LA SOCIETE COOPERATIVE AGRICOLE DU CANTON DE GRANBY } APPELLANT;

AND

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

1961
*Mar. 14
Jun. 26

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Deductions—Co-operative association—Interest paid to holders of certificates called "certificates for preferred shares"—Whether deductible as interest paid on borrowed money or non-deductible as

*PRESENT: Kerwin C.J. and Cartwright, Fauteux, Martland and Ritchie JJ.

[1] [1952] A.C. 192, 1 All E.R. 305, 2 D.L.R. 786, 5 W.W.R. (N.S.) 609.

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dividends to holders of preferred shares—Cooperative Agricultural Associations Act, R.S.Q. 1941, c. 120—Income War Tax Act, R.S.C. 1927, c. 97, s. 5(1)(b)—Income Tax Act, 1948, (Can.), c. 52, s. 11(1)(c)—Income Tax Act, R.S.C. 1952, c. 148, s. 11(1)(c).

The appellant, a cooperative agricultural association incorporated under the *Cooperative Agricultural Associations Act,* R.S.Q. 1941, c. 120, decided to borrow the additional funds it required to permit it to extend its activities. In 1946, it entered into a contract with a notary whereby the latter undertook to find the money required and in exchange for the money it received the appellant issued certificates called "certificates for preferred shares" and which contained an endorsement on the back providing for the unconditional payment of interest semi-annually at the rate of 5 per cent. The appellant deducted from its income for the years 1947 to 1953 the interest paid in respect of these certificates on the grounds that the sums paid represented interest on borrowed money, deductible from income by virtue of s. 5(1)(*b*) of the *Income War Tax Act* and s. 11(1)(*c*) of the *Income Tax Act,* and that the certificates conferred a creditor's rights on the owners thereof but not the rights of a shareholder. The Minister claimed that the sums paid out by the appellant were dividends to preferred shareholders and as such not deductible. The Income Tax Appeal Board reversed the Minister's decision, but on appeal to the Exchequer Court the deductions were disallowed.

Held: The appellant was entitled to the deductions. The semi-annual payments made to the holders of the certificates were amounts paid pursuant to a legal obligation to pay interest on money borrowed by the appellant, and as such were deductible as interest on money borrowed for the purpose of earning income.

The provisions of the certificates and of the loan contract with the notary were entirely inappropriate to describe the rights of a holder of preferred shares; they were an unequivocal and unconditional promise to pay the principal amount received from the holder at maturity and to pay interest thereon semi-annually until the principal had been paid. The governing intention of the parties, as expressed in these documents, was to create the relationship of borrower and lender, rather than that of company and shareholder. Those parts of the documents which referred to the issue of preferred shares should be rejected or ignored as mere mistaken nomenclature. The conduct of the appellant in making the payments was consistent throughout with that view and quite inconsistent with the view that it was that of company and shareholder; no dividend on the shares was ever declared; the interest which the appellant had bound itself to pay was disbursed semi-annually as a matter of routine.

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

A. Bissonnette and *J. Monet,* for the appellant.

[1] [1959] Ex. C.R. 139, [1959] C.T.C. 119, 59 D.T.C. 1061.

P. Boivin, Q.C., and *P. M. Ollivier*, for the respondent.

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The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of Fournier J. pronounced on February 2, 1959, in an appeal from a decision of the Income Tax Appeal Board, dated July 9, 1957, whereby an appeal of the appellant in respect of re-assessments made for the taxation years 1947 to 1953 inclusive had been allowed in part.

By the decision of the Income Tax Appeal Board it was directed that the respondent should deduct from the income of the appellant the amounts of $14,806.60, $17,633.53, $18,068.03, $22,823.97, $13,176.52, $10,742.92 and $8,913.52 for the taxation years 1947, 1948, 1949, 1950, 1951, 1952 and 1953 respectively. By the decision of the Exchequer Court all of these deductions were disallowed.

On the appeal to this Court the appellant asks that the decision of the Income Tax Appeal Board be restored except that for the taxation year 1950 the amount of the deduction claimed is reduced from $22,823.97 to $15,585.87.

