THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

THE GREAT WESTERN GARMENT COMPANY LIMITED ..... RESPONDENT.

1948
*June 14
*Oct. 27

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income tax—Salary "free from income tax"—Payment of income tax as part of salary—Bonus—"Rate of salary established and payable"—Income War Tax Act, R.S.C. 1927, c. 97—Excess Profits Tax Act 1940, S. of C. 1940, c. 32—Wartime Salaries Order, P.C. 1549, February 27, 1942.

At a general meeting of the shareholders of the respondent on June 2, 1941, resolutions were passed directing that its general manager and four of its officials as of January 1, 1941, should be paid certain specified amounts as salary "free from income tax", although by the Articles of Association of the company the directors had the power to make such arrangements. Article 103 of the said Articles provided that the directors might from time to time appoint one of their body as managing director; Article 105 provided that the remuneration of the managing director should be fixed by the directors and Article 123 provided that the directors might appoint such managers, secretaries, officers, etc., as they consider necessary and fix their salaries. The resolutions passed by the shareholders remained unchanged, but changes in the Income War Tax Act required that the respondent pay larger amounts as income tax on behalf of each of the officials. In assessing the respondent for income and excess profits tax, the appellant, in 1943 and 1944, disallowed certain sums as "unauthorized salary increases" on the basis that the payments of the increased income taxes represented increases in the "rate of salary" of these officials contrary to section 2 of the Wartime Salaries Order, P.C. 1549, dated February 27, 1942. It was also contended by the Minister that the resolutions were not legally binding upon the

*PRESENT: Rinfret C.J. and Rand, Kellock, Estey and Locke JJ.

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company because they did not conform to the constitution of the company or to the Companies Act. The Exchequer Court held that the resolutions were binding, that the payment of income tax was not a bonus and that the "rate of salary established and payable" was not increased.

Held: The resolutions were valid and binding upon the parties. (Barron *v.* Potter [1914] 1 Ch. 895; Foster *v.* Foster [1916] 1 Ch. 532 and Worcester Corsetry Ltd *v.* Witting [1936] 1 Ch. 640 followed. Kelly *v.* Electrical Construction Co. [1907] 10 O.W.R. 704; Colonial Ass. Co. *v.* Smith [1912] 22 Man. R. 441; Automatic Self Cleansing Filter Syndicate Co. Ltd. *v.* Cunninghame [1906] 2 Ch. 34 and Salmon *v.* Quin [1909] 1 Ch. 311 distinguished).

Held (Kellock and Estey JJ. dissenting): The rate of salary was not increased by maintaining the mode of determining it. (Judgment of the Exchequer Court [1947] Ex. C.R. 458 affirmed).

Per The Chief Justice, Rand and Locke JJ.:—The "rate of salary" in this case was that determined by a mathematical computation in which one of the factors was the variable scale of income tax rates; the words "rate of salary" are to be interpreted as meaning the salary arrangement and not the quantum of the salary.

Per Kellock and Estey JJ. (dissenting):—The salary rate "established and payable" was the amount per annum which the respondent was paying the employee, and therefore the payment of additional amounts by reason of an increase in income tax rates over and above the rate existing on November 6, 1941, falls within the prohibition of sec. 2 (*a*) of the Order.

On the question as to whether the payment of income tax could be regarded as a bonus within the meaning of sec. 2 (*d*) of the Order, The Chief Justice, Rand and Kellock JJ. expressed no opinion while Estey and Locke JJ. held that it was not a bonus. Even assuming that it was a bonus, The Chief Justice and Rand J. held that it would fall within the exception of sec. 2 (*d*) (*i*) (Kellock and Estey JJ. Contra).

APPEAL from the judgment of the Exchequer Court of Canada, O'Connor J. (1), maintaining an appeal from the decision of the Minister of National Revenue confirming respondent's assessment levied upon him for the taxation years 1943 and 1944 under the provisions of The Income War Tax Act and The Excess Profits Tax Act.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

W. R. Jackett and *E. S. MacLatchy* for the appellant.

G. H. Steer K.C. for the respondent.

(1) [1947] Ex. C.R. 458.

The judgment of the Chief Justice and of Rand J. was delivered by

RAND J.—This appeal raises the question whether a "salary free from income tax" when it amounts to more than that actually received in the basic year is contrary to the provisions of the Wartime Salaries Order P.C. 1549.

The preamble to the Order recites its purpose of "stabilizing the rates of managerial and executive salaries paid during wartime in the same general way as wage rates are stabilized under the Wartime Wages and Cost of Living Bonus Order."

Clause 1 (*c*) defines "salary" to include "wages, salaries, bonuses, gratuities, emoluments or other remuneration, including any share of profits or bonuses dependent upon the profits of the employer . . ." Under a proviso, a salesman's commission is not deemed to be a salary.

