1922
*Nov. 7, 8.
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THE CITY OF OTTAWA.....APPELLANT;

AND

SIR HENRY K. EGAN.....RESPONDENT.

(FOUR APPEALS)

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Assessment and taxes—Assessment on income—Industrial company—Distribution of funds—Assessment for current year—Consideration of previous year's income—Assessment Act, R.S.O. [1914] c. 195, s. 11 (2).

Section 11 of the Ontario Assessment Act provides for taxes on income and by subsection 2 "where such income is not a salary or other fixed amount capable of being estimated for the current year the income of such person for the purposes of assessment shall be taken to be not less than the amount of his income during the year ending on the 31st day of December then last past." In 1921 the shareholders of an industrial company were assessed in respect of moneys received from the company in 1920. On appeal it was established that no similar amounts were paid them in 1921 and the Appellate Division deducted said amount from the assessable income for that year.

Held, that the income to be taxed is that of the current year; that the income of the preceding year is only a basis from which to estimate the former when subsection 2 applies; and that the income to be assessed for 1921 was properly reduced.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment of the Ontario Railway and Municipal Board in favour of the appellant.

The question for decision and the statutory provision giving rise to it are stated in the above head-note.

Frank B. Proctor for the appellant.

Tilley K.C. and *Wentworth Greene K.C.* for the respondents.

THE CHIEF JUSTICE.—I am of the opinion that this appeal should be dismissed with costs. I concur generally with the reasons stated by Sir Wm. Meredith, the Chief Justice of Ontario, when delivering the unanimous judgment of the First Divisional Court in favour of the respondents.

I am also in full accord with the reasons for judgment of my brothers Anglin and Mignault and do not, therefore, deem it necessary or desirable to repeat these reasons.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

IDINGTON J.—The appellant seeks herein to reverse four judgments of the Appellate Division of the Supreme Court of Ontario, reversing the judgments of the Ontario Railway and Municipal Board, which had reversed the judgments of the late County Judge of Carleton, who had allowed the appeals, respectively taken, by each of the respondents, or those whom they respectively represented, against their respective assessments under the Ontario Assessment Act, by those acting on behalf of appellant.

Each of these appeals depends on the same essentially relevant facts and law, and hence are consolidated for the purposes of this appeal.

The respondents, or those they respectively represent, are pretended to be assessed in respect of income derivable from rights held by each, or those they respectively represent, as shareholders in a company incorporated as The Hawkesbury Lumber Company, by 52 Vict., c. 98, with a nominal capital of $200,000.

The power to assess is given by section 11 of the Assessment Act, c. 195 of R.S.C. [1914], which reads as follows:—

11. (1) Subject to the exemptions provided for in sections 5 and 10:—

(*a*) Every person not liable to business assessment under section 10 shall be assessed in respect of income;

(*b*) Every person although liable to business assessment under section 10 shall also be assessed in respect of any income not derived from the business in respect of which he is assessable under that section, and

(*c*) Every person liable to business assessment under clause (*f*) of subsection 1 of section 10 shall also be assessed in respect of the income derived by him from his business, profession or calling, to the extent to which such income exceeds the amount of such business assessment.

(2) Where such income is not a salary or other fixed amount capable of being estimated for the current year, the income of such person for the purposes of assessment shall be taken to be not less than the amount of his income during the year ending on the 31st December then last past. 4 Edw. VII, c. 23, s. 11.

Income is defined by section 2, subsection (*e*) of said Act, as follows:—

(*e*) "Income" shall mean the annual 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, or as being profit from a trade or commercial or financial or other business or calling directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be; and shall include the interest, dividends or profits directly or indirectly received from money at interest

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upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source.

The dominant member of this definition is that in the words "*the annual profit or gain or gratuity*" derivable from either that ascertained and capable of computation or unascertained from various specified sources which may not be so.