There is no dispute as to these amounts having been disbursed by the appellant in the years in question to holders of certificates in the form of Exhibit "A 6", to be referred to later. The sole question is whether these were payments of dividends to holders of preferred shares of the capital stock of the appellant or were payments of interest on money borrowed by the appellant.

The appellant is a cooperative agricultural association incorporated under the provisions of the *Cooperative Agricultural Associations Act*, R.S.Q. 1941, c. 120. It has its principal place of business in the City of Granby in the province of Quebec, and commenced operations in 1938. The first of the taxation years under appeal, namely the year 1947, was also the first taxation year of the appellant, as in prior years cooperatives were not taxable under the provisions of the *Income War Tax Act*.

The capital required for the operations of the appellant was initially raised by the issue to its members of common shares. Later further capital was raised by the issue of preferred shares; the form of preferred share certificate issued to subscribing members was produced as Exhibit

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"A-1". No question arises on this appeal as to the deductibility of payments made by the appellant during the taxation years under appeal to holders of certificates in the form of Exhibit "A-1". At the hearing before the Income Tax Appeal Board it was admitted by counsel for the appellant that it was not entitled to deduct these payments.

Still later, in 1944, as the affairs of the appellant prospered, it decided to extend its activities and undertake the manufacture of powdered milk; this necessitated the building of a factory and the installation of special machinery; to pay the costs of these and to discharge certain debts a sum of $275,000 was required. The appellant first endeavoured to raise this sum from its own members but without success; subsequently another attempt was made to raise the money from the members by retaining an amount of 10 cents on every 100 lbs. of milk sold for the members, which retention was to take the form of preferred share capital, but this method also proved unsuccessful. The appellant then approached investment dealers and various financial institutions with a view to borrowing the money required, but these attempts to borrow failed for the reason that under the law governing co-operatives at that time the appellant could not hypothecate its immoveable property.

Following these unsuccessful attempts the appellant approached a notary of the City of Granby who undertook to find the money required. The arrangements between the appellant and the notary were set forth in a contract dated May 10, 1946, which was approved by a resolution of the Board of Directors of the appellant of the same date. Detailed reference will be made to these documents hereafter.

The mandate given to the notary by the officers of the appellant was to raise $275,000 by way of loan. The notary's recommendation to the appellant was that the loan be made by way of the issue of preferred shares. He explained in his evidence that he had not had much experience at that time and was unaware of the contradiction in terms involved in this recommendation and in the contract of May 10, 1946, which he prepared.

The notary was successful in obtaining somewhat more than the $275,000 required; each person from whom money going to make up this total was obtained received a certificate in the form of Exhibit "A-6".

There appears to be no disagreement between the parties as to the facts stated above; but throughout the hearing before the Income Tax Appeal Board counsel for the respondent objected to any testimony being given to vary the terms of the written documents.

The contract dated May 10, 1946, is as follows:

CONVENTIONS SOUS SEING PRIVÉ ENTRE LA SOCIÉTÉ COOPÉRATIVE AGRICOLE DU CANTON DE GRANBY ET Me JACQUES NOISEUX, NOTAIRE À GRANBY.

L'AN MIL NEUF CENT QUARANTE-SIX, le dix mai, sont intervenues aux présentes:

I—LA SOCIÉTÉ COOPÉRATIVE AGRICOLE DU CANTON DE GRANBY, corporation dûment constituée en vertu de La Loi des Sociétés Coopératives de la Province de Québec, S.R.Q. (1941) chap. 120, ici représentée par MM. Omer Deslauriers, son président, et Rolland Beaudry, son secrétaire, suivant une résolution passée à cet effet par le bureau de direction de ladite société en date de ce jour et dont copie certifiée est ci-annexée après avoir été signée par les mandataires de ladite corporation et l'autre partie aux présentes; ci-après nommée LA PARTIE DE PREMIÈRE PART; et

II—Me JACQUES NOISEUX, notaire à Granby, ci-après nommé LA PARTIE DE DEUXIÈME PART.