Clause 2 (*a*) forbids an employer to "increase the rate of salary paid to a salaried official above the most recent salary rate established and payable prior to November 7, 1941 . . ." Paragraph (*d*) forbids him to "pay as bonus (which . . . shall include gratuities and shares of profits, but . . . not . . . cost of living bonus) a larger total amount to any one salaried official during any year following November 6, 1941, than the total amount paid to the said salaried official as bonus in the base year; provided that,

(1) Where the salaried official has a contractual right evidenced in writing which existed at November 6, 1941 to receive such a bonus, defined as a fixed percentage of or in fixed ratio to his salary, the profits of the business or the amount of sales, output or turnover of the business, the employer may continue to pay the said bonus at the same fixed percentage or ratio as that contracted for previous to November 7, 1941.

Some question was raised as to the sufficiency of the resolution passed by the shareholders authorizing the salary for officials who were also directors, but I think it was clearly shown on the argument that there was no substance in the point.

What the Order does is not to fix the quantum of remuneration but in contradistinction to fix the rates at which the remuneration is paid, an effect which the language of clause 2 (*a*) "the rate of salary paid" seems to me to place beyond doubt. I cannot imagine why the words "rate of" should have been added to the word "salary" if

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they were not intended to be significant. In the fluctuating bonus under clause 2 (*d*), increases in the actual amount are expressly contemplated; and considering the operation in 1942 and subsequent years of a bonus based upon a percentage of profits, sales, or output, any doubt as to the underlying intention disappears.

That the rate of salary in this case was that determined by a mathematical computation in which one of the factors was the variable scale of income tax rates is perfectly clear. The official, in reporting his income, must have shown such a sum as with the tax referable to it deducted would leave a balance of $15,000. The salary is thus fluctuating, but if the amount received in 1941 is taken as the rate, an entirely new form is given to it. The words of the Order must be taken to envisage different salary bases, and that here is not of an unusual nature. A specific sum related indefinitely to a unit of time is itself the rate for that period and is ordinarily referred to as the salary; but an increase in such a rate is to be distinguished from an increase or decrease in amount when the latter is the function of a variable; in that case the rate cannot be expressed otherwise than in terms of a mathematical relation.

It was contended that that portion of the salary representing the tax was a bonus within clause 2(*d*). Even assuming this to be so, I would agree with Mr. Steer that it is within the first proviso. It would be a bonus "in fixed ratio to" the salary. These mathematical expressions in the proviso must be interpreted in the context and scheme of the Order, and I see no difference in the intention between a fixed percentage, say, related to a variable quantity and a variable factor applied to a fixed quantity. In each case there is a fixed ratio within the language used.

I am, therefore, of opinion that the rate of salary has not been increased by maintaining the mode of determining it and that the appeal must be dismissed with costs.

KELLOCK J. (dissenting):—The question for decision on this appeal turns upon the meaning of the words "rate of salary" in paragraph 2(*a*) of P.C. 1549 of the 27th of February, 1942.

By paragraph 2 of the Order here in question an employer, unless otherwise permitted by paragraphs 3, 4 and 5, is prohibited on or after November 7, 1941, from increasing "the rate of salary paid to a salaried official above the most recent salary rate established and payable prior to November 7, 1941 . . ."

It is contended on behalf of the respondent that the "rate of salary" in the case of a managing director, to take the case of one employee as an example, was on the 6th day of November, 1941, $15,000 per year, plus income tax, and that although the tax has been increased by reason of legislation since that time, the rate of salary has remained the same and payment by the respondent of the net sum of $15,000 has involved no increase in the rate within the meaning of the Order. On the other hand, it is contended on behalf of the appellant that the rate of salary "established and payable" on the relevant date was the yearly sum actually being paid by the respondent to the employee inclusive of income tax during the relevant year.

The Order by paragraph 1 (*c*) expressly provides that "salary" shall include "payments to persons other than the employee in respect of services rendered by the employee" so that "salary" within the meaning of the Order includes any amount paid in respect of the employee's income tax.

In its recital the Order refers to the earlier Order replaced by P.C. 1549 and the fact that the earlier Order was made for the purpose of stabilizing the "rates" of managerial and executive salaries paid during wartime in the same general way as wage rates are stabilized under the Wartime Wages and Cost of Living Bonus Order, and permitting the payment of a specified cost of living bonus to salaried officials earning less than $3,000 per year.

It is further recited that it has been found that the earlier Order bears more severely than intended upon industries engaged in war production which, by reason of the fact that many of them were in the process of organization or expansion during the period before the earlier Order came into effect had not had sufficient opportunity to "adjust the salaries" of their officials and the Minister of

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Munitions and Supply was of opinion that there would be serious interference with such industries if some provision was not made for "adjustments in salaries."

It is also recited that it is desirable to permit, under certain circumstances, the "adjustment of the salary rate" payable to a salaried official, appointed or promoted after January 1, 1941.

