal Board.

It is impossible to say on this record what person, if any, is entitled to a tax credit or refund. The payment should, of course, be taken into account in assessing interest or penalties and I have no doubt the Minister will do so. In my view however, it has no bearing on the issue to be determined in this appeal.

I would dismiss the appeal with costs and confirm the assessment of the sum of $13,844.20 as being income of the estate and not income of the late Kenneth J. McArdle. In the circumstances however, and particularly with respect to the possible application of s. 63(4) of the *Income Tax Act*, I would refer the assessment of January 31, 1961, back to the Minister in order that consideration may be given to the effect of the present judgment and the payment of $2,728.59 said to have been made by appellant in August 1957.

Appeal dismissed with costs.

Solicitors for the appellant: Martineau, Walker, Allison, Beaulieu, Tetley & Phelan, Montreal.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.