LESQUELS font les conventions suivantes:

A)—LA PARTIE DE PREMIÈRE PART s'engage à emprunter la somme capitale de DEUX CENT SOIXANTE-QUINZE MILLE dollars ($275,000.00) par voie d'émission d'actions privilégiées aux taux et conditions ci-après spécifiés;

B)—Le but de cet emprunt est de consolider une dette d'environ soixante-cinq mille dollars ($65,000.00) et de parachever certaines constructions déjà commencées;

C)—Pour prélever ladite somme de $275,000.00, LA PARTIE DE PREMIÈRE PART s'oblige d'utiliser les services de LA PARTIE DE DEUXIÈME PART exclusivement aux conditions ci-après apposées;

CES FAITS ÉTANT ÉTABLIS, les parties aux présentes les précisent de la façon suivante:

CONDITIONS DU PRÊT.

1°—*MONTANT:* DEUX CENT SOIXANTE-QUINZE MILLE dollars ($275,000.00);

2°—*DURÉE:* DIX ANS (10) à compter du quinze juillet prochain mil neuf cent quarante-six;

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3°—*TAUX:* CINQ POUR CENT L'AN (5%) payable semi-annuellement les quinzièmes jours de janvier et de juillet de chaque année, le premier versement d'intérêt devenant dû le quinze juillet de l'an prochain et ensuite semi-annuellement comme susdit; l'intérêt sera payable au domicile du souscripteur de l'action;

4°—*REMBOURSEMENT:*—VINGT-SEPT MILLE CINQ CENTS dollars ($27,500.00) au minimum annuellement par voie de tirage au sort à une période laissée au choix de LA PARTIE DE PREMIÈRE PART; Les remboursements sur le capital s'effectueront au bureau principal de LA PARTIE DE PREMIÈRE PART et il devra être donné aux détenteurs immatriculés de telles actions un avis de soixante jours les informant que une ou toutes leurs actions leur seront payées. L'intérêt sur toutes les actions privilégiées émise en exécution des présentes courront à compter du jour de leur souscription jusqu'au jour de leur remboursement. La partie de première part se réserve le droit de racheter la présente émission de capital privilégié en tout temps au cours de la durée du prêt et jusqu'à concurrence de n'importe quel montant.

OBLIGATIONS DE LA PARTIE DE PREMIÈRE PART.

1°—N'engager aucun autre vendeur que LA PARTIE DE DEUXIÈME PART;

2°—Permettre que la partie de deuxième part engage qui elle voudra pour l'aider dans la vente de ladite émission d'actions privilégiées;

3°—Payer à LA PARTIE DE DEUXIÈME PART, à titre d'honoraires, une commission de trois pour cent (3%) sur toute ladite somme empruntée de $275,000.00 si LA PARTIE DE DEUXIÈME PART atteint cet objectif dans six mois à compter du premier juin prochain (1946); en acompte sur les honoraires de LA PARTIE DE DEUXIÈME PART, LA PARTIE DE PREMIÈRE PART promet de payer le ou avant le premier juin, date du lancement officiel de cet emprunt, la somme de mille dollars ($1,000.00); quant à la balance des honoraires dus à LA PARTIE DE DEUXIÈME PART, ils seront payés à cette dernière dès qu'elle aura atteint l'objectif, si elle le fait avant le premier décembre prochain (1946); si LA PARTIE DE DEUXIÈME PART n'atteint pas ledit objectif de ($275,000.00) dans ce délai de six mois, elle n'aura droit qu'à un honoraire de un et demi pour cent (1½%) sur toute la somme qu'elle aura prélevée dans ce délai.

4°—FOURNIR à LA PARTIE DE DEUXIÈME PART une liste de tous les coopérateurs avec leur adresse, leur bilan approximatif et tous les détails demandés concernant les coopérateurs ou la coopérative;

5°—Porter à elle seule toute la responsabilité découlant du présent emprunt;

6°—Payer tous les frais de publicité, impression que les parties auront convenu de faire ou autres découlant directement ou non du présent emprunt, LA PARTIE DE DEUXIÈME PART s'engageant de son côté à assumer les frais de déplacement qu'elle encourra elle-même pour la vente des actions;

7°—Maintenir toutes les bâtisses, machineries et accessoires constamment assurés contre l'incendie sous peine de payer six mois d'intérêt en plus à chacun des actionnaires;

8°—Permettre au mandataire de travailler à autre chose qu'à la négociation du présent emprunt;

9°—Donner à LA PARTIE DE DEUXIÈME PART tous les pouvoirs ordinaires et extraordinaires nécessaires à la vente des présentes actions;

10°—Ne pas destituer LA PARTIE DE DEUXIÈME PART si cette dernière remplit bien et fidèlement ses devoirs;

OBLIGATIONS DE LA PARTIE DE DEUXIÈME PART.