So far as the recital is concerned there would appear therefore to be no distinction drawn so far as the object of the Order is concerned between "adjustment of salaries" and "adjustment of the salary rate" or the "rate of salary."

In my opinion the most recent "salary rate established and payable" prior to November 7, 1941, in paragraph 2 (*a*) means the amount per month or per year the official is actually receiving at that time. Under the contract referred to above the respondent had agreed to pay the employee a "salary of fifteen thousand ($15,000) dollars per year as from January 1, 1941, free from income tax."

In my opinion the meaning of this contract was an agreement to pay a salary at the rate of $15,000 per year with a covenant to indemnify the employee against income tax not only at the existing rates but at any rate which might be authorized by Parliament during the term of the contract. The salary rate "*established* and *payable*" was, however, the amount per annum which the respondent was then actually paying the employee, namely, $15,000 plus the tax at the then existing rate. An examination of other provisions of the order, in my opinion, bears out this view.

By paragraph 1(*b*) "salaried official" includes every employee above the rank of foreman or comparable rank and for the purpose of the order any employee "*receiving*" salary or wages (excluding cost of living bonus) at a rate of less than $175 per month, is to be deemed not above the rank of foreman or comparable rank.

If the employee under the contract referred to above were entitled say, to $1,200 per year, free from income tax, instead of, as the fact is to $15,000, then, in order to determine whether or not he came within the definition, assuming the existence of no guide to determine the question other than the amount of remuneration, if the actual salary of $1,200, together with the income tax at the then existing rate amounted together to less than $2,100, the

provisions of paragraph 2(*a*) would not, in my opinion, apply to that employee at all as the prohibition of that paragraph refers only to payments to "salaried officials". It seems clear, therefore, that the amount of the salary actually being paid on November 6, 1941, is what is dealt with in paragraph 2(*a*). "Salary" is really meaningless without reference to some period of time with respect to which it is payable. In my opinion "salary" involves in its very nature not only the idea of amount but also the period with respect to which the amount has reference, in other words, rate, and when paragraph 2(*a*) speaks of a rate of salary "established and payable" prior to November 7, 1941, it means the same thing as is dealt with by paragraph 3(*d*), namely: "salary level . . . established at November 6, 1941," and the same thing as the "level of salaries paid" in paragraph 3(*a*).

Had the official above referred to been granted an increase in "salary rate" under paragraph 3(*a*), then, by reason of clause (*d*) of that paragraph the increase in "salary" would have resulted in a new salary "level" as if it had been "established" at November 6, 1941. In my view this clause would, in such case, operate to prevent thereafter the official here in question from receiving in *amount* anything more than the amount he was receiving at the time of the increase, plus the increase itself. Any subsequent increase in income tax would therefore clearly fall upon the employee and the employer would be prohibited from paying it. If that be so, the same applies to the "salary level" actually being received by the employee on November 6, 1941.

Again, by paragraph 4, provision is made for payment of a cost of living bonus in certain cases and it is provided by clause (*b*) of that paragraph that if the salary rate "payable" to a salaried official on November 6, 1941, included a cost of living bonus determined in a certain manner an additional amount of bonus may be paid and "the total salary, including such added amount of bonus shall be regarded for the purposes of this Order as the rate of salary in effect at November 6, 1941."

While the provisions of this clause apply to a specific case it expressly proceeds upon the same view of the Order as that already referred to in dealing with paragraph 3,

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namely, that the "salary rate established and payable" prior to November 7, 1941, is the amount per annum, or per month or per week, or whatever the period may be, actually being paid by the employer and received by the employee.

In my view therefore the payment by the respondent of additional amounts by reason of an increase in income tax rates over and above the rate existing on November 6, 1941, falls within the prohibition of the Order. I think that the words "no employer shall on or after November 7, 1941, increase" the rate means no employer shall "pay more than."

If the tax could be regarded as "bonus" within the meaning of paragraph 2(*d*), that clause prohibits payment of a larger amount of bonus than that paid to the same official in the base year, provided that where the bonus is covered by a contract evidenced in writing, in existence on November 6, 1941, the right to such bonus is preserved where it is defined as a "fixed" percentage of, or in a "fixed" ratio to the salary. In my opinion the "fixed percentage" and the "fixed ratio" are complementary and a tax in the later year which is 33⅓ per cent of $15,000 (the net amount actually received by the employee) is not in fixed ratio to a tax of 20 per cent of the same amount. Neither is the tax a fixed percentage of the salary but rather a percentage which fluctuates.

There is no difficulty created by the existence of a contract made prior to November 6, 1941, in view of the provisions of paragraph 9 of the Order.

In my opinion the appeal succeeds and should be allowed with costs here and below.

