

1961

*Oct. 13
Dec. 15

WOODWARD'S PENSION SOCIETY . . . APPELLANT;

AND

THE MINISTER OF NATIONAL }
REVENUE } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Exemptions—Income of society providing funds for payment of pensions—Whether society non-profit organization—Whether society acting as trustee—Whether income that of society—Whether exempt from income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 62(1)(i), 63(4) and (7)—Societies Act, R.S.B.C. 1936, c. 265.

The appellant was incorporated as a society under the *Societies Act*, R.S.B.C. 1936, c. 265. Its declared object was to assist in providing funds for the payment of pensions to employees and ex-employees of the Woodward's Stores Ltd. and to pay over its surplus funds from time to time to the trustee of a pension fund for those employees and ex-employees. For this purpose, it was authorized to acquire shares of the Woodward Stores Ltd. and to sell them to the employees. It purchased at par large blocks of shares in the various Woodward Stores and re-sold them at par to employees. It paid interest at the rate of 3 per cent. on the unpaid balance of its subscriptions for shares, but charged interest at 4 per cent. to those employees who did not pay in full upon their purchases of shares. This difference in the rate of interest which it paid and which it charged contributed to the building up of a substantial surplus, which in 1953 amounted to some \$31,000.

The appellant objected to paying income tax on that amount on the ground that it was exempt as a non-profit organization under s. 62(1)(i) of the *Income Tax Act*, maintaining that it was a society organized and operated exclusively for a purpose "except profit". The appellant also argued that the net interest it received should not be treated as income in its hands since it was impressed with an obligation that it be devoted to payment to the pension trust for distribution as pensions. It further argued that it was merely a trustee of its surplus fund in favour of the pension trust. An appeal to the Exchequer Court was dismissed and the appellant appealed to this Court.

Held: The appeal should be dismissed.

The appellant society was not entitled to an exemption under s. 62(1)(i) of the Act, since it did not meet the requirements of that section. The appellant had entirely failed to establish that it was organized and operated exclusively for a purpose other than profit and the findings of the Exchequer Court that it was both organized and operated for a profitable purpose were unassailable.

The income received by the appellant was its own income, not subject to the legal claim of any other person. After receipt it was applied by the appellant in accordance with its stated objects. *Mersey Docks & Harbour Board v. Lucas* (1882-3), 8 App. Cas. 891, followed.

The incorporating instrument and by-laws of the appellant did not constitute a declaration of trust but were merely a statement of objects and purposes. There was no income of a trust during the taxation year payable to a beneficiary or other person beneficially entitled.

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APPEAL from a judgment of Thorson P. of the Exchequer Court of Canada¹, affirming the Minister's decision. Appeal dismissed.

H. H. Stikeman, Q.C., and *D. N. Thorsteinsson*, for the appellant.

F. J. Cross and *P. M. Troop*, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—The appellant was incorporated in 1945 as a society under the *Societies Act* of British Columbia. Its declared object on incorporation was to assist in providing funds for the payment of pensions to employees and ex-employees of Woodward Stores Limited and to pay over its surplus funds from time to time to the trustees of a pension fund for those employees and ex-employees. For the purpose of achieving its object, it was authorized to acquire, by purchase, gift or otherwise, shares of Woodward Stores Limited and to sell these shares and take options for their repurchase.

The by-laws of the society provided that the directors might borrow money on behalf of the society to pay for the shares purchased and that on dissolution of the society all its assets should be conveyed to the trustees of the pension fund for the purposes of their trust.

Until October 1951 the funds for the pensions were provided by the Woodward Store companies, of which there were a number. Until 1945 the administration of these pension payments was through the various companies with a pension committee comprised of company executives. After 1945 the administration was through the Woodward Pension Plan Trust. The Woodward Pension Plan Trust was set up at the same time as the appellant society.

Before the incorporation of the appellant and the constitution of the pension trust, the various Woodward stores had operated a share sale plan to their employees. After 1945 this plan was taken over by the appellant society. It was incorporated, in part at least, for this purpose. It carried

¹[1959] C.T.C. 399, 59 D.T.C. 1254.

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out its objects in this way. It purchased at par large blocks of shares in the various Woodward stores and then resold them at par to employees. The appellant paid interest at the rate of 3 per cent. on the unpaid balance of subscriptions but it charged interest at 4 per cent. to the employees on their unpaid balances. This difference in the rate of interest which it paid and which it charged contributed to the building up of a substantial surplus. Other contributing factors were dividends received from the shares on hand and capital gains made on the reorganization of some of the companies whose shares it held. In the period from October 1, 1951, to January 31, 1952, the appellant paid over to the pension trust a total of \$13,089.30 and in the 12 months period ending January 31, 1953, it paid over to the same trust the sum of \$42,273.23.

The dealings in shares of the appellant are set out in some detail in the judgment under appeal but to show the scale of these dealings it is enough to state that in the eight fiscal periods from the date of incorporation to January 31, 1953, it sold 599,272 shares to employees and repurchased 263,593. In the 1953 taxation year, 66,931 shares were sold and 31,630 were repurchased. No shares were ever sold without taking an option to repurchase at par on death or the cessation of employment.