The appellant's commissioner of assessment having discovered that in December, 1920, the said Hawkesbury Lumber Company had made a distribution amongst its shareholders out of some surplus assets accumulated over so long a period as fifteen years, or more, prior to the end of the year 1916, and called it a dividend, came to the conclusion, somewhat hastily, I respectfully submit, that it must be considered assessable income of that year, 1920, and acted accordingly, and directed the several parties receiving part thereof to be assessed in the assessment roll of 1921, prepared as the basis of taxation for 1922.

I cannot understand how that which clearly was no part of "the annual profit or gain" in the year 1920, can be taken as the measure of what was to determine the assessment for 1921 in default of other means of determining same.

The word "dividend" used in the latter part of the definition of income is clearly restricted to dividends or profits received from money at interest, or other form of such like character, and in no sense intended as a repetition of that found as the expression relative to manufacturing industries such as this lumbering industry or its like.

And when one turns to the charter of the Hawkesbury Lumber Company which in express terms includes all the powers given by the Companies' Clauses Act (save and except section 18 and anything else inconsistent with said charter) as then in force and so recently enacted, and considers all so invoked, it seems, if possible, more obvious that dividends such as it was empowered thereby to declare might well include capital no longer needed as well as profits.

The dividend now in question might well have been of that character; especially so when we find that special provision was made for the private business concerns of several

of those promoting the company's incorporation becoming the property of the company.

It might well be that the assets so acquired might turn out in the course of time to far exceed in value the modest capital stock of the company and produce more capital than needed and hence the basis of distribution by way of dividends such as the directors were given power to declare.

The rise in value of timber lands, held only by virtue of mere licence, may also have largely contributed to the value of the company's assets and have become a subject of distribution by way of dividend by the year 1916, or any of the fifteen preceding years. Such increase of value is not part of what is taxable as income.

In such an elastic and comprehensive charter as this company had there was ample room for the actual capitalization of even more profits as contended for by counsel for respondent.

But inasmuch as that may not have been declared in a formal way I may be permitted to suggest that the foregoing reasons I have assigned founded on the history of said company by virtue of its charter and all implied therein presents in a more cogent light the insuperable difficulty of maintaining appellant's pretensions herein.

All I am concerned with is that in any way one can look at the meaning of the word "dividend" relied upon by appellant, it does not justify the assumption that the dividend in December, 1920, was part of the income of the respondent for that year, and thus a basis within the meaning of subsection 11, subsection (2) above quoted from the Assessment Act.

There has been, at least ever since A.D. 1853, an income tax in force in Upper Canada later known as Ontario. It was included for many years under the term "personal property" as defined in the several Acts in the earlier years of said period.

And when, as of necessity, the income of the previous year had to be taken as basis it was generally referred to as that for the past year, and in one of the Acts seemed to refer to it as fixed by the assessment of the past year.

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It was not until 1904 that income was defined as it is now, as above quoted. I suspect that before and even since the assessment of income under said Act when a previous year had to be used as a basis the actual fact was got from the previous year's assessment roll.

And I respectfully submit that due insistence on the part of municipal officers would have brought forward the actual facts and an honest basis for assessment of respondents, or those they respectively represent, based on the previous year, quite within the limits of subsection 2 of section 11, instead of the adoption of a dividend which was the accumulation of fifteen years previous to a period three or four years anterior to the year now in question.

If, however, I am mistaken in my suggestion and the parties concerned should in face of such insistence as open to appellant's officers have taken the ground that they were not bound to submit to such taxation until the money had been got, then they might have been within their legal rights. And if a shareholder in an industrial concern is not liable until paid the part that is paid in and for the last year previous to the assessment is all that in any court should be acted upon.

It is a clear and express principle of law applicable to the construction of taxing statutes that express language in same is indispensable.

I would refer to the language of Lord Cairns in *Cox* v. *Rabbits* (1), where he said that

> a taxing Act must be construed strictly; you must find fixed words to impose the tax, and if words are not found which impose the tax it is not to be imposed.

I think the application of this language of Lord Cairns, which expresses that which is undoubted law, to the facts presented by this appeal, should dispose of this appeal, and observance of which should have averted this appeal from the Appellate Division.