ESTEY J. (dissenting):—At a general meeting of the shareholders of the respondent on June 2, 1941, resolutions were passed directing that its general manager and four of its officials as of January 1, 1941, should be paid certain specified amounts as salary "free from income tax."

These resolutions remained unchanged at all times material hereto, but changes in the *Income War Tax Act* required that the respondent pay larger amounts as income tax on behalf of each of the officials. This practice of paying the income taxes of certain of its officials had existed

for many years prior to the outbreak of war, respondent's method being to deduct the salary, as that term is used in the above-mentioned resolutions, plus the amount paid on account of its officials' income taxes, as expenses in computing its profits. The amounts (hereinafter set out) paid for the years here in question were so treated and were included in the tax returns as filed under the item "Salaries including Plant and Sales Supervision."

In assessing the respondent for income and excess profits tax the taxing authorities in 1943 disallowed the sum of $30,791.97 as "unauthorized salary increases," and on the same basis in 1944 the sum of $26,868.34. These disallowances were made on the basis that the payments of the increased income taxes represented increases in "the rate of Salary" of these officials contrary to the provisions of Wartime Salaries Order P.C. 1549, dated February 27, 1942. The decision to disallow these amounts was reversed in the Exchequer Court (1) and the Minister of National Revenue appeals from the judgment of that Court. No question is raised as to the computation of the amounts nor the fact that they were paid consequent upon increases in the income tax.

P.C. 1549 consolidates and amends the Wartime Salaries Order P.C. 9298, dated November 27, 1941. It recites that P.C. 9298 was "for the purpose of stabilizing the rates of managerial and executive salaries paid during wartime . . .," that this Order "bears with special and unintended severity upon industries engaged in the production, repairing and servicing of war supplies," and that "serious interference with and loss of production in war industries may result if some provision is not made whereby adjustments in salaries can be made in proper cases," and that it is desirable that the adjustment of salaries in certain cases should be made. These recitals clearly evidence that this Order P.C. 1549 was passed with the purpose and intent of stabilizing managerial and executive salaries but to provide for such adjustments as may be necessary to assist war production. This Order P.C. 1549 provides in para. 7:

> 7. The amount of any salary, found by the Minister of National Revenue to have been paid in excess of the amounts permitted by this Order or to have been paid in violation of this Order, shall be deemed

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to be an unreasonable and abnormal expense of the employer for all purposes including the purposes of the Income War Tax Act and The Excess Profits Tax Act 1940, and pursuant to subsection (2) of Section 6 of the Income War Tax Act 1940, such amount shall be disallowed as an expense of the employer in assessing the employer's profits subject to taxation under the said Acts.

The shareholders' resolutions embodied the respondent's obligations as employer to remunerate or pay these officials. Each of the latter was entitled both to the salary, as that term was used in the resolutions, and to the payment of his income tax as consideration for his services to the respondent. The latter, in paying the income tax, discharged a liability to each of the officials and thereby provided to them a benefit or gain just as effectively as if they had received that added amount from the respondent and used it in payment of their respective income taxes.

The term "salary" is defined in P.C. 1549 as follows:

1. For the purpose of this Order, unless the context otherwise requires,

. . . . . .

(c) "Salary" shall include wages, salaries, bonuses, gratuities, emoluments or other remuneration . . . and shall include payments to persons other than the employee in respect of services rendered by the employee . . .

The word "emolument" is defined in the Oxford Dictionary:

Profit or gain arising from station, office, or employment; dues, reward, remuneration, salary.

Webster's Dictionary includes the word "compensation." The payment of the income tax was either a gain or a part of the remuneration realized by these officials arising out of their employment. It would seem to follow that the scope and meaning of the phrase "emoluments or other remuneration" is sufficiently wide and comprehensive to include the payment of the officials' income taxes by the respondent to the Receiver General of Canada within the definition of "salary" in para. 1(c) of P.C. 1549. Moreover, this definition contemplates just such a payment as here made on behalf of the officials to the Receiver General of Canada.

Then para. 2(a) of P.C. 1549 provides:

2. Unless otherwise permitted by paragraphs 3, 4 and 5 hereof, no employer shall, on or after November 7, 1941:

(a) increase the rate of salary paid to a salaried official above the most recent salary rate established and payable prior to November 7, 1941, or if no rate of salary for a particular salaried official

were established and payable prior to November 7 because the said salaried official was not employed by the employer prior to the said date, increase the rate of salary above the rate of salary first payable to the said salaried official.

A cost of living bonus established and payable prior to November 7, 1941, shall be regarded as part of the rate of salary established and payable to a salaried official prior to the said date, and as such may continue to be paid at the same rate, but may not subsequently be increased by reason of any increase in the cost of living index unless permitted by paragraph 4 hereof.

