
WALTER GLEN LUMBERS APPELLANT;

1944

AND

*Mar. 15, 16.

*April 25.

THE MINISTER OF NATIONAL }
 REVENUE } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Exemptions—“Income”—Annuities—Exemption claimed as to monthly payments received from an insurance company—Whether income derived from “annuity contract” “like” Government annuity contracts—Decision of the Minister—Income War Tax Act (R.S.C. 1927, c. 97, and amendments), ss. 3 (1) (b), 5 (k) (and, by reference, s. 3 of c. 24, 1930, and s. 6 of c. 43, 1932).

The *Income War Tax Act* (R.S.C. 1927, c. 97, and amendments) defines “income” as including (*inter alia*) annuities received under any contract “except as in this Act otherwise provided” (s. 3 (1) (b)), but, by s. 5 (k), exempts “the income arising from any annuity contract entered into prior to” June 25, 1940, “to the extent provided by” s. 3 of c. 24 of 1930 and s. 6 of c. 43 of 1932; and declares, as did said legislation of 1930, that “the decision of the Minister in respect of any question arising under ” such exempting provision shall be “final and conclusive”.

Said legislation of 1930 had exempted the income to the extent of \$5,000 “derived from annuity contracts with the dominion or provincial governments or any company incorporated or licensed to do business in Canada effecting like annuity contracts”.

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.

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Said legislation of 1932 had exempted \$1,200 only, "being income derived from annuity contracts with the Dominion Government or like annuity contracts issued by any Provincial Government or any company incorporated or licensed to do business in Canada", but preserved, as to income arising out of annuity contracts entered into prior to the 1932 legislation, the exemption provided by said legislation of 1930.

Appellant in 1918 entered into a contract with an insurance company which entitled him, after paying premiums for 20 years, to receive, at his option, either a lump sum, or monthly payments during his lifetime with the payments going thereafter to his wife, if surviving him, during her lifetime, and with a guaranteed period of payment of 20 years. During the payment of the premiums the contract constituted a policy of insurance and on appellant's death the monthly sums would become payable to his wife, if then living, for her lifetime, with the same guarantee of 20 years. There was provision in the contract for payment of dividends, for cash surrender values, loan values and paid-up term insurance options. After paying the premiums for 20 years, appellant elected to receive the monthly payments, commencing January 1, 1939. For the amount so received in 1940, \$1,500, he claimed exemption from income tax, for the whole amount or alternatively for \$1,200.

Held, affirming judgment of Thorson J., [1943] Ex. C.R. 202, that the payments so received were subject to income tax, without exemption.

Per the Chief Justice, Kerwin and Hudson JJ.: The income from a company, in order to be exempt under said legislation of 1930 as properly interpreted, must be derived from an annuity contract which was "like" annuity contracts being issued by the Dominion or a province, and, in order to be exempt under said legislation of 1932, must be derived from an annuity contract which was "like" annuity contracts being issued by the Dominion. The contract of 1918, in question, was not, on the evidence, a "like" contract, as required. It was of no avail to say that by 1939 the insurance feature had gone and there was then only an annuity contract like those of the Dominion: the rights and obligations upon appellant's exercise of his option were determined by the contract of 1918, the company's payments were in fulfilment of its promise of 1918, and pursuant to what was really appellant's direction as to how the benefits which had accrued to him should be satisfied. Dealing with a further point, raised only before this Court, it was held that in view of s. 3 (1) (b) of the Act as it now stands (so enacted since the decision in *Shaw v. Minister of National Revenue*, [1939] S.C.R. 338), taxation of the payments was not objectionable on the ground that they were in the nature of a return of capital.