Can distribution of capital or bequests or heirship inheritance which have come in during the year be taxed as income?

It is not that received but that earned or gained by industry that alone seems to be taxable, if those items are maintainable.

(1) [1870] 3 App. Cas. 473 at p. 478.

There were many other objections submitted in argument and others again which occur to me as cogent in the way of appellant, which I have left aside lest the foregoing reasoning, presenting what seems to me insuperable, might be confused therewith and thereby be impaired.

The reference to English decisions on very differently framed Acts, as a glance at the Imperial Act of 1918 shews, is rather far fetched.

I hold the appeal should be dismissed with costs throughout.

DUFF J.—The principle of income assessment and taxation clearly expressed in the legislation which comes under consideration on this appeal is that it is the income for the current year which is assessable. That is impliedly declared in section 11, subsection 2, expressly declared in section 19 (*b*) as well as in the form of return prescribed under the authority of section 18, subsection 1 (*a*). In certain circumstances (where the income is not a "fixed amount" and where it is not "capable of being estimated for the current year") the income of the preceding year is made to furnish the standard or evidence for fixing the minimum income for the current year, but it is only as evidence (conclusive it is true up to a certain point) that the income of the preceding year becomes relevant to the question of assessment. Mr. Proctor's principal contention, which he presented with both force and candour, was that, according to the scheme of the legislation, incomes are divided into two classes, one class being incomes of "fixed amount" of which salaries and wages are to be taken as the type, while the other embraces all other descriptions of income. As regards the first class, the amount being "fixed" at the critical time, according to Mr. Proctor's suggestion, no difficulty could arise, but as regards all other descriptions of income the assessable amount is determined by the income of the previous year. The scheme of the legislation, as Mr. Proctor thus conceives it, is no doubt a more practicable and workable scheme than that which in my view the legislation does in fact embody, but there are fatal objections to that contention. In the first place the language of the sections already mentioned is too plain

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to admit of doubt that the income of the preceding year is, as I have already said, to be treated only as evidence for the purpose of fixing the minimum amount of the assessment; and in the next place this view of the legislation is quite incompatible with the language of section 19 (*b*) which contains not a word about salary or wages and directs a reference to the income of the previous year when the income for the current year cannot be estimated. Section 19 (*b*) was enacted as an amendment and must be taken, I think, to govern the construction of section 11, subsection 2.

The fundamental principle of the statute being that it is the income of the current year that is to be assessed and to be estimated, I concur with the view of the Chief Justice of Ontario that it is not an unreasonable implication that the assessing authority in determining the assessable amount in any given case is bound to proceed upon the facts known to it at the time the question comes up for determination.

The Ontario Municipal Board was therefore bound in giving judgment on the municipality's appeal to take into account the fact then known that no income had been received in respect of the shares in question in the year 1921.

This is of course conclusive of the appeal. I express no opinion upon the other questions argued.

ANGLIN J.—Having regard to the definition of "income" in section 2 (*e*) of the Assessment Act, to the provisions of sections 11 and 13, according to which the assessment roll in respect to income was directed to be prepared (s. 22 (3), col. 20), and to the declaration required from an income taxpayer (section 19*a*) and the note in the form (no. 2) of return prescribed by section 18, I agree with the unanimous opinion of the Divisional Court, as stated by the learned Chief Justice of Ontario, that the assessment roll in question made in 1921 was an assessment roll for that calendar year and that the taxable income to be included in it was the income of that year.

It may have been legitimate for the assessor when preparing the roll for 1921 to have included in the assessable income of the several respondents in respect of prospective

dividends from their holdings in the Hawkesbury Lumber Company amounts equal to the sums received by them from that source during the year 1920, if such latter sums should be regarded as income. Although the respondents, who had knowledge on the subject not available to the assessor, had made returns of income for 1921 which shewed no income to be received from the Hawkesbury Lumber Company, the assessor may have been within his right in declining to accept these returns (s. 20 (1)) and in applying the provisions of s. 11 (2) when preparing the roll. He did not, necessarily, then know that the respondents would not receive any income from the Hawkesbury Lumber Company during the entire year 1921. But, as is pointed out by the Chief Justice of Ontario, the object of the rehearings of assessment appeals provided for by the statute by the Judge of the County Court, the Ontario Railway and Municipal Board and the Divisional Court, before each of which " the whole question of the assessment " may be re-opened, is that

> the accurate amount for which the assessment should be made * * * may be placed upon the roll by such Judge, Board or Court (s. 82).

