

1960  
\*May 9  
June 13

SETTLED ESTATES LIMITED ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REV- }  
ENUE ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Taxation—Income tax—Exemption claimed as a personal corporation—  
Claim rejected—The Income Tax Act, R.S.C. 1952, c. 148, ss. 63(1)(2),  
68(1)(a), 139(1)(u)(ac).*

Appellant incorporated as a private company under the *Companies Act* of British Columbia, was controlled for many years by one Fiddes, who died on April 25, 1954. Letters probate were granted to his

\*PRESENT: Locke, Cartwright, Abbott, Martland and Judson JJ.

<sup>1</sup> (1862), 9 Cox C.C. 231 at 233, 32 L.J.M.C. 24.

executors on June 15, 1954. Following Fiddes' death the shares of the appellant were held by the executors and the company was controlled by them during the 1955 and 1956 taxation years. The appellant claimed that the executors were individuals according to s. 139(1)(u) (ac) of the *Income Tax Act* and as they had the requisite control and had met all other requirements of s. 68(1), the company was in 1955 and 1956 a personal corporation, and therefore exempt from income tax. The Minister rejected the claim and reassessed for the years in question. These reassessments were confirmed on appeal to the Income Tax Appeal Board and to the Exchequer Court. The appellant then appealed to this Court.

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*Held:* The appeal should be dismissed.

The executors controlled the appellant company during the period in question on behalf of numerous beneficiaries of the estate. This was not one of the three methods of control contemplated by s. 68(1)(a) of the Act, i.e. (i) by an individual resident in Canada, (ii) by such an individual and one or more members of his family who were resident in Canada, (iii) by any other person on his or their behalf. An executor could not be the individual referred to in that section, because a plain intention to the contrary was to be gathered from its context.

S. 63 had no relevancy in the determination whether a corporation is a personal corporation.

APPEAL from a judgment of Cameron J. of the Exchequer Court of Canada<sup>1</sup>, affirming reassessments made by the Minister of National Revenue. Appeal dismissed.

*K. E. Meredith*, for the appellant.

*E. S. MacLachy and T. E. Jackson*, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—The issue in this appeal is whether the appellant was a personal corporation within the meaning of s. 68 of the *Income Tax Act* during its 1955 and 1956 taxation years. Both the Income Tax Appeal Board and the Exchequer Court<sup>1</sup> have found that it was not. The appellant contests this finding and appeals from the reassessments made for the 1955 and 1956 taxation years.

The appellant was incorporated as a private company under the *Companies Act of British Columbia* and for many years it was controlled by the late Robert William Fiddes, who owned 1699 shares out of its 1700 total issued ordinary shares. During the lifetime of the late Mr. Fiddes the appellant was admittedly a personal corporation within the

<sup>1</sup>[1959] Ex. C.R. 449, C.T.C. 284, D.T.C. 1138.

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meaning of s. 68 of the *Income Tax Act*. Mr. Fiddes died on April 25, 1954. Under his Will the Montreal Trust Company and Elmore Meredith, both of the City of Vancouver, were appointed executors and Letters Probate were granted to them on June 15, 1954. Following the death of Mr. Fiddes, the shares of the appellant were held by these executors and the appellant was controlled by them during the 1955 and 1956 taxation years. For these years, in filing its income tax returns, the appellant claimed exemption from tax on the ground that it was a personal corporation. The Minister rejected this claim and reassessed for these years on the ground that the appellant was not a personal corporation. These are the reassessments which were confirmed on appeal to the Income Tax Appeal Board and to the Exchequer Court.

In my opinion, the appeal fails and should be dismissed with costs.