Per Rand and Taschereau JJ.: The language used in the legislation of 1930, on its true construction, must be taken to refer not only to the company but to the contract out of which the payments arise; and the question is whether appellant's contract was an annuity contract like those at the time issued by the Governments mentioned. In the exempting legislation now in question, what is dealt with is an "annuity contract entered into" prior to certain dates. The contract here was "entered into" in 1918 and it is that contract which must be considered, not the situation existing after January 1, 1939

(when, so appellant contended, all insurance features had dropped and, whatever the contract was before, it was then an annuity contract with the characteristics of Government contracts): the payments arising in 1939 flowed from the obligations created in 1918; what the legislation contemplated was an annuity contract as of the time it was made, not as of any moment thereafter which might mark the beginning of some stage of performance under it. Assuming that the contract in question could properly be described as an "annuity contract" (of which doubt was expressed), the circumstance of insurance and other features differentiating it from a Government annuity contract were ample grounds upon which the Minister could rule, as he did, that the contract in question was not "like" a Government annuity contract; no error in the interpretation of the statute on his part had been shown and his exercise of judgment in this case should be held to be, under the legislation, within his exclusive field of determination. (It was remarked that no question arose as to whether the sums received by appellant were or were not income within the statutory definition; the amount received during 1940 was included in his return, and it was only on the question of the right to the exemption claimed that this appeal turned.)

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APPEAL from the judgment of Thorson J., President of the Exchequer Court of Canada (1), dismissing the appellant's appeal from the decision of the Minister of National Revenue affirming an assessment of the appellant for the year 1940 for income tax under the provisions of the Dominion *Income War Tax Act* (R.S.C. 1927, c. 97, and amendments). The main question in dispute was as to appellant's right to exemption, under s. 5 (k) of said Act (and with reference to provisions of s. 3 of c. 24 of the statutes of 1930 and of s. 6 of c. 43 of the statutes of 1932) in respect of the amount received in the year 1940 in monthly payments under a contract with The Mutual Life Assurance Company of Canada.

A. L. Fleming K.C. and A. L. Smoke for the appellant.

Robert Forsyth K.C. and E. S. MacLatchy for the respondent.

The judgment of the Chief Justice and Kerwin and Hudson JJ. was delivered by

HUDSON J.—The appellant made a return for the year 1940, showing as income received in that year \$1,500 from an annuity paid by the Mutual Life Assurance Company. He claimed an exemption in respect of same to the extent of \$1,200. This claim to exemption was disallowed by the Minister on the ground

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that under the provisions of Section 3 (b) of the Act, income includes annuities or other annual payments received under the provisions of any contract except as in this Act otherwise provided; that the provisions of paragraph (k) of Section 5 of the Act are not applicable as the said annuity contract was not similar to those issued by the Dominion Government and the decision of the Minister in this respect is final and conclusive and that under no other provisions of the Act is the said annuity exempt from tax.

An appeal to the Exchequer Court was dismissed.

In 1918 the appellant insured his life with the Mutual Life Assurance Company. Under the terms of the policy, upon paying his premiums for twenty years he became entitled at his option to either a lump sum or annual payments for the remainder of his life. In case of his death his representative was entitled to substantial benefits. It was in fact what is commonly called an endowment policy.

The appellant completed his annual payments and on the 2nd of December, 1938, he signed what was called a "direction *re* optional settlement" by which he elected to receive annual payments rather than a lump sum. It is the amount received from this source in the taxation year of 1940 which gives rise to the present controversy.

Although the appellant claimed in his return exemption to the extent of \$1,200 only, in these proceedings he has claimed alternatively that the whole amount received is exempt under the provisions of the amendment to the statute of 1930, or in the alternative to an exemption to the extent of \$1,200 under the provision of 1932. He also claims that the payments were in the nature of a return of capital and, therefore, not taxable under the Act.

The relevant statutory provisions are as follows:

3. For the purposes of this Act, "income" means the annual net profit or gain or gratuity * * * received by a person from * * *

* * *

(b) annuities or other annual payments received under the provisions of any contract except as in this Act otherwise provided.

The deductions and exemptions allowed are specified in section 5 of the Act as follows:

5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions.