LA PARTIE DE DEUXIÈME PART s'oblige, dans la négociation de cet emprunt à agir en bon père de famille et à ne jamais défigurer la réalité pour faciliter la présente vente sous peine de payer à LA PARTIE DE PREMIÈRE PART, à titre de dommages-intérêts liquidés la somme de cinq cents dollars ($500.00). Elle sera aussi sujette à toutes les obligations d'un mandataire telles quelles sont stipulées au titre du MANDAT dans le Code civil de la Province de Québec, sauf les dérogations apportées au présent contrat.

EN FOI DE QUOI les parties ont signé.

The resolution of the Board of Directors of the appellant adopting this contract was passed on May 10, 1946. After setting out the names of those present the minutes read:

But de l'assemblée étude du contrat avec le notaire M. Jacques Noiseux.

B-967 Il est proposé par M. Origénes secondé par Isidore Martin et adopté unanimement que le contrat ci-annexé soit signé par M. Omer Deslauriers Prés. et Rolland Beaudry, secrétaire.

The face of certificate "A 6" reads as follows:

Certificate	*ACTIONS*	*2 ACTIONS*
No. B-61	*PRIVILÉGIÉES*	*Entièrement acquittées*

SOCIÉTÉ COOPÉRATIVE AGRICOLE DU CANTON DE GRANBY.

Constituée en vertu de la loi des Sociétés Coopératives Agricoles. S.R.Q. 1941, Chapitre 120

Montant de chaque action $50.00

Echéance —.—.—.

Intérêt 5% Payable le 15 juillet et le

15 janvier

LE PRESENT CERTIFICAT ATTESTE QUE M. *Celia Chouinard* est le détenteur de deux (2) actions privilégiées entièrement libérées du capital de ladite Société Coopérative Agricole, d'une valeur nominale de cinquante dollars chacune, transférables dans les livres de la Société par une déclaration écrite signée par le détenteur immatriculé ou par son fondé de pouvoirs, mention de cette immatriculation étant faite sur ledit certificat par le gérant de la Société.

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Lesdites actions privilégiées sont émises conformément à une résolution du Bureau de Direction en date du 10 mai 1946, et sont sujettes aux dispositions énoncées au verso du présent certificat.

EN FOI DE QUOI, les officiers dûment autorisés de la Société ont signé le présent certificat à Granby ce dixième jour de juin mil neuf cent quarante-six

(Sgd.) Rolland Beaudry
Secrétaire

(Sgd.) Omer Deslauriers
Président.

On the reverse this certificate is entitled "Certificat d'actions privilégiées"; a transfer form is printed and the following conditions appear:

Le présent certificat est assujetti aux conditions suivantes:

La SOCIÉTÉ COOPÉRATIVE AGRICOLE du Canton de Granby payera, pour valeur reçue, au détenteur immatriculé la somme de cent dollars à échéance—.—.—. et payera sur les actions privilégiées à partir du 10 juin 1946 19..... et par la suite semestriellement, le quinzième jour de juillet et le quinzième jour de janvier, un intérêt au taux de 5% l'an jusqu'à date d'échéance desdites actions. Les actions du présent certificat sont payables aux bureaux de la Société Coopérative Agricole du Canton de Granby, 10 rue Laval, Granby, P.Q. L'intérêt est payable par chèque semestriellement au détenteur immatriculé. Les actions et l'intérêt du présent certificat sont payables en monnaie légale du Canada.

