HENRY GOLDMAN ..... APPELLANT; 1953

*Jan. 30
*Feb. 23

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income—Whether payment received was gift or remuneration—Income War Tax Act, R.S.C. 1927, c. 97, s. 3(1), (4) as amended.

The appellant was chairman of a committee formed to protect the interest of a certain class of shareholders in the reorganization of a company which was in receivership, and had one B appointed counsel for the committee. Under the scheme of arrangement subsequently adopted, the company was to pay the costs and expenses, including counsel fees, of the several committees; there was to be no remuneration to the members of the committees as such, but it was understood that if the fees allowed would reasonably permit it, counsel would make some allowance to the committees for the work they did. B assigned to the appellant the amount by which his taxed fees exceeded a specified amount. In his income tax return for 1947, the appellant took the position that the amount was a gift from B and therefore not taxable. The Minister's assessment was upheld on appeal to the Income Tax Appeal Board and subsequently to the Exchequer Court.

Held: The appeal should be dismissed. It is clear that both the appellant and B intended that the money paid to the appellant was to be in remuneration for the services rendered as chairman of the committee.

APPEAL from the judgment of the Exchequer Court of Canada, Thorson P. (1), affirming the decision of the Income Tax Appeal Board and upholding the assessment made against the appellant for income tax by the Minister of National Revenue.

H. H. Stikeman Q.C. and A. L. Bissonnette for the appellant.

W. R. Jackett Q.C. and F. J. Cross for the respondent.

The judgment of the Chief Justice, Kellock, Locke and Fauteux, JJ. was delivered by:—

KELLOCK J.—The facts found by the learned trial judge (1) are essentially as follows. The appellant was active with two others in the formation of a committee of shareholders of a company then in receivership, and became its

*PRESENT: Rinfret C.J. and Rand, Kellock, Locke and Fauteux JJ.

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chairman. Shareholders of other classes, as well as bondholders, had also formed other committees. The reorganization of the company was, at this time, being attempted through the instrumentality of a negotiating committee appointed by the provincial government, and, ultimately, a scheme of arrangement was agreed upon.

The appellant had nominated a Mr. Black to be counsel for the shareholders' committee of which he was chairman, and the former was duly appointed and acted in that capacity throughout.

When the negotiation of the plan of reorganization was nearing its final stage, at a meeting of all the committees with the government committee, the appellant raised the question of remuneration for committee members. According to the evidence of Mr. Black, the chairman of the negotiating committee said that it had been understood throughout that there would be no remuneration for committee members "as such" but that counsel fees should be on a scale that the committees "could get something". After this meeting Mr. Black said to the appellant that while he did not like this arrangement, he was prepared to follow it out and see that, in that way, the appellant's committee did get something. Nothing was then said as to amount.

The scheme of arrangement provided that the company should pay the "costs and expenses" of the committees, but "not including any remuneration to the members of the said committees *as such*". It also provided that

> The amount of the foregoing . . . costs and expenses in each case shall be as agreed upon by the Bondholders' Protective Committee and the person entitled thereto or, in default of such agreement, as may be determined by The Supreme Court of Ontario.

In a conversation between the solicitor for another shareholders' committee and Mr. Black, the subject of fees came up. The latter said he would be satisfied with $5,000 for himself, whereupon the other solicitor said that he would recommend that the bondholders' committee approve of $10,000, so as to provide $5,000 for the appellant's committee. According to Black, the appellant, on learning of this, was critical of Black for mentioning what the appellant regarded as a small amount, and Black was instructed to ask for $50,000.

The bondholders' committee refused to go beyond $8,000, which would have left $3,000 only for the appellant's committee and this was not acceptable to the appellant. At the appellant's insistence, Black then prepared a bill of costs for $75,000 for the purposes of taxation under the scheme. The appellant attended with Black on the taxation, on which occasion Black explained that the bill was not only for legal fees but also remuneration for the committee. In view of the terms of the scheme, however, the taxing officer could not and did not allow anything beyond legal fees. The bill was taxed at $20,000 plus some small disbursements. The appellant, pleased with the result, told Black he was going to tell his committee that Black's fee should be $6,000 instead of $5,000, and this was done.

Subsequently, it was arranged, with the approval of the department, that the amount taxed should be paid in three annual instalments, as the reorganization had occupied some three years. Upon the appellant stating to Black that he wanted his money assigned to him, Black assigned to the appellant the last two annual instalments amounting to $7,000 each. It is the first of these which is in question here. The appellant has taken the position that the amount was a gift to him and not taxable.

The appellant later demanded from Black $3,500 out of the $6,000 which Black had retained, claiming that Black had agreed to split his fees with him. This was refused, whereupon the appellant complained to the Law Society, stating that Black had agreed that everything over the $6,000 was to go to the appellant "for the committee efforts" and that, in addition, the legal fees were to be split. Black has taken the position throughout that the $6,000 was for himself exclusively and all that he was interested in, and that he had agreed to pay over to the appellant everything over and above that amount as remuneration for the committee.