The foregoing provision "no employer shall, on or after November 7, 1941, increase the rate of salary paid to a salaried official" is imperative. Thereafter an employer must not increase the rate of the employee's salary whether that increase be called for under the terms of an existing contract or however it may be provided for. This view is in accord with para. 9 under which the employer is protected against the enforcement of "an increase in the rate of salary" where such is provided for in an agreemnt. Para. 9 reads as follows:

9. No agreement providing for an increase in the rate of salary above the rate payable at November 6, 1941, shall be enforceable in respect of such increase except and to the extent that such increase is within the amount that may be permitted by paragraphs 3 or 4 hereof, and no action shall lie against any person for breach of contract for complying with the provisions of this Order or for refusing to pay any salary in excess of the amount permitted by this Order.

The issue largely turns upon the meaning of the phrase "rate of salary" where it precedes the word "paid" in para. 2(*a*). In the second paragraph of 2(*a*) it is provided that a cost of living bonus established prior to November 7, 1941, shall be regarded as part of the rate of salary. This in itself indicates that it is the total salary paid in the year or other period prior to November 7th that is expressed in terms of a rate of salary paid that is stabilized by this Order.

Paragraphs 3, 4 and 5 provide for adjustments as exceptions to the general prohibition in para. 2. In para. 3(*a*) in respect to promotions and new appointments the Minister of National Revenue may approve certain increases in the rate of salary, subject to a proviso "that the total salary including the increase is not higher than the level of salaries paid to salaried officials for similar services in like businesses." In 3(*b*) the Minister may "authorize a temporary increase in salary and subsequently one further

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increase, . . . provided that the increased rate of salary ultimately payable shall not be higher than the limit mentioned . . ." in 2(*b*). In that paragraph 2(*b*) the limit is expressed "no employer shall . . . pay . . . a rate of salary higher than the rate previously paid . . ." In para. 3(*c*) the phrase "rate of salary" is used throughout. Then in 3(*d*) it is provided:

> 3. (*d*) After any increase in salary has been approved in accordance with sub-paragraph (*a*), (*b*) or (*c*) of this paragraph and a new salary level so established, the provisions of this Order shall apply to the said salary level from the effective date of that increase as if it had been established at November 6, 1941.

The new salary level referred to in para. 3(*d*) is the rate of salary prior to November 7, 1941, plus the increase "in the rate of salary" under 3(*a*), or the "temporary increase in salary" and one further increase if there be one under 3(*b*), or in the "rate of salary" under 3(*c*). The new salary level is the amount of the actual salary or salaries paid, including the foregoing increases, and thereafter the provisions of this Order apply as if these increases, though only payable from the "effective date," had been established at November 6, 1941, and therefore the prohibition in para. 2 would thereafter apply. It seems to follow that with every increase in the amount paid a new rate of salary is established. In every case it is the amount of salary paid to the officials which is expressed in terms of a rate.

Then para. 4 provides that in certain cases, without the approval of the Minister of National Revenue, an employer may pay a cost of living bonus, subject to the limitations included in that paragraph. In 4(*b*) it is provided that "if the salary rate payable to a salaried official on November 6, 1941, included a cost of living bonus . . . there may be added to such bonus an amount based . . . on the rise in the index number for October 1, 1941 . . . and the total salary including such added amount of bonus shall be regarded, for the purposes of this Order, as the rate of salary in effect at November 6, 1941."

The language in this paragraph appears to express even more clearly than in para. 3 that the new rate of salary is the salary paid prior to November 6, 1941, plus additions permitted thereafter, or the total of these, expressed in terms of a rate. It should be noted in this connection that the phrase "total salary" appears also in para. 3(*a*).

In para. 5(*a*) the Minister of National Revenue may approve of an increase "in the rate of salary paid," and then in 5(*b*) "no payment of an increase in salary pursuant to the provisions of this paragraph . . . until notification has been received by the employer . . . that an increase in salary has been approved and the amount thereof." It is significant in this paragraph that the only approval provided for is that of an increase "in the rate of salary paid," and yet in para. (*b*) it is "an increase in salary" which has been approved and the amount thereof.

In the foregoing summary such phrases as "total salary" and "new salary level" are expressions synonymous with the phrase the amount of salary. Then in para. 5 the phrase "increase in salary" is synonymous with an increase in the "rate of salary."

Moreover, in para. 6 it is provided that "any employer . . . who pays or contracts to pay a salaried official a salary in violation of any provision of this Order . . ." The phrase "rate of salary" is not mentioned in this para. 6 and yet it is the increase in the rate of salary that is prohibited in 2(*a*). It must follow that the word "salary" as used in this paragraph means the rate of salary.

It would be present to the minds of those passing this Order for general application throughout Canada that the salaries paid and subject thereto would be expressed in many ways. In order that there might be a common basis for comparison, it was provided that however expressed as between the employer and the salaried official, the total salary paid should, for the purposes of this Order, be expressed in terms of a rate. It is that salary so expressed that is stabilized. It is the total salary paid subsequent to the 6th of November, 1941, and expressed in terms of a rate that is compared with the total salary so expressed and paid prior thereto.

