
CAPITAL MANAGEMENT LIMITED . . . APPELLANT;

AND

THE MINISTER OF NATIONAL }
REVENUE }

RESPONDENT.

1967
*Nov. 29, 30
1968
Jan. 29

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Capital cost allowance—Acquisition of right to manage mutual fund for limited period—Whether “franchise, concession or licence”—Whether depreciable property—Income Tax Act, R.S.C. 1952, c. 148, s. 11(1)(a)—Income Tax Regulations, s. 1100(1)(c), schedule B, class 14.

In 1959, the appellant company acquired for a substantial sum the right to manage two mutual funds for a period of ten years. The appellant was to be remunerated for its services by a commission. It was contended by the appellant that it was entitled to claim a capital cost allowance on the ground that it had acquired a depreciable property, *i.e.*, a “franchise, concession or licence for a limited period in respect of property” within the meaning of class 14 of schedule B of s. 1100(1)(c) of the Income Tax Regulations. The Exchequer Court

*PRESENT: Cartwright C.J. and Abbott, Hall, Spence and Pigeon JJ.

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held that the rights acquired could not be described as a franchise, concession or licence in respect of property. The company appealed to this Court.

Held: The appeal should be dismissed.

The trial judge rightly adopted the view expressed in the *Investors Group v. M.N.R.*, [1965] 2 Ex. C.R. 520, that the words "franchise, concession or licence" in the statute were used to refer to some right, privilege or monopoly that enables the concessionnaire or franchise holder to carry on his business or that facilitates the carrying on of his business and that they were not used to refer to a contract under which a person was entitled to remuneration for the performance of specific services.

Revenu—Impôt sur le revenu—Coût en capital à titre d'allocation—Acquisition du droit de gérer un fonds mutuel pour une période déterminée—«Franchise, concession ou licence»—Bien susceptible de dépréciation—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 11(1)(a)—Règlements de l'impôt sur le revenu, art. 1100(1)(c), cédule B, classe 14.

En 1959, la compagnie appelante a acquis pour un montant substantiel le droit de gérer deux fonds de placement mutuels pour une période de dix ans. L'appelante devait être rémunérée de ses services au moyen d'une commission. L'appelante prétend qu'elle a droit de réclamer une allocation du coût en capital pour le motif qu'elle avait acquis un bien susceptible de dépréciation, à savoir, une franchise, concession ou licence pour une période déterminée à l'égard d'un bien dans le sens de la classe 14 de la cédule B de l'art. 1100(1)(c) des Règlements de l'impôt sur le revenu. La Cour de l'Échiquier a statué que les droits en question ne pouvaient pas être décrits comme étant une franchise, une concession ou une licence à l'égard d'un bien. La compagnie en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Le juge de première instance a eu raison d'adopter l'opinion exprimée dans la cause *Investors Group v. M.N.R.*, [1965] 2 R.C. de l'É. 520, à l'effet que dans le statut on se sert des mots franchise, concession ou licence en rapport avec un droit, un privilège ou un monopole permettant au concessionnaire ou au détenteur de la franchise d'exercer son commerce ou de lui en faciliter l'exercice, et que ces mots ne sont pas employés en rapport avec un contrat en vertu duquel une personne a droit d'être rémunérée pour des services spécifiques.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada¹, en matière d'impôt sur le revenu. Appel rejeté.

¹ [1967] 2 Ex. C.R. 84, [1967] C.T.C. 150, 67 D.T.C. 5103.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada¹, in an income tax matter. Appeal dismissed.

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R. de Wolfe MacKay, Q.C., and *C. C. Locke, Q.C.*, for the appellant.

G. W. Ainslie, for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of Gibson J. in the Exchequer Court of Canada¹ pronounced on April 5, 1967, wherein he dismissed the appellant's appeal against its 1960 assessment. The Minister had refused to permit the appellant, in computing its income, to deduct the sum of \$191,466.50.

By indentures dated October 1, 1954, between a corporation known as Capital Management Corporation Limited and the Montreal Trust Company, the All Canadian Dividend Trust Fund and The All Canadian Compound Fund mutual fund operations were established. These agreements designated the Capital Management Corporation as the manager of the trust funds and the Montreal Trust as the custodian of the assets thereof. Under that agreement, the Capital Management Corporation was entitled to a fee of not less than one-tenth of one per cent and not more than one-fifth of one per cent of the capital of the trust fund payable quarterly. There was no limitation on the period of time during which the Capital Management Corporation Limited was entitled to act as manager of the fund and receive the said fee although it might retire upon notice.

The appellant company was incorporated under the provisions of the British Columbia *Companies Act* on October 23, 1959. On October 31, 1959, the appellant entered into an agreement with Capital Management Corporation Limited, i.e., the existing manager under the trust deeds, whereby it purchased from the latter all its rights under the said trust deeds of October 1, 1954. The conveyance of

¹[1967] 2 Ex. C.R. 84, [1967] C.T.C. 150, 67 D.T.C. 5103.

