
THE TORONTO GENERAL TRUSTS }
 CORPORATION } APPELLANT;
 AND
 THE CORPORATION OF THE CITY }
 OF OTTAWA } RESPONDENT.

1935
 * June 13. 14.
 * Oct. 1.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and taxation—Income tax—Exemption—Assessment by municipality for income received by a corporation as executor in Ontario on behalf of and payable to persons resident outside of Ontario—Assessment Act, R.S.O. 1927, c. 238, as amended in 1930, c. 46—Exemption under s. 4 (22).

The appellant corporation, as executor of an estate, received in Ontario, during the year 1932, income on behalf of and payable to persons resident outside of Ontario. It was assessed in respect of such income by the respondent city, and the questions for determination were, whether appellant was entitled to exemption under s. 4 (22) of the *Assessment Act* (R.S.O. 1927, c. 238, as amended in 1930, c. 46), and, if so, to what extent.

* PRESENT:—Duff C.J. and Lamont, Cannon and Crocket JJ. and Dysart J. (*ad hoc*).

1935
 TORONTO
 GENERAL
 TRUSTS
 CORPORATION
 v.
 CITY OF
 OTTAWA.

Held: For the purposes of such assessment, appellant was not a "person" within the phrase "all other persons" in said s. 4 (22) and was not entitled to exemption thereunder. (The words "income derived" and "income received," as used in the Act, and the distinction indicated, from the Act and from the history of the legislation, in the use of those phrases, discussed, and the distinction, as made in *McLeod v. City of Windsor*, [1923] Can. S.C.R. 696, applied).

APPEAL by the Toronto General Trusts Corporation (hereinafter called the "Trusts Corporation") from the judgment of the Court of Appeal for Ontario (1) allowing the appeal of the City of Ottawa (the present respondent) from the judgment of Daly Co. C.J.

The Trusts Corporation is the executor or trustee of the estates in question, and, as executor or trustee, in each estate, during the year 1932, received income on behalf of and payable to more than one person resident outside of Ontario. It filed income returns in 1933 with the Assessment Commissioner of the City of Ottawa in respect of the incomes received on behalf of all such estates and such non-resident beneficiaries. The Corporation of the City of Ottawa is the municipality which, under s. 13 (1) (5) of the *Assessment Act* (R.S.O. 1927, c. 238, as amended in 1930, by 20 Geo. V, c. 46) was entitled to assess the Trusts Corporation for income received by it as executor or trustee on behalf of the several beneficiaries in such estates as were resident outside of Ontario.

In determining the amount of income to be assessed against the Trusts Corporation, as executor or trustee, the Assessment Commissioner allowed an exemption of \$1,500 upon each return in respect of so much of such income as was payable by the trustee to persons resident outside of Ontario, irrespective of the number of such beneficiaries.

From such assessments the Trusts Corporation appealed to the Court of Revision of the City of Ottawa, which reduced such assessments by directing that an exemption of \$1,500 be allowed in respect of the income payable to each beneficiary resident outside of Ontario.

The City of Ottawa appealed to His Honour, Judge Daly, Judge of the County Court of the County of Carleton. As the same question arose in respect of the assessment in each

estate, the appeals were consolidated and heard together. The learned County Court Judge dismissed the appeal. At the request of counsel for the City of Ottawa, he stated the questions of law involved in the appeal, in the form of a special case for a Divisional Court, pursuant to the provisions of s. 84 of the said *Assessment Act*. The questions stated were as follows:—

1935
TORONTO
GENERAL
TRUSTS
CORPORATION
v.
CITY OF
OTTAWA.

Question 1. Was I correct in holding that the Toronto General Trusts Corporation are a "person" within the meaning of such word as used in the phrase "and to the amount of \$1,500 in the case of all other persons," as they appear in subsection 22, of section 4, of the *Assessment Act*, namely:—

"22. The annual income derived from any source by any person assessable directly in respect to income under this Act, to the amount of \$3,000 if such person is a householder in the municipality and assessed as such, or being the head of a family occupies with his family any portion of a dwelling house although not assessed therefor, or if the person is a widow or over sixty years of age, and to the amount of \$1,500 in the case of all other persons."