As the learned Chief Justice says:

> When the appeal was before the Ontario Railway and Municipal Board the year 1921 had expired, it was demonstrable and was demonstrated that the income for which it is sought to assess the appellants was not received in 1921, and in my view it was the province of each tribunal to which an appeal has been made, to apply the test provided by section 11 (2), and when the appeal was before the Board, and as it is now before us, not only was the income of 1921 not incapable of being estimated but it was actually and definitely ascertained.

I also respectfully agree that it is

> open to an appellant at every stage until the final tribunal of appeal (the Divisional Court) is reached, and indeed before it, to show what the amount for which he is to be assessed is.

Assuming, therefore, in the appellant's favour, but without so deciding, that the moneys received by the respondents in 1920 from the Hawkesbury Lumber Company were " income " within the purview of the Assessment Act, they were income for 1920, not for the current year 1921, in and for which the roll in question was prepared. It having been conclusively shewn before the Ontario Railway and Municipal Board (which heard the appeal on the 23rd of January, 1922), that the respondents had in fact derived

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no income from that source during the year 1921, I agree that the assessment roll was properly "corrected" by the Divisional Court and that "the accurate amounts" of the assessable incomes of the respondents were properly inserted therein in lieu of the supposititious amounts which had been fixed by the assessor acting under s. 11 (2).

It may be that the omission from the Assessment Act of some provision for a special assessment in any year of income received after the roll for that year had been completed, similar to that made by (s. 9 (2)) for the case of transfer of exempted land, was purely accidental. But it is no part of the duty of a court to supply such deficiencies in legislation. What is sometimes called an equitable construction is not admissible in a taxing statute. In order to justify taxation upon it the subject of assessment must be brought clearly within the provisions of the Act. *Partington* v. *Attorney General* (1); *Tennant* v. *Smith* (2); *Attorney General* v. *Milne* (3).

I would for these reasons dismiss this appeal with costs.

BRODEUR J.—The respondents are shareholders in the Hawkesbury Lumber Company. This company had a capitalization of $200,000. It was very successful and had accumulated large surpluses which, after paying some dividends, were appropriated to capital purposes. It was found however by the Dominion taxing officer that if the profits earned previously were not paid out to the shareholder before the end of 1920 he would have to make a special levy on these profits. Then the shareholders of the company decided to make, in December, 1920, the distribution suggested by this taxing officer. Such a distribution was called in the resolution of the company a "dividend."

In the year 1921 the shareholders, respondents in this appeal, made their return to the municipal taxing officer and did not include therein any reference to the large "dividend" which they had received in the previous year.

The municipal assessor claims that such an amount should have been included in that return and that the respondents should be assessed accordingly.

(1) L.R. 4 H.L. 100 at p. 122. (2) [1892] A.C. 150 at p. 154.
(3) [1914] A.C. 765 at p. 771.

The respondents, on the other hand, contend that they cannot be assessed in 1921 for that alleged dividend received in 1920, and their contention was maintained by the Appellate Division.

The Assessment Act provides that every person not liable to business assessment shall be assessed in respect of his income; and the income is defined by the Act as meaning the annual profit or gain and includes the dividends or profits received (section 2, paragraph (*e*) and section 11, paragraph (*a*)).

It is also provided in subsection 2 of section 11 that when the income

> is not a salary or other fixed amount capable of being estimated for the current year, the income of such person for the purposes of assessment shall be taken to be not less than the amount of his income during the year ending on the 31st December then last past.