Les certificats d'actions privilégiées sont assujettis au remboursement total ou partiel par voie de tirage, au choix du bureau de direction de la Société, au lieu de paiement mentionné dans le présent certificat, du capital dudit certificat, avec l'intérêt couru sur le capital, en tout temps sur un avis de soixante jours. Le préavis de remboursement sera signifié par lettre au détenteur immatriculé du certificat. L'intérêt du certificat cessera de courir après la date de remboursement spécifié dans ledit avis.

Conformément aux dispositions du 2° paragraphe de l'article 5 de la loi des sociétés coopératives agricoles, les actions privilégiées ne confèrent pas à leurs détenteurs le droit d'assister et de voter aux assemblées générales.

The only difference of substance between the front of Certificate "A 6" and that of Certificate "A-1" is that in the latter the date of the resolution of the Board of Directors is given as July 8, 1943. There are, however, striking differences between the conditions on the reverse of the two certificates; those on certificate "A-1" are as follows:

Lesdites actions privilégiées ont les privilèges, droits, priorités et sont sujettes aux restrictions, limitations, et dispositions qui suivent, savoir:

1. Le détenteur d'actions privilégiées aura droit de recevoir, à même les profits nets de la Société, un dividende préférentiel, non cumulatif, au taux de 5% l'an.

2. Le détenteur d'actions privilégiées aura droit dans toute liquidation, dissolution ou autre distribution de l'actif de la société entre ses actionnaires (autrement que par voie de ristourne à même les surplus) au remboursement du montant capital versé sur ses actions, avec tous dividendes déclarés et impayés, s'il y en a.

3. Le détenteur d'actions privilégiées n'aura droit à aucune participation dans les bénéfices ou l'actif de la société autre que celle prévue par les paragraphes 1 et 2 qui précèdent.

4. La société aura droit de racheter en tout temps quand il en aura été ainsi décidé par résolution de son Bureau de Direction, la totalité des actions privilégiées, ou telle partie desdites actions, selon qu'elle jugera à propos d'en décider ainsi.

5. Les détenteurs d'actions privilégiées désignés pour rachat devront présenter leurs certificats au bureau de la société au jour fixé dans l'avis de rachat et les remettre sur paiement du prix de rachat. Ces certificats seront ensuite annulés. Le droit aux dividendes sur lesdites actions privilégiées ainsi rachetées cessera automatiquement à la date fixée pour le rachat et les porteurs desdites actions ainsi rachetées n'auront plus dans la suite aucun droit quelconque contre ou dans la société, sauf celui de recevoir le paiement du prix de rachat.

6. Conformément aux dispositions du 2° paragraphe de l'article 5 de la Loi des sociétés coopératives agricoles, les actions privilégiées ne confèrent pas à leurs détenteurs le droit d'assister et de voter aux assemblées générales.

The principal of all the monies received by the appellant from the holders of certificates in the form of Exhibit "A 6" was repaid in full by July 15, 1956. Interest was paid half-yearly, in accordance with the undertaking contained in the certificates, to the holders of all of these certificates outstanding from time to time. The payments of interest were made by the officers of the company without the passing of any resolution by the Board of Directors to authorize such payments other than that of May 10, 1946, quoted above.

The right of the appellant to deduct the amounts claimed was governed for the years 1947 and 1948 by the provisions of s. 5(1)(*b*) of the *Income War Tax Act* and for the years 1949 to 1953 inclusive by those of s. 11(1)(*c*) of the *Income Tax Act*. For the purposes of the question which we have to decide there is no significant difference between these provisions.

The question is whether the semi-annual payments made to the holders of certificates in the form "A 6" were amounts paid pursuant to a legal obligation to pay interest on money borrowed by the appellant. It is not disputed that the

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money obtained from the holders of the certificates was used by the appellant for the purpose of earning income from its business. The contention of the respondent is that such money was not borrowed but formed part of the paid-up capital of the appellant having been received from subscribers to its preferred shares.