“Personal corporation” is defined by s. 68 of the *Income Tax Act* in the following terms:

68. (1) In this Act, a “personal corporation” means a corporation that, during the whole of the taxation year in respect of which the expression is being applied,
- (a) was controlled, whether through holding a majority of the shares of the corporation or in any other manner whatsoever, by an individual resident in Canada, by such an individual and one or more members of his family who were resident in Canada or by any other person on his or their behalf;
  - (b) derived at least one-quarter of its income from
    - (i) ownership of or trading or dealing in bonds, shares, debentures, mortgages, hypothecs, bills, notes or other similar property or an interest therein,
    - (ii) lending money with or without securities,
    - (iii) rents, hire of chattels, charterparty fees or remunerations, annuities, royalties, interest or dividends, or
    - (iv) estates or trusts; and
  - (c) did not carry on an active financial, commercial or industrial business.
- (2) For the purpose of paragraph (a) of subsection (1), the members of an individual's family are his spouse, sons and daughters whether or not they live together.

It is admitted that the income of the corporation qualifies under subs. (b) of s. 68(1). The question is whether the control of the corporation in 1955 and 1956 was such as to qualify it within subs. (a) of s. 68(1). A personal corpora-

tion does not pay income tax but its income is taxed in the hands of the shareholders under s. 67 of the Act, which reads:

67. (1) The income of a personal corporation whether actually distributed or not shall be deemed to have been distributed to, and received by, the shareholders as a dividend on the last day of each taxation year of the corporation.
- (2) No tax is payable under this Part on the taxable income of a corporation for a taxation year during which it was a personal corporation.

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The appellant's submissions on this appeal were that the executors were individuals according to the definition of "individual" and "person" in s. 139(1)(u) and (ac), and that consequently, the requirements of s. 68(1)(a) were met.

Section 139(1)(u) and s. 139(1)(ac) read:

139(1)(u). "Individual" means a person other than a corporation;

139(1)(ac). "person" or any word or expression descriptive of a person, includes any body corporate and politic, and the heirs, executors, administrators or other legal representatives of such person, according to the law of that part of Canada to which the context extends; . . . .

The argument is that since an individual means a person (other than a corporation) and as the definition of "person" includes executors and legal representatives, it follows that the executors of the Fiddes estate are individuals and that having had the requisite control and all the other requirements of s. 68(1) having been met, the appellant company was in 1955 and 1956 a personal corporation.

I have no hesitation in rejecting this argument. The executors controlled this company during the taxation years in question on behalf of the beneficiaries of the estate. This, in my opinion, is not one of the three modes of control contemplated by s. 68(1)(a). The three modes of control are:

- (i) by an individual resident in Canada;
- (ii) by such an individual and one or more members of his family who were resident in Canada (family being defined by statute);
- (iii) by any other person on his or their behalf.

In my opinion, the individual first referred to must be a natural living person exercising control on his own behalf.

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The word does not include executors, whether corporate or otherwise. I say this because that individual first referred to is next referred to in connection with his family. There is no room for executors, whether corporate or otherwise, in this scheme of control. The last mode of control is by any other person on behalf of an individual or on behalf of the individual and members of his family. I can think of situations where executors could exercise control under this third mode of control, for example, if T dies leaving all his shares in a personal corporation to executors and trustees in trust for an individual or for that individual and members of his family. But this is not the present case. Under the terms of the will left by the late Mr. Fiddes, the executors control on behalf of numerous beneficiaries. They do not control on behalf of an individual or the individual and members of his family. My conclusion therefore is that an executor cannot be the individual referred to in s. 68(1)(a).

Nor do I think that the appellant can get any assistance from ss. 63(1) and (2) of the *Income Tax Act*, which define a trust and then go on to define a trust as an individual as follows:

- 63(1). In this Act, trust or estate means the trustee or the executor, administrator, heir or other legal representative having ownership or control of the trust or estate property.
- 63(2). A trust or estate shall, for the purposes of this Act, and without affecting the liability of the trustee or legal representative for his own income tax, be deemed to be in respect of the trust or estate property an individual. . . .

Section 63 has no relevancy in the determination whether a corporation is a personal corporation. Although s. 63(2) may require executors to be deemed an individual for the purpose of taxation of the trust or estate and although they may be an individual holding the shares of the appellant company, for the reasons I have given they cannot be the individual referred to in s. 68(1)(a), because a plain intention to the contrary is to be gathered from the context of the section itself.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the appellant: Meredith & Co., Vancouver.*  
*Solicitor for the respondent: A. A. McGrory, Ottawa.*