The appellant made various explanations below with respect to the $14,000, including a claim that it was a gift connected in some way with various mining claims which the appellant had and upon which he had spent, he says, some moneys. He proposed, he said, if they should turn out well, to transfer them to a company in which he and

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Black were or would be shareholders. All of these explanations were denied by Black and rejected by the learned trial judge.

On the facts as found by the learned trial judge (1) the inferences I think are plain. The appellant throughout his activity on the committee intended to be paid for his services if he could succeed in so doing. It has been already noted that the scheme of arrangement did not completely eliminate the possibility of the members of the committees being remunerated, but excludes direct payment to them for remuneration "as such". It was solely at the insistence of the appellant and for his benefit, that the taxation proceeded, and on the basis of the agreement between Black and the appellant that Black was to have no interest in any moneys beyond the $6,000 which he had agreed to take.

The appellant having succeeded in obtaining the remuneration he set out to obtain, and which he has kept for himself, I do not consider that the form by which that result was brought about is important nor that if there be any illegality attaching to the agreement to divide the taxed costs, this can avail the appellant. What the appellant received, he received as remuneration as he intended. Mr. Stikeman admits that had the offer of the bondholders to approve payment of $8,000 been accepted, the $3,000 which would thereby have found its way to the appellant would have been taxable in the hands of the latter as remuneration. In my view the mere interposition of the certificate of taxation does not change the character of that which the appellant actually received.

"Income" is defined by section 3(1) of the statute to mean, inter alia,

> . . . the annual net profit or gain or gratuity, whether ascertained and capable of computation as being . . . salary . . .

Subsection (4) provides that

> Any payment made to any person in connection with any duty, office or employment . . . shall be salary of such person and taxable as income for the purposes of this Act.

In *Herbert* v. *McQuade* (2), the question for consideration arose under Schedule E., of the *Income Tax Act*, 1842, which imposed tax on "the persons respectively having,

(1) [1951] Ex. C.R. 274. (2) [1902] 2 K.B. 631.

using or exercising the offices or employments of profit" in Schedule E for "all . . . . . profits whatsoever accruing by reason of such offices, (or) employments . . . . .". Collins M.R., at p. 649, referring to an earlier decision said that,

> a payment may be liable to income tax although it is voluntary on the part of the persons who made it, and that the test is whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it.

In my view this reasoning is equally applicable to payments made to a person "in connection with" an office or employment. In the case at bar it is perfectly clear that the payment in question was made in connection with the appellant's office as chairman and as remuneration therefor.

In *Seymour* v. *Reed* (1), Viscount Cave L.C., at 559, stated the principle to be that the language of Schedule E. rendered taxable

> all payments made to the holder of an office or employment as such, that is to say, by way of remuneration for his services, even though such payments may be voluntary, but that they do not include a mere gift or a present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services.

In *Cowan* v. *Seymour* (2), it was held that a sum paid to the secretary of a company who had acted as liquidator in the voluntary winding-up without remuneration was not taxable income, the amount in question having been paid to him by the shareholders after the winding-up as a tribute or testimonial and not as payment for services.

In my opinion these authorities make it plain on which side of the line the amount received by the appellant in the case at bar falls. This was not received by him as a testimonial nor as anything but remuneration for the services which he had performed. That the services had been completed when payment was made or that there was no assurance from the beginning that the services would be remunerated do not prevent the amount in question being taxable income. Lord Sterndale, M.R., in the case last cited, said at p. 508:

> It seems to me that there may very well be a payment in respect of an office which has been gratuitous up to its end, which still may be a payment for the services of that office, and therefore a profit accruing by reason of the office.

(1) [1927] A.C. 554. (2) [1920] 1 K.B. 500.

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At page 511, Atkin L.J., as he then was, said:

> I agree also that it is not conclusive against a profit accruing to the holder by reason of his office that the office has terminated at the time he in fact received the alleged profit.

And at 512:

> So I should say the question here is whether if a sum of money is given to the secretary or liquidator substantially in respect of his services as secretary or liquidator, it accrues to him by reason of his office.

I would be, in any event, of the opinion that the payment here in question, being paid and received as remuneration, also falls within the words "the annual profit or gain from any other source" in section 3, subsection (1), of the statute.

It is not without interest to observe that the appellant himself testified that prior to the formation of the committee, the matter of fees was one of the first things he discussed with Black. The appellant deposed that he then told Black that there was no assurance that anybody would get anything and that the latter had said that while there might not be anything for the committees, nevertheless, in organizations of that character "they generally arranged for payment of the solicitor's fees or counsel fees and in big companies the fees are generally large", and Black "was willing to offer me to split his fee" for the purpose of developing the mining claims to which I have already referred. Mr. Stikeman admits that under such arrangement, any moneys received by the appellant would be taxable.

It is true that Black denied this story and that the learned trial judge has accepted his evidence, but the significance of the evidence is that it demonstrates that from the outset the appellant intended to be paid for his services if he could succeed in so doing. In my opinion the means he ultimately took to secure that result do not, any the less, render the moneys he did receive, liable to taxation, although events did not actually take the course which, from this evidence of his, he had intended them to take.