* * *

(k) The income arising from any annuity contract entered into prior to the twenty-fifth day of June, 1940, to the extent provided by section three of chapter twenty-four of the statutes of 1930 and section six of chapter forty-three of the statutes of 1932 * * *

The decision of the Minister in respect of any question arising under paragraphs * * * and (k) hereof shall be final and conclusive.

By the Statutes of 1930, chapter 24, section 3, paragraph (k), it was provided:

(k) the income to the extent of five thousand dollars only derived from annuity contracts with the dominion or provincial governments or any company incorporated or licensed to do business in Canada effecting like annuity contracts * * *

By the Statutes of 1932, chapter 43, paragraph (k) above referred to was repealed and the following substituted therefor:

(k) twelve hundred dollars only; being income derived from annuity contracts with the Dominion Government or like annuity contracts issued by any Provincial Government or any company incorporated or licensed to do business in Canada.

To entitle the appellant to total exemption under the Statutes of 1930 the payment must arise from an annuity contract with a company "effecting like annuity contracts" (that is, annuity contracts like those being issued by the Dominion or a province).

It is fairly clear on the evidence that the contract entered into in 1918 was not like any contract then being issued by the Dominion or by the provinces. It was so held by the Minister and by the learned President in the court below and I agree with them.

But it is contended that the exemption given by the statute extends to annual payments made by companies who in fact sold annuities similar to those issued by the Dominion or a province, even if the particular contract in question was unlike any of those so issued.

The wording of the section lends some colour to this argument, but when Parliament was legislating about annuities it gave exemption to some but not all annuities and the purpose seems to have been to extend such exemption to those issued by companies. No reason is suggested for granting a greater privilege in respect of money paid under contracts of private companies than those procurable from the Government. I am of the opinion that this contention fails.

Under the amendment of 1932 this question does not arise. The language is "annuity contracts with the Dominion or like annuity contracts with companies".

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It is next contended that when the exercise of the option became effective in 1939 the contract had been stripped of all insurance benefits and what remained was in fact only an annuity contract similar to those issued by the Dominion.

The rights of the appellant and the obligations of the company upon the exercise of the option were determined by the contract of 1918. The payments made by the company to the appellant were made in fulfilment of its promise made in 1918. What is spoken of as an exercise of an option was properly called in the instrument itself a "direction" and it was a direction as to how the benefits which had accrued to the appellant should be satisfied. I am of the opinion that the appellant fails on this point.

The appellant also raised in this Court for the first time a claim that the payment in question was in the nature of a return of capital, citing the decision of this Court in *Shaw v. Minister of National Revenue* (1). Subsequent to that decision, paragraph (b) of section 3 of the Act as considered in the *Shaw* case was repealed and there was substituted therefor the following:

(b) annuities or other annual payments received under the provisions of any contract, except as in this Act otherwise provided.

It was argued on behalf of the Minister that this amendment no longer left room for the argument which was successful in the *Shaw* case (1) and with this I agree.

Another argument pressed upon us was that by the final clause of paragraph (k) of section 5 the decision of the Minister was final and conclusive. Having come to the same conclusion as the decision of the Minister that there was no like annuity contract in the present case, it becomes unnecessary to decide whether or not the decision of the Minister is conclusive.

I would dismiss the appeal with costs.

The judgment of Taschereau and Rand JJ. was delivered by

RAND J.—This is an appeal from the Exchequer Court which upheld a ruling by the Minister of National Revenue that a payment of \$1,500 received by the appellant during the year 1940 was not income arising from an annuity contract within the exemption provisions of the *Income War Tax Act*.