Question 2. If the above question is answered in the affirmative, was I correct in holding, that the Toronto General Trusts Corporation, being executors, administrators, trustees or agents (as the case may be) of an estate or fund created or left by a person resident in Ontario, and having received in the year 1932, as such executors, administrators, trustees or agents, income from such fund or estate on behalf of and payable to persons resident outside of Ontario, and being assessed in respect thereof by the Appellant Corporation, were entitled under the provisions of subsection 22, of section 4, of the *Assessment Act*, to an exemption of \$1,500, in respect of the income received by them on behalf of and payable to each such non-resident beneficiary; that is to say, where there are two or more non-resident beneficiaries in the same estate, should the income received on behalf of each such non-resident beneficiary be exempt from assessment to the extent of \$1,500?

On appeal by the City of Ottawa, on the special case stated as aforesaid, the Court of Appeal allowed the City's appeal; and to question one, answered "No"; and, in consequence of such answer, found it unnecessary to answer question two.

Special leave was granted to the Trusts Corporation by the Supreme Court of Canada (1) to appeal to this Court. By the judgment now reported, the appeal to this Court was dismissed with costs.

W. F. Schroeder for the appellant.

F. B. Proctor K.C. for the respondent.

1935
 TORONTO
 GENERAL
 TRUSTS
 CORPORATION
 v.
 CITY OF
 OTTAWA.

The judgment of Duff C.J. and Lamont and Crocket JJ. was delivered by

LAMONT J.—This is an appeal from the judgment of the Court of Appeal for Ontario in a special case stated by His Honour Judge Daly, Senior Judge of the County Court of the County of Carleton. The first question set out in the special case is:—

Was I correct in holding that the Toronto General Trusts Corporation are a “person” within the meaning of such word as used in the phrase “and to the amount of \$1,500 in the case of all other persons,” as they appear in subsection 22 of section 4 of the Assessment Act, namely:—

“22. The annual income derived from any source by any person assessable directly in respect to income under this Act, to the amount of \$3,000 if such person is a householder in the municipality and assessed as such, or being the head of a family occupies with his family any portion of a dwelling house although not assessed therefor, or if the person is a widow or over sixty years of age, and to the amount of \$1,500 in the case of all other persons.”

The facts of the case are as follows: The Toronto General Trusts Corporation (hereinafter called the Trusts Corporation) are the executors or administrators or trustees of the estates hereinafter mentioned, that is to say, the estate of the late J. L. Murphy, the estate of the late A. F. Rogers, the estate of the late Rev. W. T. Herridge, the estate of the late A. D. Broderick and the estate of the late W. C. MacKay.

During the year 1932 the said Trusts Corporation received certain sums of money as executors or administrators or trustees of the above mentioned estates on behalf of and payable to certain beneficiaries resident outside of Ontario. Income returns were filed in 1933 by the Trusts Corporation with the Assessment Commissioner of the City of Ottawa in respect of income payable to the several beneficiaries.

The part of the income which the return shewed was received in Ontario and was payable to each of the beneficiaries (resident outside of Ontario) was assessed by the Assessment Commissioner to the Trusts Corporation for 1933. No assessment was made against or in the name of any non-resident beneficially entitled to any part of the income.

The learned County Court Judge decided in favour of the appellant and upheld the view of the Court of Revision

that the exemption of \$1,500 mentioned in subsection 22 of section 4 of the *Assessment Act* should be allowed to the Trusts Corporation in respect of each return of income made on behalf of a person residing outside of Ontario and paid to such person. The City of Ottawa appealed from this decision to the Court of Appeal for Ontario. That Court reversed the judgment and held that the answer to the first question should be "No."