I would dismiss the appeal with costs.

RAND J.:—The findings made by the President of the Exchequer Court (1) on conflicting evidence were not challenged before us. Their effect is that both the solicitor to the committee representing the 7 per cent preferred shareholders and its chairman, the appellant Goldman, as well as the chairmen of the reorganization committee and of the 6 per cent preferred shareholders' committee, understood that while no remuneration as such was to be paid to the members of the several committees by the company, the solicitors were to consider whether they could not, out of their agreed or taxed fees, make them some allowance. Goldman had argued strongly for direct remuneration, but without success.

The solicitor, at the meeting at which these matters were discussed, stated that he would be willing to accept $5,000 for his own services and to hand any excess over that amount allowed him to Goldman. The reorganization committee offered $8,000 but, on the objections of Goldman, it was declined. The fees were then taxed at approximately $20,000. Goldman thereupon agreed that the solicitor should retain an additional $1,000. The money was made payable in three annual instalments, the first of $6,000 to go to the solicitor and two of $7,000 to Goldman. The solicitor viewed the arrangement as equivalent to a recognition by him of a trust of all over $6,000 in favour of Goldman. Some time later, at the latter's insistence, he executed an assignment of the instalments which were, in due course, received.

In his income return for 1947, Goldman showed the first instalment of $7,000 as a gift from the solicitor with a note that the donor was to pay the gift tax. This was disallowed by the Department and the amount added to his income, the tax on which is the matter of this appeal.

That both parties intended the money to be paid and received as remuneration for services rendered by Goldman as committee chairman is not open to doubt. The solicitor became in fact a conduit between the company and Goldman. It was urged that the payment was voluntary. Apart from the question of a declared trust, it can be assumed

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that the solicitor was not legally bound to make the payment; but that he was bound by the common understanding, whatever it may be called or whatever its nature, is equally beyond doubt. He voluntarily undertook the obligation at least of his word given in an economic relation; but voluntariness of his consequent action is not to be confused with that present in gift.

The question is, therefore, whether the money so paid is within the provisions of the *Income Tax Act*. Sec. 3 provides:—

> (1) . . . 'Income' means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments . . . directly or indirectly received by a person from any office or employment . . . and also the annual profit or gain from any other source including . . .

The money was paid in respect of services performed in a business context; strictly speaking the 7 per cent preferred shareholders were the beneficiaries of and the persons for whom the work was done, even though indirectly the resulting arrangement was of the company's capital structure; is it necessary that the payment be made by the person for whom the services are rendered? The language of the section is,

> Directly or indirectly received by a person from any office or employment;

What is indirect if not something other than the normal direct course between employer and employee or its equivalent? I should say that the present case is a good example of indirect payment. Certainly, where the person paying is involved in relations that connect him with the object of the services, as here, it would be cutting down the language of sec. 3 unwarrantably to treat the payment as not within it.

Mr. Stikeman's basic objection was that we are not permitted to go behind objective facts and admit subjective understandings to give a payment its character. I find it a bit difficult to appreciate the force of that contention. To show that work has been done for or in the expectation of remuneration or that money is paid for certain work, necessarily involves the intention of the parties concerned; intention is material to the nature of

acts in almost all relations; it is part of them, and certainly it is so in those here, whether of service or payment or receipt.

In *Cowan* v. *Seymour* (1), the Court of Appeal held that a sum voted by the individual shareholders of a company, after its liquidation, to the former secretary who had served without remuneration was, in the circumstances, a voluntary gift and not a sum that accrued to him "in respect of an office or employment of profit". It was argued there, as it has been here, that if the office does not carry profit there never can be income paid in respect of it. In the view of the Master of the Rolls, once a profit accrued to a person by virtue of an office, that fact itself made it an office of profit. In this aspect the difference in the language of the two statutes obviates the difficulty of that reasoning for the case here. Nor was the fact that the office was at an end conclusive; it is a circumstance of weight but not more. The Master of the Rolls adopted what was said by Lord Loreburn in *Cooper* v. *Blakiston* (2):

> In my opinion, where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office.

Contrasted with such a payment is a benefaction of an exceptional kind such as a testimonial or other personal tribute, the antecedent instigation of which has been an office or employment. There the essential elements of gift are present; and though it may be related to the fact of services, it is not as remuneration for them that the gift is attributed.

In *Herbert* v. *McQuade* (3), it is said that the payment must be looked at from the standpoint of the person who receives it. While that aspect is no doubt relevant, the purpose of the donor or payer can be no less so. It is the latter's mind which determines that the payment be made at all and the object to which it is referred. That, at the same time, we should have, on the part of the receiver,

(1) [1920] 1 K.B. 500. (2) (1903-11) 5 T.C. 343 at 347.
(3) [1902] 2 K.B. 631 at 649.

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an acceptance in the same understanding furnishes a complementary circumstance which would seem to me to put the matter beyond controversy.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Stikeman & Elliott.*

Solicitor for the respondent: *F. J. Cross.*