It is pretty evident under these different provisions of the law that what should be assessed would be the income of the current year. In the present case the assessment which is at issue is the assessment for the year 1921. The taxpayer, in making his return, and the assessor, in making his assessment roll, should insert therein the amount of the income which could be estimated.

If, however, the amount cannot be estimated then the income of the taxpayer for the previous year can be used as a basis for the fixing of the income.

The whole question is whether the amount of the income could be estimated or not.

It seems to me very clear that the large amount received in the year 1920 as a "dividend" from the Hawkesbury Lumber Company could not be estimated as being likely to be received during the year 1921. Nobody could suggest such a thing possible that the shareholders of this company were to receive in 1921 the same amount as was received by them the year previous. On the other hand, their income could easily be ascertained or estimated, and then there was no occasion to apply the provision of subsection 2 of section 11.

For these reasons, the appeal fails and should be dismissed with costs.

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MIGNAULT J.—There are four appeals here from the Appellate Divisional Court of Ontario, the question being as to the validity of the assessment, under *The Assessment Act* (Ontario), of the four respondents for income for the year 1921, and against which assessment the respondents appealed.

On the 22nd December, 1920, each of the four respondents received a large sum of money from The Hawkesbury Lumber Co., being a dividend of 875 per cent which, by resolution adopted at an extraordinary general meeting of the shareholders of the company, held on the 15th December, 1920, was declared payable to the shareholders of record on that day out of an accumulated cash surplus in the hands of the company. In the return made to the appellant for purposes of assessment for 1921 the respondents, who had duly paid the tax on their assessed income for 1920, made no mention of this sum which was received by them in 1920 and not in 1921; but the assessing authorities of the city of Ottawa nevertheless included it in the income tax assessment for 1921. The respondents unsuccessfully appealed to the Court of Revision, but succeeded in their appeal to the County Court, before the late Judge Gunn, where the amount thus added to the assessment was struck out. The city took an appeal to the Ontario Railway and Municipal Board which decided in its favour, this judgment however being reversed by the Appellate Divisional Court. The city of Ottawa now appeals to this court.

Income assessment under The Assessment Act is for the current calendar year, whereas the Dominion income tax is levied on the income received during the preceding year. No little of the difficulties of this case come from the very arduous problem which the legislature endeavoured to solve when it decided to levy the tax on income not already received but estimated for the year current at the time of the assessment.

As defined by section 2, subparagraph (*e*), "income" is the annual 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, or as being profits from a trade or commercial

or financial or other business or calling directly or indirectly received by the person subject to the tax, and it includes dividends or profits directly or indirectly received from stocks or from any other investment.

Subsection 2 of section 11 states that where such income is not a salary or other fixed amount capable of being estimated for the current year, the income of such person for the purposes of assessment shall be taken to be not less than the amount of his income during the year ending on the 31st December then last past.

Section 19*a* provides that in cities having a population of not less than 100,000 (which would comprise Ottawa), every person in receipt of an income liable to assessment shall within the time fixed by by-law of the council forward to the assessment commissioner a statutory declaration showing his total income from all sources during the current year and in ascertaining such income subsection 2 of section 11 shall apply. The respondents duly forwarded this declaration within the time prescribed by a by-law of the council.

The form of statutory declaration authorized by the Act contains a note which is to the same effect as subsection 2 of section 11, and it is on this form that the respondents' declarations were prepared.

Assuming for the moment, but not deciding, that the amount received by the respondents in December, 1920, could properly be described as "income," the appellants' main contentions are based on this subsection. It must be observed however that it is only when the assessed's income is not a salary or other fixed amount "capable of being estimated for the current year," that his income is taken to be not less than the amount of his income during the previous calendar year. Inasmuch as the taxation is imposed upon an income to be received during the year of assessment, and which must be estimated before it is actually received, if this income can be estimated subsection 2 does not apply. And it does not follow that an income cannot be "estimated" because it consists in whole or in part of dividends paid periodically year after year, for these dividends may well be of a fixed amount which