1935
 TORONTO
 GENERAL
 TRUSTS
 CORPORATION
 v.
 CITY OF
 OTTAWA.
 Lamont J.

The material section of the statute to be construed in the present case is section 4, subsection 22.

Two of the principal contentions on behalf of the respondent were:—

(1) That "persons" in the phrase "all other persons" of subsection 22 of section 4 of the *Assessment Act*, as amended by the Statutes of Ontario of 1930, ch. 46, s. 1, means and includes only "natural persons";

(2) That "persons" in that phrase includes only persons who are assessable in respect of income to which they are beneficially entitled.

It is unnecessary to pass on the first of these.

As to the second, Mr. Proctor very properly calls our attention to the circumstance that, in section 4, in which the general rule relating to the assessment of income is declared, there is a difference between the phraseology designating the liability of residents of Ontario in respect of the taxation of income coming to them for their own behoof, and that in relation to income received in Ontario "by or on behalf of" a person resident outside of the province. In the second case, where the recipient may or may not be beneficially entitled to the income to be assessed, that income is designated as "income received," while in the first case the income assessable falls under the phrase "income derived." This distinction of phraseology would appear to have been observed generally in the enactments relating to the assessment of income from 1897 down to the present time. For example, in section 12 (1) of the Revised Statutes of Ontario, 1927, ch. 238, the phrase employed is "income received" where the subject matter dealt with is income which is received in Ontario for or on behalf of persons resident out of Ontario and income received in Ontario for or on behalf of an

1935
 TORONTO
 GENERAL
 TRUSTS
 CORPORATION
 v.
 CITY OF
 OTTAWA.
 Lamont J.

estate or trust. On the other hand, in subsections 16 and 18 of section 4 of the same statute, the phrase "derived by any person from His Majesty's Imperial Treasury" is used to qualify officers' pay and pensions, salaries, etc.; and "income derived" is used in relation to the income which comes to a farmer from his farm. In both these cases, the income is envisaged, of course, as income to which the recipient is beneficially entitled.

The successive Assessment Acts beginning with that of 1897 and coming down to and including the *Assessment Act* in the Revised Statutes of 1927 (those of 1904, 1914 and 1927) contain in each case a provision dealing with the exemption of income, of which subsection 22 of section 4, as amended in 1930, is the successor. These various enactments, passed during this period of 30 years, all deal, obviously, with one subject matter: exemptions enjoyed in respect of income to which the recipient is beneficially entitled; and, in each case, the terms in which the enactment is expressed recognizes the distinction in phraseology adverted to. In each case, the income, to which the exemption attaches, is denoted by the phrase "income derived." In section 4 (22), as amended in 1930, this form of phraseology is preserved. Reading the amended section in light of the whole of the provisions relating to the assessment of income, including the series of enactments of 1897, 1904, 1914 and 1927, to which it is the successor, it would seem a reasonable view that the subject matter of the section, as amended, is the same as the subject matter of the section in its unamended form in R.S.O. 1927, and of each one of this succession of enactments beginning in 1897; namely, exemptions attaching to income to which the recipient is beneficially entitled. This view as to the distinction explained, in its application to the provisions of the Ontario *Assessment Act* (R.S.O. 1914, cap. 195), has been explicitly accepted in the judgments of this Court and of the Ontario Courts. *McLeod v. City of Windsor* (1).

Further, an exemption gives a privilege in respect of taxation, and the principle is not only well settled, but

(1) [1923] Can. S.C.R. 696, at 700, 701 and 710.

rests upon obvious reasons that those who advance a claim to special treatment in such matters must shew that the privilege invoked has unquestionably been created. (*City of Montreal v. Collège Sainte Marie* (1)).

On the whole, therefore, it would appear that the exempting section ought not to be applied to income assessed under section 13 (1) of the *Assessment Act*, as amended in 1930. The decision of the Court of Appeal to the effect that, for the purposes of the application of the exempting section, the appellant corporation is not a person within the meaning of the phrase "all other persons," is, in my opinion, correct and should not be disturbed.

