1967
*May 3, 4
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THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

BENABY REALTIES LIMITED ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Taxation—Income tax—Expropriation of land resulting in taxable profit to taxpayer—Appropriate year of assessment—Expropriation Act, R.S.C. 1952, c. 106, s. 23—Income Tax Act, R.S.C. 1952, c. 148, s. 85B (1)(b).*

The respondent, conducting its business on the accrual basis, made a profit when the Crown expropriated part of its land. The expropriation took place during the respondent's 1954 taxation year, but an agreement fixing the amount of compensation and the payment of that compensation took place only in the respondent's 1955 taxation year. The respondent argued that, by virtue of s. 23 of the *Expropriation Act*, R.S.C. 1952, c. 106, it had the right to receive compensation from the moment of expropriation, that the compensation was therefore "receivable" in the taxation year 1954 within the meaning of s. 85B.(1)(*b*) of the *Income Tax Act*, R.S.C. 1952, c. 148, and was required to be accounted for as income for that year. The Minister contended that the taxpayer's profit did not form part of its income for the year 1954 because it was not received in that year and because it did not become an amount receivable in that year. The Exchequer Court set aside the Minister's assessment and held that the profit was taxable and should be assessed in the respondent's 1954 taxation year. The Minister appealed to this Court, where the appeal was argued on the assumption that the profit was taxable.

*Held:* The Minister's appeal should be allowed.

It is true that at the moment of expropriation the respondent acquired a right to receive compensation in place of the land, but, in the absence of a binding agreement between the parties or of a judgment fixing the compensation, the respondent had no more than a right to claim compensation and there was nothing which could be taken into account as an amount receivable due to the expropriation. Until the amount was fixed either by arbitration or agreement, there could be no amount receivable under s. 85B.(1)(*b*) of the *Income Tax Act*.

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*Revenu—Impôt sur le revenu—Expropriation d'une terre—Contribuable réalisant un profit imposable—Année d'imposition—Loi sur les expropriations, S.R.C. 1952, c. 106, art. 23—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 85B (1)(b).*

La compagnie intimée, qui faisait affaires en vertu du principe de comptabilité d'exercice, a réalisé un profit lorsque sa terre fut expropriée par la Couronne. L'expropriation a eu lieu durant l'année d'imposition 1954 de l'intimée, mais une entente établissant le montant de l'indemnité et le paiement de cette indemnité ont eu lieu

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*PRESENT: Fauteux, Abbott, Judson, Ritchie and Hall JJ.

durant l'année d'imposition 1955 de l'intimée. L'intimée a soutenu que, en vertu de l'art. 23 de la *Loi sur les expropriations*, S.R.C. 1952, c. 106, elle avait droit de recevoir une indemnité du jour de l'expropriation, que l'indemnité était en conséquence «recevable» durant l'année d'imposition 1954 dans le sens de l'art. 85B.(1)(*b*) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148, et devait être considérée comme étant un revenu pour cette année. Le Ministre a soutenu que le profit réalisé par le contribuable ne faisait pas partie de son revenu pour l'année 1954 parce qu'il n'avait pas été reçu durant cette année et parce qu'il n'était pas devenu un montant recevable durant cette année. La Cour de l'Échiquier a mis de côté la cotisation du Ministre et a jugé que le profit était imposable et qu'il devait être cotisé dans l'année d'imposition 1954 de l'intimée. Le Ministre en appela devant cette Cour. A l'audition, il fut assumé que le profit était imposable.

*Arrêt:* L'appel du Ministre doit être maintenu.

Il est vrai que l'intimée avait acquis, au moment de l'expropriation, le droit de recevoir une indemnité pour tenir lieu du terrain, mais, en l'absence d'une entente irrévocable entre les parties ou d'un jugement établissant l'indemnité, l'intimée n'avait pas plus qu'un droit de réclamer une indemnité et il n'y avait rien qui pouvait être considéré comme étant un montant recevable, occasionné par l'expropriation. Tant que le montant n'était pas établi soit par arbitrage ou par une entente, il n'y avait aucun montant recevable sous l'art. 85B.(1)(*b*) de la *Loi de l'impôt sur le revenu*.

APPEL d'un jugement du Juge Noël de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel maintenu.

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APPEAL from a judgment of Noël J. of the Exchequer Court of Canada[1], in an income tax matter. Appeal allowed.

*Paul Ollivier, Q.C.*, for the appellant.

*N. N. Genser, Q.C., Philip F. Vineberg, Q.C.*, and *Sidney Phillips, Q.C.*, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—The sole question in this appeal is whether a profit of $263,864.03 was properly assessed in the taxation year 1955. The judgment of the Exchequer Court[1] holds that this profit must be excluded in assessing the profits for the taxation year 1955 on the ground that it should have been assessed in the taxation year 1954.

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[1] [1965] C.T.C. 273, 65 D.T.C. 5161.

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The facts are simple. On January 7, 1954, the Crown in right of Canada expropriated two parcels of land belonging to the respondent company, Benaby Realties Limited, on the Island of Montreal. The company's 1954 fiscal year ended on April 30, 1954. On November 9, 1954, as a result of an agreement fixing the amount of compensation, the Crown paid the sum of $371,260. This happened during the company's 1955 fiscal year, which ended on April 30, 1955. The profit of $263,864.03 is the difference between the cost of the land and the amount of compensation.