The salary contracts as evidenced by the above-mentioned resolutions were not expressed in terms of a rate. It cannot be doubted but that the parties in effecting such an agreement in 1941, under the circumstances of war, would have in mind the possibility of changes in the income tax. Under this Order it is the total of the two sums (that paid and styled as salary and that paid as income tax) that constitutes the rate of salary paid, and it is that rate which

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is stabilized. If the total of these two sums in subsequent years is increased then within the meaning of this Order the rate of salary paid is increased. In fact this Order by its express terms is only concerned with the contractual relations between the parties in order to ascertain the total paid as salary in the period prior to November 7, 1941, and in so far as its provisions for future increases may be contrary to this Order.

The position of the appellant is identical with an employer who agreed on January 1, 1941, to pay his manager a fixed amount as salary and an annual increase to be determined in each year. Under this Order as each increase was paid a new rate of salary would be established. A perusal of the terms of this Order, and particularly the use of the words "paid" and "payable" in para. 2(*a*) and 9, indicates that it is the actual amount paid as salary prior to November 7, 1941, expressed in terms of a rate that is stabilized.

The foregoing construction of the above-quoted para. 2(*a*) not only appears to give to the words their literal meaning but is consonant with the express purpose of the Order. *Reigate Rural Dist. Council* v. *Sutton Dist. Water Co.* (1); *Re George Edwin Gray* (2).

In *McBratney* v. *McBratney* (3), Duff, J., (later Chief Justice), after referring to the language in a statute, continued:

> Of course where you have rival constructions of which the language of the statute is capable you must resort to the object or principle of the statute if the object or the principle of it can be collected from its language; and if one finds there some governing intention or governing principle expressed or plainly implied then the construction which best gives effect to the governing intention or principle ought to prevail against a construction which, though agreeing better with the literal effect of the words of the enactment runs counter to the principle and spirit of it.

Moreover, it would seem that under the terms of sec. 9 these officials could only enforce payment of their salaries up to the amount computed on the basis of the rate of their respective salaries as it obtained prior to November 7, 1941.

The total salary paid to each official expressed in the terms of a rate of salary paid per year in each of the years

(1) 99 L.T. 168 at 170.
(2) (1918) 57 S.C.R. 150 at 169.
(3) (1919) 59 S.C.R. 550 at 561.

here in question was greater than the rate paid in the basic period and therefore contrary to the provisions of para. 2(*a*). The increases were, as a consequence, properly disallowed by the Minister under para. 7, *supra*.

I am in agreement with the learned trial Judge (1) that the payments here made to the Receiver General of Canada were not by way of a bonus. The word "bonus" may have many meanings and as used in statutes has been variously defined. See *Ward* v. *City of Edmonton* (2); *Colonial Investment Co.* v. *Borland* (3), affirmed 6 D.L.R. 211. It is not defined in Order P.C. 1549, but as used it does not appear to have any other than its usual and ordinary dictionary significance. There it imports an extra or additional payment by way of an inducement or reward for some undertaking or effort. The contract here provides for the payment of the income tax without regard to the success or achievements of the business as a whole, or to the efforts or attainments of the individual official. It is a contractual salary obligation on the part of the respondent payable in any event and irrespective of whether the business realized a profit or attained any particular objective in a given year. If, however, the payment to the Receiver General of Canada could be regarded as a bonus within the meaning of Order P.C. 1549, then it is specifically prohibited by para. 2(*d*) and it does not come within any of the exceptions of para. 2(*d*) (i), 2(*d*) (ii) or 2(*d*) (iii).

I agree that the above-mentioned resolutions relative to the payment of the officials' income taxes passed by the shareholders and acted upon by the respondent were valid.

The appeal should be allowed with costs.

LOCKE, J.:—By paragraph (*a*) of section 2 of the Wartime Salaries Order, P.C. 1549, it was provided that no employer should on or after November 7, 1941 "increase the rate of salary paid to a salaried official above the most recent salary rate established and payable prior to November 7, 1941", and paragraph 7 of that Order provided that the amount of any salary found by the Minister to have been paid in excess of the amounts permitted by the Order should be deemed an unreasonable and abnormal expense of the employer for the purposes of the *Income War Tax*

(1) [1947] Ex. C.R. 458.
(2) [1932] 3 W.W.R. 451.
(3) [1911] 1 W.W.R. 171.