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such rights in the agreement of October 31, 1959, appears in para. 1 thereof as follows:

1. The Vendor hereby sells, transfers and assigns unto the Purchaser and the Purchaser hereby accepts the sale, transfer and assignment of all the vendor's exclusive right and concession under the Indentures for and in consideration of the price of one million, nine hundred and thirteen thousand and sixty dollars (\$1,913,060) payable upon the execution hereof.

Immediately prior to that agreement of sale between Capital Management Corporation Limited and the appellant, the former had entered into amending agreements with the Montreal Trust Company which agreements were approved by the unit holders in both the All Canadian Dividend Fund and the All Canadian Compound Fund. By the agreements which were made on October 16, 1959, the manager, i.e., at that time the Capital Management Corporation Limited, was given the exclusive right and concession to manage all moneys and securities held by the trustees subject to the terms of the trust agreement for the period from October 16, 1959, to October 15, 1969. Also by those agreements the fees which the manager was to receive from the trustees were fixed at one-eighth of one per cent of the capital, again payable quarterly. It is the contention of the appellant that it is entitled to claim a capital cost allowance of an amount equal to one-tenth of the purchase price of \$1,913,060, as set out in para. 1 of the agreement quoted above under the provisions of the *Income Tax Act* and Regulations.

Section 11(1) of the *Income Tax Act* provides:

11. (1) Notwithstanding paragraphs (a), (b) and (h) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for the taxation year:

- (a) such part of the capital cost to the taxpayer of property, or such amount in respect to the capital cost to the taxpayer of property, if any, as is allowed by regulation;

Regulation 1100(1) of the *Income Tax Regulations* provides:

(1) Under paragraph (a) of subsection (1) of section 11 of the Act, there is hereby allowed to a taxpayer, in computing his income from a business or property, as the case may be, deductions for each taxation year equal to

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(c) Such amount as he may claim in respect of property of class 14 in Schedule B not exceeding the lesser of

- (i) the aggregate of the amounts for the year obtained by apportioning the capital cost to him of each property over the life of the property remaining at the time the cost was incurred, or
- (ii) the undepreciated capital cost to him as of the end of the taxation year (before making any deduction under this subsection for the taxation year) of property of the class;

* * *

Class 14 of Schedule B reads:

Property that is a patent, franchise, concession or licence for a limited period in respect of property but not including
(*the exclusions are irrelevant*).

The parties agree that Gibson J. correctly stated that the determination of the issue as to whether the appellant is entitled to such capital costs deduction is dependent upon the answer to the question:

Are the rights or obligations obtained and assumed by the appellant pursuant to the agreement between it and the Capital Management Corporation Ltd. dated October 31st, 1959, "property that is a patent, franchise, concession or licence for a limited period in respect of property"?

Of course, such rights are not a patent so the question narrows down to whether they were a franchise, concession or licence, and also whether they were "in respect of property".

Gibson J. held that the rights which the appellant received from its predecessor under the said agreement were essentially the right to act as a managing agent for a set fee and that such right could not be described as a franchise, concession or licence in relation to property, and he therefore dismissed the appellant's appeal from the assessment made by the Minister.

The appellant in its submission to Gibson J. and to this Court emphasized that its rights under the trust agreements which it purchased on October 31, 1959, were much more than the rights to act as manager for a fee, in that it had the sole right to designate the brokers who could sell the units in the two funds and was entitled to an acquisition fee of 2 per cent of the proceeds of the sale of any of those units. In addition, the broker or selling agent was

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entitled to a commission of 6 per cent although sometimes less than 6 per cent was paid as discounts were given for large purchases.

Under the trust agreements, the appellant was entitled, in the words of article XVII, s. 5:

5. The Manager or any company in or with which it or its stockholders may be interested or affiliated or any officer or director of the Manager or of any such company may buy, sell, hold, own or deal in any of the certificates with the same rights as other holders thereof.

The appellant never did buy, sell, hold or deal in any of the certificates but it did purchase all the shares of an existing corporation known as General Mutual Funds Ltd. and that entity then sold a large number of units and obtained the 6 per cent commission aforesaid. The appellant obtained the 2 per cent acquisition fee on the units sold by General Mutual Funds Ltd. as well as on the units sold by a very large number of brokers all of whom it had chosen under its power in the trust deed. It is the appellant's submission that these rights are, therefore, a "franchise, concession or licence" within the aforesaid class 14 of regulation 1100.