The contract, under which monthly payments of \$125 were made, was entered into in the year 1918. In general, its terms provided for the payment of annual premiums for twenty years, upon the completion of which the insurance company, subject to a lump sum commuted value option, would pay to the appellant, the insured, the sum mentioned during his lifetime, and, at his death, to his wife for her lifetime. Underlying both these life interests was a guaranteed period of twenty years. During the payment of the premiums the contract constituted a policy of insurance and, on the death of the insured, the monthly sums would become payable to his wife, if then living, for her lifetime, with the same guarantee of twenty years. There was provision also for the payment of dividends both during the endowment period and thereafter, and as well for cash surrender values, loan values and paid-up term insurance options. Both the assured and his wife were living on January 1st, 1939, when the policy matured and when the monthly instalments became payable.

In 1930 the *Income War Tax Act* was amended to the effect that income to the extent of \$5,000 derived from annuity contracts with the dominion or provincial governments or with a properly licensed incorporated company "effecting like annuity contracts" should be exempt from taxation. In 1932 this was in turn amended by reducing the amount of exemption to \$1,200 but preserving the exemption of the 1930 legislation to all contracts entered into prior to May 26th, 1932, when the 1932 Act came into force. In 1940 a further amendment was made by which the exemption was limited to the income arising from an annuity contract entered into before the 25th day of June, 1940, to the extent provided by the legislation of 1930 and 1932.

No question arises as to whether these annual sums are or are not income within the definition of that term in the *Income War Tax Act*. The amount received during 1940 was included in the return of the appellant and it is only on the question of the right to the exemption claimed that this appeal turns.

The amendment of 1930 provided that the decision of the Minister in respect of any question arising under the paragraph dealing with annuities should be final and conclusive. Such a question did arise under that paragraph,

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section 5, par. (k), and it was whether the contract of the appellant was one "like" an annuity contract of the governments mentioned. Some point was made that the language of the 1930 amendment, "income * * * derived from annuity contracts with * * * any company incorporated or licensed to do business in Canada effecting like annuity contracts", characterized only the company and not the actual contract and it was argued that, as admittedly the insurance company in question did both in 1918 and 1939 issue contracts of the same sort as those made by the dominion and provincial governments; the contract in the case, being an annuity contract issued by such a company, was, therefore, within the exempting legislation. On its true construction, however, the language used in 1930 must be taken to refer not only to the company but to the contract out of which the payments arise, and the question remains whether or not the contract upon which the appellant stands is an annuity contract like those at the time issued by the two governments.

Whether, at the time it was made, the contract could properly be described as an "annuity contract" is extremely doubtful. It was argued to be a contract of insurance plus annuity. But it is also contended that, whether or not it was so before 1939, on January 1st of that year all insurance features had dropped and that at that moment it had become both an annuity contract and one with the characteristics of government contracts: it is then urged that in each case the question to be asked under the *Income War Tax Act* is this: what is the nature of the obligation under which the income is paid at the moment when it is paid? and from these premises the conclusion of exemption is drawn.

In the amendments made in 1930, 1932 and 1940, what is dealt with is an "annuity contract entered into" prior to certain dates. That language is plain and well understood. The contract here was entered into in 1918 and the payments arising in 1939 flow from the obligations then created. What is contemplated is an annuity contract as of the time of its being made and not as of any moment thereafter which may mark the beginning of some stage of performance under it.

The essential characteristic of the government annuity agreement is that the benefits shall be fully purchased by the annuitant. That may be either by one payment or by a series of payments, but until the price has been received the right to the annuity does not arise. In the contract in question, for the first twenty years there was present a fundamental obligation of insurance for which there was no purchase in the annuity sense. Assuming, then, that it was an annuity contract, a point which I do not find it necessary to decide, the circumstance of insurance and the other differentiating features mentioned were ample grounds, I should say, upon which the Minister could rule that the contract was not "like" a government annuity contract. No error in the interpretation of the statute on his part has been shown and, if this exercise of judgment is not within his exclusive field of determination, I should feel at a loss to know in what circumstances such a ruling would not be reviewable.

The decision of the President of the Exchequer Court was, therefore, right and the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Fleming, Smoke & Mulholland.*

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

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