In the 1953 taxation year, the year in question in this appeal, the appellant received in interest \$31,525.58 and from dividends, \$35,954.17, making a total of \$67,479.75. From this income the Minister, in his notice of reassessment, allowed the following deductions:

- (a) \$22.30 for sundry expenses;
- (b) \$35,954.17, being an amount equivalent to the dividends that the appellant had received from taxable corporations in Canada.

He did not allow as a deduction in computing income the amount of \$42,273.23 which the appellant had paid to the pension trust and which the appellant described in its statement as pensions paid.

The appellant objected to the notice of reassessment but it was confirmed by the Minister. The appellant then appealed to the Exchequer Court¹. Its appeal failed and it now appeals to this Court.

¹[1959] C.T.C. 399, 59 D.T.C. 1254.

The first ground of error submitted is that the appellant was exempt from income tax in its taxation year 1953 under the provisions of s. 62(1)(i) of the *Income Tax Act*, R.S.C. 1952, c. 148. This section reads:

62(1) No tax is payable under this part upon the taxable income of a person for a period when that person was

- (i) a club, society or association organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof.

The sole question under this section is whether the appellant was a society "organized and operated . . . for any other purpose except profit". The judgment of the Exchequer Court under appeal holds that the appellant had failed to bring itself within that subsection. The learned President found that the purpose for the organization of the appellant was a very limited one, namely, to earn money for the purpose of providing funds for the payment of pensions by the pension trust and that this was achieved by profitable dealings in the shares of the various Woodward stores.

It is true that the appellant is not an ordinary commercial company but a society incorporated under the *Societies Act*, R.S.B.C. 1936, c. 265, that no part of the appellant's property is payable to or otherwise available for the personal benefit of any proprietor, member or shareholder, and that the appellant was organized for the stated object and purpose of assisting in the provision of funds for pensions to be paid to employees and ex-employees of the stores. Nevertheless, this last-named purpose could not be achieved without the share sale plan which was designed to make a profit to enable the payments to be made to the pension trustees. In the taxation year in question the appellant earned in interest alone the sum of \$31,525.58, a sum which went a long way towards the payments which were made to the pension trustees. The appellant has entirely failed to establish that it was organized and operated exclusively for a purpose other than profit and the findings of the learned President that it was both organized and operated for a profitable purpose are unassailable. This ground of appeal therefore fails.

The next ground of appeal is that the net interest received by the appellant in the taxation year was not income in its hands because it was not received beneficially since it was

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impressed with an obligation that it be devoted to payment to the pension trust for distribution as pensions. I have some difficulty in understanding the nature of the obligation, short of a trust, which the appellant sought to establish. The argument was based on *K. B. S. Robertson Ltd. v. Minister of National Revenue*¹; *Phyllis Bouck v. Minister of National Revenue*²; and *Minister of National Revenue v. St. Catharine's Flying Training School Limited*³. These cases do not support the appellant's submission. The first case involved receipts which could only be retained for the use of the taxpayer if subsequent events permitted their retention. Until these events happened, the receipts were not income. In the other two cases, the monies which it was sought to tax were received in trust for payment to others. There is nothing analogous in any of these cases to the terms on which the appellant received its income. The income received by the appellant was its own income, not subject to the legal claim of any other person. After receipt it was applied by the appellant in accordance with its stated objects. The learned President rightly held that the case was within the principle of *Mersey Docks & Harbour Board v. Lucas*⁴.

The third ground of appeal can scarcely be distinguished from the second ground. The second ground speaks of a receipt impressed with an obligation to pay it to the pension trustees. In the third ground it is urged that the appellant was a trustee of its surplus funds in favour of the pension trust and is entitled by s. 63(4) and (7) to deduct what otherwise would be its taxable income for 1953, the amount in fact paid in that taxation year to the pension trust as beneficiary. This argument is not mentioned in the reasons of the learned President and we were told that it was not submitted to him. In my opinion, it fails along with the other two arguments. One cannot construct such a trust of the surplus funds out of the instrument incorporating the society and its by-laws. There was, in the first place, no trust of the shares in which the appellant dealt by purchase and sale and by holding. If the incorporating instrument and the by-laws remain unchanged, the surplus funds are to be paid over in a certain way from time to time and the assets on a

¹ [1944] Ex. C.R. 170, 3 D.L.R. 239.

² [1952] 2 S.C.R. 17, C.T.C. 90, D.T.C. 1090, 3 D.L.R. 82.

³ [1955] S.C.R. 738, C.T.C. 185, 55 D.T.C. 1145, 4 D.L.R. 705.

⁴ (1882-3), 8 App. Cas. 891.

dissolution of the society are to be distributed in the same way. But this does not establish a trust. There is no obligation to make any payments which would enable the pension trust to assert a claim that the appellant's income was the income of the pension trust. The income might accumulate indefinitely. In fact, no payments were made to the pension trust during the period 1945 to 1951 when the appellant was building up a surplus. The society might never be dissolved, the objects might be changed, and the by-laws changed.

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My conclusion is that the incorporating instrument and by-laws do not constitute a declaration of trust but are merely a statement of objects and purposes. There was no income of a trust during the taxation year in question payable to a beneficiary or other person beneficially entitled and the appeal fails on this ground also.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Stikeman & Elliott, Montreal.

Solicitor for the respondent: A. A. McGrory, Ottawa.