The appeal will, therefore, be dismissed with costs.

CANNON J.—Under section 4 of the *Assessment Act*,
 * * * all income [a] derived either within or out of Ontario by any person resident therein, or [b] received in Ontario by or on behalf of any person resident out of the same shall be liable to taxation, subject to certain exemptions. Amongst others, subsection 22 exempts the annual income *derived* from *any* source by *any* person *assessable directly* in respect to income *under this Act* to the amount of \$1,500 in the case of all persons other than (1) a householder in the municipality and assessed as such, or (2) being the head of a family occupies with his family any portion of a dwelling house although not assessed therefor, or (3) a widow, or (4) a person over sixty years of age. These four categories enjoy an exemption of \$3,000.

Now, under section 13, subsection 1, of the Act, as amended in 1930,

Where a person resident in Ontario creates a trust or agency fund or dies leaving an estate, and income from such fund or estate is *payable* to a person resident outside of Ontario, the income *payable* to such non-resident shall be assessed in the hands of the executors, administrators, trustees or agents of such estate or fund, who may pay the amount of taxes out of the income in their hands.

This section taxes the income payable to each non-resident in the hands of the executors or trustees. Can it be said that the exempting clause does apply to the income received in Ontario by or on behalf of any person resident out of the same? It seemed to me at first, that the exemption would apply both to the income derived in

1935
 TORONTO
 GENERAL
 TRUSTS
 CORPORATION
 v.
 CITY OF
 OTTAWA.
 Lamont J.

1935
 TORONTO
 GENERAL
 TRUSTS
 CORPORATION
 ".
 CITY OF
 OTTAWA.
 Cannon J.

Ontario by residents and to income received in Ontario for non-residents, if assessable directly, under the Act, the latter being the only one assessable in the hands of the trustee, as is clearly shown by the late Chief Justice Anglin in *McLeod v. City of Windsor* (1). But, in this latter case, this Court made a clear distinction between "derived" and "received" as used in this Act, and decided that "derived" meant "received by a person beneficially entitled." The trustee, although directly assessed in his representative capacity, does not "derive" any income for his own benefit, and therefore would seem to be outside the scope of the exemption clause. It may be a *casus omissus*, as this interpretation discriminates against non-residents and may have the effect, which the Legislature probably never contemplated, of causing a flight of such trust funds and capital away from this province.

The Assessment Commissioner of the respondent allowed an exemption of \$1,500 upon each return in respect of so much income as was payable by the trustees to persons resident outside of Ontario, irrespective of the number of such beneficiaries. Such was the position, which was satisfactory to the respondent, before an appeal was launched by the appellants.

The Court of Revision decided that in the case of each estate the executors or trustees were entitled to an exemption of \$1,500 from the amount of income in their hands for the benefit of *each* beneficiary who resided outside of Ontario.

The County Judge agreed with the Court of Revision but, in his stated case, put the questions in such a way that, when the matter came before the Court of Appeal, the respondent was enabled to secure a judgment which went much further than the position taken by the Assessment Commissioner and decided, in effect, that the exemption clause did not apply to non-residents.

It seems to me that the only issue raised by the parties at the origin of this litigation was limited to this—whether or not the Assessment Commissioner was right in limiting the exemption to \$1,500 for each estate, instead of allowing the same exemption to each non-resident beneficiary.

(1) [1923] Can. S.C.R. 696, at 711-712.

However, the sole question before us is whether or not we should give a different answer than the one adopted by the Court of Appeal. I consider myself bound by the interpretation adopted by this Court in the *Windsor* case (1) in 1923 and I would, therefore, answer in the negative the first question stated by the learned County Judge.

This appeal should be dismissed with costs.

DYSART J. (*ad hoc*)—I concur in the dismissal of this appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *MacCraken, Fleming & Schroeder.*

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

1935
TORONTO
GENERAL
TRUSTS
CORPORATION
v.
CITY OF
OTTAWA.
Cannon J.

(1) [1923] Can. S.C.R. 696.