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is paid at regular intervals, although, of course, on account of unforeseen events, they may vary or even fail to be paid. When the respondents made their declarations for 1920, these declarations no doubt contained an estimate of dividents to be received from stocks as do their returns for 1921. The 1920 declarations could not estimate extraordinary receipts like the dividend of 875 per cent on the Hawkesbury Lumber Company's stock declared in December. The declarations for 1921 could however estimate the respondents' incomes to be received during that year, and no criticism is made by the appellant as to this estimate, the claim being that, under subsection 2 of section 11, the declaration should have included, as income for 1921, a sum which admittedly was received in 1920 and was not again received in 1921. The sufficiency of the 1921 declarations is now questioned and not the sufficiency of the declarations made for 1920, and so far as any income really received in 1921 is concerned the declarations for 1921 are not attacked.

It is not claimed that the respondents acted otherwise than in perfect good faith, or that the dividend of 875 per cent was declared in December, 1920, with the view to enable the respondents to escape municipal taxation thereon. The Hawkesbury Lumber Company had consulted the commissioner of taxation under the Dominion income tax law, and was informed by him that if dividends were declared and paid out of surplus before the 31st December, 1920, such dividends would be considered to be non-taxable in the hands of the shareholders. No inference can be drawn from this that an attempt was made to evade taxation under the provincial Act. But the appellant objects that if this dividend cannot be included in the respondents' incomes for 1921, the respondents will escape taxation on the large amount which they received late in December, 1920. And in its factum it says:—

> The dividends could not have been charged to income tax upon the assessment rolls prepared in 1920, for the reason that certain of these rolls were finally revised prior to the date upon which the dividend was declared. Others were completed shortly afterwards. The rolls had been completed by the assessor and had been turned over by him prior to the 30th day of September, 1920.
>
> The assessor had no knowledge which would have enabled him to enter these amounts upon the assessment rolls under preparation in 1920.

In no way would he foresee that a dividend of 875 per cent would be declared towards the end of December, 1920, long after his assessment rolls had gone before the court of revision.

It is not suggested that the respondents could have foreseen this dividend, when they made their statutory declarations in 1920, but really the criticism of the appellant points to a *casus omissus* in The Assessment Act, a case which neither the legislature nor these parties had foreseen, and it is impossible for the court to add to this taxation law in order to provide for it. And I also think that subsection 2 of section 11 cannot be extended to cover it.

The Assessment Act did not provide for the preparation of a supplementary roll to include income actually received after the preparation of the regular roll but not included therein. Nor did it require a supplementary declaration from persons receiving unforeseen income after the preparation of the roll. I have said that it is a very arduous problem to devise a complete scheme of taxation on income to be received during the year of assessment, and this case shews how difficult the problem really is. The legislature may well provide for such a contingency, but in my opinion it has not yet done so. I refer of course to the statute as it stood at the time of these proceedings.

I may complete what I have to say on this branch of the case by referring to section 118 which provides for the remission or reduction of taxes by the court of revision on the petition of a person who has *inter alia* been overcharged by reason of a gross and manifest error in the roll, or who has been assessed for income but has not received such income. It does not go any further and does not authorize the making of a supplementary roll in a case like the one under consideration.

In my opinion therefore, the appellant's contention based on subsection 2 of section 11 is unfounded. This subsection can be applied to the case of persons having a fluctuating income which cannot be estimated in advance and to my mind this is its object and scope.

In view of what I have said it is unnecessary to determine whether the dividends received by the respondents are properly described as "income" as defined by The Assessment Act.

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There is the further ground that under sections 82 and 83 of The Assessment Act, on an appeal upon any ground against an assessment, the County Court Judge or the Ontario Railway and Municipal Board or a divisional court may re-open the whole question of the assessment so that omissions from, or errors in, the roll may be corrected, and may determine the accurate amount for which the assessment should be made. The Appellate Court has exercised this power and I respectfully concur in the reasons given by the learned Chief Justice of Ontario for exercising it.

In my opinion therefore the appeals fail and should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Frank B. Proctor.*

Solicitors for the respondent: *Greene, Hill & Hill.*