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Act and the *Excess Profits Tax Act*, 1940. It was on the footing that the increased amounts which became payable to Messrs. Jacox, McAulay, Sutcliffe, Shaw and Roscoe for the years 1943 and 1944, by reason of the increase in the income tax rate, contravened the provisions of section 2 that the Minister disallowed them under subsection 2 of section 6 of the *Income War Tax Act*. On the appeal to the Exchequer Court (1) an order was made for the delivery of pleadings, and upon this being done an issue was raised by the Minister as to whether the arrangements for the remuneration of these five persons said to have been authorized by the shareholders' resolution of June 2, 1941, or to have become otherwise binding upon the company were in fact legally binding upon it. I do not feel called upon to decide whether, under the wording of paragraph (*a*) of section 2 of the Wartime Salaries Order, it was incumbent upon the taxpayer to do more than to establish that the salary rates in question were treated both by the company and its employees as binding upon both of them and that both acted upon the assumption that they were so binding, but propose to deal with the matter on the footing that the Crown is entitled to rely upon any non-compliance with the Articles of Association of the company or of the *Alberta Companies Act* which might render these employment contracts unenforceable.

The respondent company was incorporated by Memorandum of Association under the *Alberta Companies Act* in November, 1910. C. D. Jacox was employed by the company in the capacity of general manager in February, 1931, the arrangement being made with him by the then managing director, C. A. Graham. There was no written contract and the matter was not considered by the Board of Directors. R. W. Roscoe, the present Secretary of the company was employed on May 1, 1941, the arrangement being made with him by Mr. Jacox on behalf of the company, and his remuneration being agreed upon at $3,600 a year, free of income tax, without the intervention of the directors. Mr. Graham had died in December, 1940, and the position of managing director had not been filled at the time of the employment of Roscoe. W. A. McAulay was employed by the company as sales manager and had originally been

(1) [1947] Ex. C.R. 458.

employed by Graham when the latter was managing director. W. B. Shaw was the factory superintendent and F. B. Sutcliffe was the secretary-treasurer of the company but the evidence is silent as to the manner in which they were engaged.

Different considerations apply in determining the position of Jacox who became the managing director in 1941 and those of the remaining four employees. Dealing first with the case of Jacox: Article 103 of the Articles of Association provided that the directors might from time to time appoint one of their body as managing director, and article 105 that the remuneration of the managing director "shall from time to time be fixed by the directors and may be by way of salary or commission or participation in profits or by way of all of these modes." On May 10, 1941, Sutcliffe as secretary sent out notices calling the annual general meeting of the ordinary shareholders for the 2nd of June, the purposes of the meeting being stated to be to receive the report of the auditors for the year ending December 31, 1940, and to elect the directors and auditors of the company for the ensuing year. On May 23rd a further notice was sent by the secretary to the shareholders, giving notice that further business would be proposed, namely, to appoint Jacox managing director of the company at a salary of $15,000 per year, free from income tax, to be effective as from January 1, 1941, and to provide that the salaries of McAulay, Sutcliffe, Shaw and Roscoe as then in effect be free of income tax and subject to adjustment from time to time at the discretion of the managing director effective as from the same date. No explanation was given in the evidence as to the reason for asking the shareholders either to appoint the managing director or to fix his remuneration. As to the other four, however, Jacox said that while he could have made the new arrangements with them on behalf of the company he thought that since they were changing the basis of pay it was a reasonable thing to have the matter determined by the shareholders, and it may perhaps be assumed that it was for the same reason that the new arrangement to be made with him was submitted to them. All of the shareholders other than Northwest Securities Corporation Ltd. were present at the meeting either in person or by proxy:

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in the case of that company McAulay, the Vice-President, was apparently authorized to act on its behalf and represented it and the resolutions were unanimously adopted. Jacox, McAulay, Sutcliffe and Shaw had been directors for the past year and were all re-elected. At a meeting of the newly elected board held later on the same day Mr. Jacox was elected President and appointed Managing Director and Messrs. McAulay and Sutcliffe were re-elected as Vice-President and Secretary respectively. The minutes are silent as to the remuneration of Jacox and of the other four officials. The respondent company acted upon the authority of the resolutions and paid Jacox and the others on the basis authorized, a procedure which was apparently considered by the directors at a meeting held on September 24, 1941, when a statement giving detailed records of the operations of the company for the eight months ending August 1941 was read and discussed and apparently approved. The evidence is very meagre as to what took place at this meeting which may be accounted for by the fact that Mr. Sutcliffe, the Secretary, had died some time before the trial but apparently all the figures showing the expenses of operation were available to the directors and these would show that monthly instalments of income tax were being paid on behalf of Jacox and the others in the manner authorized. On March 2, 1942, at a further meeting of the directors the auditor's statement which showed expenditures for salaries, including, without detailing them, the amounts paid for income tax on behalf of Jacox and the others, was approved by the Board and it was made clear from the evidence of Mr. Evans, one of the two directors appointed to represent the preferred shareholders, that all of the directors were aware of and approved the arrangements which the shareholders had purported to authorize in the previous June.