The respondent submits that those words, "franchise, concession or licence in respect of the property" must be interpreted in the sense used by ordinary businessmen on this continent. Counsel for the respondent agrees that the words extend not only to certain kinds of privileges or monopolies conferred by virtue of statutory enactment but may also extend to rights created by contract between private parties. The respondent, however, submits that the English authorities dealing with similar words when used in contracts in reference to property are not helpful in interpreting the words used in income tax legislation on this continent. Counsel for the respondent, therefore, cites American dictionaries, and, particularly, Webster's International Dictionary, 3rd ed., which, at p. 902, defines "franchise" as:

3 a: a right or privilege conferred by grant from a sovereign or a government and vested in an individual or a group; specif: a right to do business conferred by a government—see FRANCHISE TAX b: a constitutional or statutory right or privilege; esp: the right to vote—usu. used with *the* c(1): the right granted to an individual or group to market a company's goods or services in a particular territory (2): the territory involved in such a right d: a contract for public works or public services granted by a government to an

individual or company e(1): the right of membership granted by certain professional sports leagues (2): such membership itself (3): a team and the professional organization operating it having such membership f: the right to present, broadcast, or televise the events put on by a sports league or organization . . .

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And at p. 470 where "concession" is defined as:

a: a grant of land or other property esp. from a government in return for services rendered or proposed or for a particular use; *specif*: a tract granted to a foreign power in a Chinese treaty port or other trading center and permitted rights of extraterritoriality and local self-government b: a usu. exclusive right to undertake and profit by a specified activity [a—to build a canal] [conflicting —s in the oil fields] c: a lease of premises or a portion of premises for a particular purpose, esp. for some purpose supplementary to another activity (as the storing of wraps of patrons of a theatre) or for providing entertainment; *often*: the premises covered by such a concession or the activities for which it is granted [it was reported that some of the —s at the fair were not honest] . . .

And at p. 1304, where "licence" is defined as:

3 a(1): a right or permission granted in accordance with law by a competent authority to engage in some business or occupation, to do some act, or to engage in some transaction which but for such licence would be unlawful [a—to sell liquor] [a marriage] —[a—to practice medicine] (2): a document evidencing a licence granted . . .

There seems to have been only one decision in Courts in Canada which has any direct application to the present situation: *The Investors Group v. M.N.R.*², where Jackett P. considered a like appeal and expressed the view that the words "franchise, concession or licence" in the statute were used to refer to some right, privilege or monopoly that enables the concessionaire or franchise holder to carry on his business or that facilitates the carrying on of his business and that they were not used to refer to a contract under which a person was entitled to remuneration for the performance of specific services. Gibson J. adopted this view in dismissing the appellant's appeal. Counsel for the appellant submits that the present case should be distinguished from *Investors Group v. M.N.R.* on the ground that in that case all the taxpayer obtained under the agreement was a power to procure and recommend salesmen with a duty to finance their expenditures and that there was nothing to show that such power was an exclusive power. It is true that in the report of the case in 18 Dominion Tax Cases at page 457, Mr. St. Onge dealt with

² [1965] 2 Ex. C.R. 520, [1965] C.T.C. 192, 65 D.T.C. 5120.

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those circumstances but I did not find that the learned President in considering the appeal in the Exchequer Court placed any reliance whatsoever upon them. On the other hand, he based his decision solely on a consideration of the proper interpretation to be given to the words "franchise, concession or licence" in business practice on this continent.

Counsel for the respondent submits that the appellant in relying on the power which it alleges it had to deal with the units and advancing that power as one reason in interpreting its rights as a franchise, is misconstruing the power granted to it in the two trust deeds. Counsel for the respondent points out that the trust deeds themselves carefully distinguished between shares and certificates for shares, so in the trust deed setting up the All Canadian Dividend Fund it is provided in article IV, para. 2, "shares may be purchased by or through persons authorized by the manager", and in para. 3, "upon receipt of the purchase price of a *share or shares* by the trustee, the trustee shall issue to each such purchaser of such *share or shares* a *certificate* representing the number of shares purchased by him", while in article XVII, para. 5, it is provided:

5. The Manager or any company in or with which it or its stockholders may be interested or affiliated or any officer or director of the Manager or of any such company may buy, sell, hold, own or deal in any of the certificates with the same rights as other holders thereof.

(The underlining is my own).

And by article XVI, para. 2, the same exact right is given to the trustee. I am in agreement with this submission of counsel for the respondent that the power given to the manager and, as I have said, also to the trustee, to deal in certificates is not a power by which it may purchase shares from treasury, but merely a power permitting it to buy and sell on the market certificates for such shares once they have been issued, a power which, of course, is a very frequent one in contracts appointing trustees of a fund or managing agents of a fund when those trustees or managing agents are in the business of dealing in securities and holding investments. Once this interpretation is accepted then the position of the appellant is reduced to that of a managing agent with a right to designate selling agents and to obtain a 2 per cent acquisition fee on sales of all

shares by such agents. It is difficult to distinguish between that position and the position of the appellant in *Investors Group v. M.N.R.*, and I have already expressed my agreement with the view of the learned President in that decision.

This is sufficient to dispose of the appeal. I, therefore, find it unnecessary to refer to another submission made by counsel for the respondent, *i.e.*, that whether the rights of the appellant are or are not a “franchise, concession or licence” they are not “in respect of property”. I prefer to express no opinion on that submission.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Duquet, MacKay, Weldon, Bronstetter, Willis & Johnston, Montreal.

Solicitor for the respondent: D. S. Maxwell, Ottawa.

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