1953
*Dec. 14
1954
*Feb. 15

DOMINION TAXICAB ASSOCIATION APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income—Contracts between taxicab association and taxicab owners—Whether moneys paid to association as admission fees pursuant to contract, taxable—The Income Tax Act, S. of C. 1948, c. 52, ss. 2, 3, 4—Companies Act, R.S.Q. 1941, c. 276.

The appellant, a taxicab association incorporated in 1949 under Part III of the *Quebec Companies Act* (R.S.Q. 1941, c. 276) without share capital, received moneys during 1949 from taxicab owners pursuant to contracts under which the taxicab owner became a member of the Association and the latter was to render certain services. The contracts read as follows:

Par les présentes, il est entendu et convenu ce qui suit:

Le membre dépose la somme de $500 comme droit d'entrée pour obtenir le privilège de mettre un taxi en service dans ladite Association.

*PRESENT: Kerwin, Rand, Locke, Cartwright and Fauteux JJ.

Le membre consent à ce que ledit droit d'entrée devienne la propriété absolue de la Dominion Taxicab Association lors de son départ, à moins que les deux signataires des présentes consentent mutuellement au transfert dudit dépôt à un nouvel acquéreur.

La Dominion Taxicab Association s'engage à considérer ce droit d'entrée comme un dépôt sur lequel un intérêt pourra être payé quand le Bureau de Direction le jugera à propos.

The Minister included these moneys when computing the Association's income. The appellant contended that the contracts were contracts of deposit and that each member remained the owner of the moneys so deposited. The assessment was maintained by the Income Tax Appeal Board and by the Exchequer Court.

Held: The appeal should be allowed and the assessment set aside.

Per Kerwin, Locke, Cartwright and Fauteux J J.: On the true construction of the contract and on the evidence, none of the moneys became the absolute property of the Association in the year 1949; as each deposit was received by the Association and became part of its assets there arose a corresponding contingent liability equal in amount. Such deposit could not, therefore, be regarded as a profit from the appellant's business.

Per Rand J.: The payments, both in the intention of the subscribers and of the Association, were to enable capital assets to be acquired and were limited in their application to that purpose. They cannot, therefore, be held to be income.

(*Diamond Taxicab Association* v. *Minister of National Revenue* [1952] Ex. C.R. 331; [1953] C.T.C. 104, distinguished).

APPEAL from the judgment of the Exchequer Court of Canada (1), Archibald J., affirming the decision of the Income Tax Appeal Board and maintaining the assessment for income tax.

T. P. Slattery, Q.C. and *E. B. Fairbanks* for the appellant.

D. H. W. Henry and *R. G. Decary* for the respondent.

The judgment of Kerwin, Locke, Cartwright and Fauteux JJ. was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of Archibald J. (1) dismissing an appeal from a decision of the Income Tax Appeal Board which had in turn dismissed an appeal from the assessment of the appellant to income tax for the taxation year 1949.

The appellant was incorporated in July 1949, under Part III of the *Quebec Companies Act,* R.S.Q. 1941, c. 276, without share capital. By the terms of its Letters Patent it was to be composed of the three applicants for incorporation "as well as other persons who are or may become members of the corporation."

(1) [1953] Ex. C.R. 164.

1954

DOMINION TAXICAB ASSOCIATION v. MINISTER OF NATIONAL REVENUE

Cartwright J.

Among the purposes for which it was incorporated were the following:—

1. To purchase, assume, take over or otherwise acquire, all or part of the assets, rights, franchises, concessions, privileges, and to succeed to the business known under the name "DOMINION TAXICAB ASSOCIATION" by acquiring all or any part of the assets, with the goodwill and all rights and contracts passed with the said "DOMINION TAXICAB ASSOCIATION."

* * *

3. To found, maintain, establish, services likely to benefit members of the Association.

* * *

8. To purchase, rent or otherwise acquire, all or any part of the property, franchise, goodwill, rights and privileges held or enjoyed by any person, firm or corporation, the purchase, rental or the acquisition of which may be to the Association's advantage.

* * *

14. To acquire, purchase, sell, rent, exchange, all immovable property necessary for the purposes of the Association.

During the year 1949 the appellant entered into contracts with the owners of 81 taxicabs and received $500 in respect of each taxicab making a total of $40,500. The respondent ruled that this sum was income of the appellant liable to tax and the question in this appeal is whether or not this ruling is correct.

All of the sums of $500 making up the total amount in question were paid under the terms of contracts in writing entered into between the appellant and its individual members in the following form:—

Association de Taxis

DOMINION Taxi Association
1250 rue St-Georges Street
MONTREAL, P.Q.

CONTRAT

Contrat intervenue entre DOMINION TAXICAB ASSOCIATION et M. ..... demeurant à Montréal, au numéro ..... de la rue..... le ..... 19.....
Par les présentes, il est entendu et convenu ce qui suit:

Le membre dépose la somme de $500 comme droit d'entrée pour obtenir le privilège de mettre un taxi en service dans ladite Association.

Le membre consent à ce que ledit droit d'entrée devienne la propriété absolue de la Dominion Taxicab Association lors de son départ, à moins que les deux signataires des présentes consentent mutuellement au transfert dudit dépôt à un nouvel acquéreur.

La Dominion Taxicab Association s'engage à considérer ce droit d'entrée comme un dépôt sur lequel un intérêt pourra être payé quand le Bureau de Direction le jugera à propos.

Je, soussigné, déclare avoir lu et bien compris les termes des présentes.