The Companies Act of Alberta does not deal with the question as to whether contracts of this nature are to be made or authorized by the directors or by the shareholders, so that the principles upon which such cases as *Kelly* v. *Electrical Construction Company* (1) and *Colonial Assurance Company* v. *Smith* (2) were decided are inapplicable. Nor is this a case where there is a conflict as to the respec-

(1) (1907) 10 O.W.R. 704. (2) (1912) 22 Man. R. 441.

tive rights of the shareholders and the directors to deal with the matter, such as in *Automatic Self Cleansing Filter Syndicate Co. Ltd.* v. *Cuninghame* (1) and *Salmon* v. *Quin* (2). Here I think it is a proper inference from the evidence that the directors were unwilling to exercise the authority given to them and that it was at their request that the matter was submitted to and dealt with by the shareholders and I think the resolutions so passed were binding upon the company. *Barron* v. *Potter* (3); *Foster* v. *Foster* (4); *Worcester Corsetry Ltd.* v. *Witting* (5), Lawrence, L.J. at 651, 652. Article 105 authorizing the directors to fix the remuneration of the managing director does not require them to deal with the matter by resolution, or to contract in the company's name in any particular form. While the company was, in my opinion, obligated by the passing of the resolution, if there were doubt as to this the arrangement authorized should be taken to have been ratified and confirmed by the directors at their meetings of September 24, 1941, and March 2, 1942, and having been acted on by both parties bound both of them.

Different considerations apply in the case of McAulay, Sutcliffe. Shaw and Roscoe. Article 123 provided that without prejudice to the general powers conferred upon the directors to manage the business of the company they might appoint such managers, secretaries, officers, clerks, agents and servants as they consider necessary for the conduct of the company's affairs and fix their salaries. Jacox said that he had the power to employ these men and fix their remuneration without reference to the Board and it was clear that in the case of Roscoe he did so. The action of Graham in employing Jacox as general manager in 1931 and Shaw at a later date, without the intervention of the Board, indicates, in my opinion, that the officer managing the company's business was entrusted by the Board with the power to employ and fix the remuneration of other employees of the company. Since McAulay, Sutcliffe and Shaw were directors, apparently Mr. Jacox considered it proper to obtain the authority of the shareholders and, as in the case of his own arrangement, this was done with the authority and approval of the directors. The arrange-

(1) [1906] 2 Ch. 34.
(2) [1909] 1 Ch. 311; [1909] A.C. 442.
(3) [1914] 1 Ch. 895.
(4) [1916] 1 Ch. 532, 551.
(5) [1936] 1 Ch. 640.

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ment so authorized was acted upon by these employees and by the company and the directors at the meetings referred to, approved and ratified the arrangements. I have no doubt that upon these facts the respondent company became liable to pay the salaries agreed upon and such additional amount as these individuals might be required to pay as income tax under the arrangement.

The prohibition in paragraph (*a*) of section 2 of the Wartime Salaries Order is against increasing the rate of salary paid to a salaried official. The arrangements in question here were made prior to November 7, 1941, and made effective as from January 1st of that year. The arrangement in the case of each of the five officials was that they should be paid fixed amounts free of income tax. The amount to be paid each under this arrangement was materially increased by amendments to the *Income War Tax Act* made after the year 1941 increasing rates of taxation upon individual incomes. It is contended on behalf of the Minister that the expression "rate of salary" should be interpreted as meaning the amount of the salary. I think that this is not the meaning to be assigned to the expression. In my opinion the words "rate of salary" are to be interpreted as meaning the salary arrangement. I think whether the employment contract provided remuneration at the rate, say, of $1,000 a year or $1,000 and 500 bushels of wheat or $1,000 plus an amount sufficient to pay the employees' income tax, each arrangement would be described in ordinary language as the rate of salary. I think further that if the arrangement was for a payment partly in cash and partly in kind such as $1,000 in cash and 500 bushels of wheat, an increase in the market value of wheat in subsequent years would not be an increase in the salary rate, and that if the contract required the employer to also pay an amount sufficient to pay the employees' income tax the rate is not changed if Parliament in later years increases the amount of the taxation. I think it is significant that in paragraph (*d*) of section 2 of the Order the prohibition is against paying a "larger total amount" as bonus during any year following November 6, 1941, than the total amount paid as bonus in the base year, with certain exceptions. Had it been intended to

prohibit an increase in the amount of salary rather than to prohibit a change in the salary arrangement paragraph (*a*) would have been so worded.

It was further contended that the agreement to pay the amount of the income tax was a bonus within paragraph (*d*) of the Order. That paragraph says that the word "bonus" for the purpose of the subparagraph shall include gratuities and shares of profits and the arrangement in question is neither one nor the other. It cannot be said that an amount payable to an employee pursuant to the terms of a contract is a gratuity.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. S. Fisher.*

Solicitors for the respondent: *Milner, Steer, Dyde, Poirier, Martland & Layton.*