It was argued in the Exchequer Court that the profit was not taxable but the judgment of the Exchequer Court was against this and the appeal in this Court was argued on the assumption that this was a taxable profit. The only issue was the appropriate year of assessment.

The taxpayer's argument in this Court is that from the moment of expropriation, the taxpayer no longer had its land but had instead the right to receive compensation. This is set out in s. 23 of the *Expropriation Act*, which reads:

> The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; and any claim to or encumbrance upon such land or property shall, as respects Her Majesty, be converted into a claim to such compensation money or to a proportionate amount thereof, and shall be void as respects any land or property so acquired or taken, which shall, by the fact of the taking possession thereof, or the filing of the plan and description, as the case may be, become and be absolutely vested in Her Majesty.

The taxpayer conducted its business on the accrual basis unders s. 85B.(1)(*b*), which reads:

> 85B.(1) In computing the income of a taxpayer for a taxation year,
> (*b*) every amount receivable in respect of property sold or services rendered in the course of the business in the year shall be included notwithstanding that the amount is not receivable until a subsequent year unless the method adopted by the taxpayer for computing income from the business and accepted for the purpose of this Part does not require him to include any amount receivable in computing his income for a taxation year unless it has been received in the year.

The Crown's argument is that the general rule under the *Income Tax Act* is that taxes are payable on income actually received by the taxpayer during the taxation period; that there is an exception in the case of trade receipts under s. 85B.(1)(*b*), which include not only actual receipts but amounts which have become receivable in

the year; that the taxpayer's profit from this expropriation did not form part of its income for the year 1954 because it was not received in that year and because it did not become an amount receivable in that year.

In my opinion, the Minister's submission is sound. It is true that at the moment of expropriation the taxpayer acquired a right to receive compensation in place of the land but in the absence of a binding agreement between the parties or of a judgment fixing the compensation, the owner had no more than a right to claim compensation and there is nothing which can be taken into account as an amount receivable due to the expropriation.

The Exchequer Court founded its judgment on *Newcastle Breweries v. Inland Revenue Commissioners*[2], which was a case involving the government's requisitioning of a supply of rum in 1918. The company accepted the government's price without prejudice to its right to claim a larger amount. This was subsequently granted under legislation enacted in 1920. This additional sum was received in 1922. The Inland Revenue then reopened the company's 1918 trading account to include this additional sum and the Courts held throughout that this could be done. What happened was that in 1918 there was a compulsory sale at a fixed price with an award of additional compensation under statutory authority three or four years later.

The application of this decision to the *Canadian Income Tax Act* is questionable. This decision implies that accounts can be left open until the profits resulting from a certain transaction have been ascertained and that accounts for a period during which a transaction took place can be re-opened once the profits have been ascertained.

There can be no objection to this on the properly framed legislation, but the *Canadian Income Tax Act* makes no provision for doing this. For income tax purposes, accounts cannot be left open until the profits have been finally determined. Taxpayers are required to file a return of income for each taxation year (s. 44(1)) and the Minister must "with all due despatch" examine each return of income and assess the tax for the taxation year. However, in many cases, compensation payable under the *Expropriation Act* is not determined until more than four years after

[2] (1927), 12 Tax Cas. 927.

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the expropriation has taken place and, in many of these cases, the Minister would be precluded from amending the original assessment because of the four-year limitation for the assessment (s. 46(4)).

My opinion is that the *Canadian Income Tax Act* requires that profits be taken into account or assessed in the year in which the amount is ascertained.

*Try v. Johnson*[3] is much closer to the point in issue here. The claim was for compensation under legislation which imposed restrictions on "Ribbon Development". When the case reached the Court of Appeal, the amount of compensation was admitted to be a trade receipt. The argument in that Court was directed to the appropriate year of assessment. The judgment was that the right of the frontager to compensation under the *Ribbon Development Act* contained so many elements of uncertainty both as to the right itself and the quantum that it could not be regarded as a trade receipt for the purpose of ascertaining the appropriate year of assessment until the amount was fixed either by an arbitration award or by agreement.

Under the *Canadian Expropriation Act,* there is no doubt or uncertainty as to the right to compensation, but I do adopt the principle that there could be no amount receivable under s. 85B.(1)(*b*) until the amount was fixed either by arbitration or agreement.

The case of *Minister of National Revenue v. Lechter*[4] does not support the taxpayer's submission. In that case, the expropriation was in the 1954 fiscal year; the settlement was in the 1955 fiscal year and, according to its terms, payment should have been made within 60 days. For some reason the Treasury Board authorization was 7 months later and the actual payment 10 months later, both events falling within the 1956 fiscal year.

The judgment says no more than this, that the respondent, operating on an accrual basis, was bound to treat the profit of $234,506.91 on the disposition of part of lot 507, as having been earned prior to January 31, 1955, and that it was not taxable income in his taxation year ending January 31, 1956. The governing factor was the settlement made in the 1955 taxation year.

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[3] [1946] 1 All E.R. 532.

[4] [1966] S.C.R. 655, [1966] C.T.C. 434, 66 D.T.C. 5300, 58 D.L.R. (2d) 481.

I would therefore allow the appeal, set aside the judgment of the Exchequer Court and restore the assessment of the Minister, with costs in this Court and in the Exchequer Court.

*Appeal allowed with costs.*

*Solicitor for the appellant: D. S. Maxwell, Ottawa.*

*Solicitors for the respondent: Genser, Phillips and Friedman, Montreal.*