.....
Membre

It is the submission of the respondent that the sum of $40,500 is profit derived from the appellant's business during the taxation year and so is liable to tax under the combined effect of sections 2(1), 3(*a*) and 4 of the *Income Tax Act*. The expression "profit" is not defined in the *Act*. It has not a technical meaning and whether or not the sum in question constitutes profit must be determined on ordinary commercial principles unless the provisions of the *Income Tax Act* require a departure from such principles. In the case at bar the main question is as to the respective rights of the appellant and its members in regard to the deposits of $500 made in pursuance of the contracts in the form quoted above. It is well settled that in considering whether a particular transaction brings a party within the terms of the *Income Tax Acts* its substance rather than its form is to be regarded.

Counsel for the appellant argues that the substantial transaction in the case of each contract was a loan of $500 made by the member to the Association repayable on demand; while for the respondent it is submitted that the $500 immediately on being paid over became the absolute property of the Association being a part of the consideration for its agreement to supply services, the remainder of the consideration being the monthly payments to be made by the member.

I have reached the conclusion that, on the true construction of the contract and on the evidence, none of the payments of $500 became the absolute property of the Association in the year 1949; but that as each deposit was received by the Association and became a part of its assets there arose a corresponding contingent liability equal in amount. The consideration moving from the member to the Association was not the outright payment to it of $500 but the deposit with it of that sum. While the contract fails to indicate with any precision the respective rights of the parties in regard to the sum deposited and particularly fails to make clear the circumstances, if any, under which the member may require the return of such sum, all its terms appear to me to be inconsistent with the view that the Association acquired any absolute property in such sum. The second paragraph of the contract shews that two conditions had to be fulfilled before the absolute

1954

DOMINION TAXICAB ASSOCIATION v. MINISTER OF NATIONAL REVENUE

Cartwright J.

ownership of the deposited sum could pass to the Association, (i) the member must have left the Association, and (ii) the parties must have failed to agree on a satisfactory successor to the retiring member. If such a successor were agreed upon the deposit would be transferred to him, and, presumably, although this is not of importance, the successor would reimburse the retiring member. It is in evidence that not only up to the end of 1949 but up to the date of the trial, in December 1952, no member had retired without a satisfactory substitute being found.

Paragraph 3 of the contract is also inconsistent with the view that the sum deposited had become the property of the Association.

I do not find it necessary to decide under what circumstances a member might require the return of his deposit as I think it clear that the moneys deposited did not become the absolute property of the Association. While the method of book-keeping adopted by the parties is not conclusive either for or against the party sought to be charged with tax, I am of opinion that in the case at bar the appellant rightly treated the $40,500 as a deferred liability to its members, and that unless and until the necessary conditions were fulfilled to give absolute ownership of a deposit to the appellant and to extinguish its liability therefor to the depositing member, such deposit could not properly be regarded as a profit from the appellant's business.

The case at bar is distinguishable from *Diamond Taxicab Association Ltd.* v. *Minister of National Revenue* (1), affirmed in this Court without written reasons. In the circumstances of that case it was held that the sums there in question had been paid outright to the Association as part of the consideration for the services it rendered; no question of a deposit arose.

For the above reasons I would allow the appeal with costs throughout and declare that no part of the said sum of $40,500 was assessable as income of the appellant in the taxation year in question.

(1) [1952] Ex. C.R. 331; [1953] C.T.C. 104.

RAND J.:—The appellant was incorporated by letters patent of the province of Quebec and among the objects were:—

1. To purchase, assume, take over or otherwise acquire, all or part of the assets, rights, franchises, concessions, privileges, and to succeed to the business known under the name "DOMINION TAXICAB ASSOCIATION" by acquiring all or any part of the assets, with the goodwill and all rights and contracts passed with the said "DOMINION TAXICAB ASSOCIATION".

* * *

4. For the furtherance of the purposes of the Association, to keep, maintain, operate, direct, offices, garages, stores, gasoline depots or other similar premises for keeping, cleaning, repairing and generally taking care of, automobiles and motor-vehicles of all kinds and descriptions, as well as all accessories connected therewith or relating thereto, and to purchase, sell, exchange, or otherwise dispose of, automobile-vehicles of all kinds and descriptions as well as all parts and accessories and generally all articles or items which may be useful, with a view to permitting full and complete realization of the purposes of the Association.

* * *

14. To acquire, purchase, sell, rent, exchange, all immovable property necessary for the purposes of the Association.

Subsidiary powers were expressly and impliedly conferred enabling it generally to do all such acts and things as might be necessary or become incumbent upon the Association to achieve those objects, including the obtaining of capital funds.

The contributions of $500 made by the members on the terms of the application set forth in the reasons of my brother Cartwright, both in the intention of the subscribers and of the corporation, furnished those funds. They were obviously to enable capital assets to be acquired and were limited in their application to that purpose. I am quite unable, therefore, to see how they can be held to be income.

The case of *Diamond Taxicab Association Limited* v. *M.N.R.* (1), affirmed without reasons by this Court was decided on the facts there presented. It was held that the interpretation given them by the Exchequer Court, that the monies had been paid as commuted compensation for future services, had not been shown to be erroneous.

I would therefore allow the appeal and set aside the assessment of the Minister with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Slattery, Bélanger & Fairbanks.*

Solicitor for the respondent: *R. G. Decary.*

(1) [1952] Ex. C.R. 331; [1953] C.T.C. 104.