The solution of this question depends primarily on the construction of the terms of the certificate in the form of Exhibit "A 6" which was the document received by each of the persons who provided the money. The wording on the face of the certificate would indicate that its holder was a purchaser of preferred shares subject to the provisions stated on the back of the certificate. These provisions are however entirely inappropriate to describe the rights of a holder of preferred shares; they are an unequivocal and unconditional promise to pay the principal amount received from the holder at maturity and to pay interest thereon at 5 per cent per annum half-yearly on July 15, and January 15, until the principal has been paid. The date of maturity is not fixed in the certificate and it becomes necessary to refer to the resolution of May 10, 1946, according to which it is stated on its face to have been issued; this resolution in turn refers to the contract of the same date. It appears from paragraphs 2 and 4 of the contract under the heading "Conditions du prêt" that the whole of the principal is to be repaid in ten years from July 15, 1946, and that meanwhile at least $27,500 is to be paid annually on account of principal, the certificates upon which such annual payments are made being selected by lot.

The contract exhibits the same inconsistencies as the certificate. The appellant agrees to *borrow* $275,000 but *by means of an issue of preferred shares;* the term of the *loan* is to be ten years with annual repayments but such repayments are to be made *to the holders of shares* selected by lot; the right of prepayment reserved by the appellant is expressed as the right *to redeem the present issue of preferred capital.*

The task of construing documents containing such inconsistencies is not easy, as is evidenced by the difference of opinion between the Income Tax Appeal Board and the Exchequer Court; but I have reached the conclusion that the governing intention of the parties, as expressed in the

documents, was to create between the appellant and those who paid over their money in exchange for certificates in form "A 6" the relationship of borrower and lender rather than that of company and shareholder.

The appellant had power to borrow money and also power to issue preferred shares so that no question arises as to either of such courses being *ultra vires*. If, however, the appellant in fact chose the course of issuing preferred shares it did not have power to bind itself unconditionally to pay interest regardless of whether or not there were profits available for that purpose and it did so bind itself in clear words. This circumstance distinguishes the case at bar from that of *Minister of National Revenue v. Société Coopérative Agricole du Comté de Châteauguay*[1], a decision of Saint-Pierre D.J., which was affirmed without recorded reasons by this Court on April 8, 1954.

In the case at bar, in my opinion, the governing intention to create the relationship of borrower and lender appears with sufficient certainty from the relevant documents, and those parts of the documents which refer to the issue of preferred shares should be rejected or ignored as mere mistaken nomenclature by the application of the maxim *falsa demonstratio non nocet*.

The course of conduct of the appellant in making payment was consistent throughout with the view that the true relationship between it and the holder of the certificates was that of borrower and lender and quite inconsistent with the view that it was that of company and shareholder; no dividend on the "shares" was ever declared; the interest which the appellant had bound itself to pay was disbursed semi-annually as a matter of routine.

The appellant appears to have prospered and to have made sufficient profits to defray the instalments of interest as they fell due, but this could not be foreseen with certainty and it is clear that the position of those who paid their money in exchange for the certificates in form "A 6" would be better if they were held to be lenders, and therefore creditors, than if they were held to be holders of preferred shares and so postponed to the claims of creditors. The relevant documents were prepared by or for the appellant

[1] [1952] Ex. C.R. 366, [1952] C.T.C. 245, 52 D.T.C. 1129.

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and if their terms were ambiguous the holders of the certificates could have relied on the maxim *verba chartarum fortius accipiuntur contra proferentem.*

I do not find it necessary to decide whether we are free to consider the evidence given at the hearing, under reserve of objections made by counsel for the respondent, as to what the notary represented to the lenders, ninety per cent of whom he dealt with personally, or the evidence as to the representations in the advertisements of "the loan" which were widely circulated. Were we free to consider this evidence it would strengthen the case of the appellant but I do not rely upon it.

For the above reasons I would allow the appeal and order that the matter be referred back to the Minister with a direction to deduct from the income of the appellant the amounts of $13,301.09, $15,046.61, $13,670.67, $15,585.87, $13,176.52, $10,742.92 and $8,913.52 for the taxation years 1947, 1948, 1949, 1950, 1951, 1952 and 1953 respectively. The appellant is entitled to its costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: Stikeman & Elliot, Montreal.

Solicitor for the respondent: A. A. McGrory, Ottawa.