

THE PETER BIRTWISTLE TRUST.....APPELLANT;

1938

AND

* June 14, 15.

* Dec. 19.

THE MINISTER OF NATIONAL }
REVENUE} RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Liability for assessment—Income War Tax Act (R.S.C., 1927, c. 97, as amended), ss. 11 (2), 4 (e), 55, 56—“Income accumulating in trust for the benefit of unascertained persons or persons with contingent interests”—“Charitable institution”—Liability for interest prior to date of assessment—Costs.

B. of London, Ontario, on May 27, 1918, made a deed of settlement of real and personal properties to a trust company in Ontario, for management, administration, etc. At the end of 21 years after B.'s death the trustee was to pay the whole fund with accumulations thereon to the Municipal Council of the Town of Colne in Lancashire, England, “to be used by the said Council for the benefit of the aged and deserving poor of the said Town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said Council.” B. died on April 19, 1927. The trust company made yearly income returns for each of the years 1919 to 1934 respectively to the Dominion Government on the form to be filed by trustees. No assessment was made until February 21, 1936, when assessments for income tax were made for all those years, interest being added. Liability to pay the tax was disputed. Sec. 11 (2) of the *Income War Tax Act* (R.S.C., 1927, c. 97, as amended) provides that “income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee * * *.”

Held (reversing judgment of Maclean J., [1938] Ex. C.R. 95) (Kerwin J. dissenting): The income in question was not within said s. 11 (2) and was not taxable.

Per The Chief Justice, Crocket and Davis JJ.: The fund was created for a purpose—to be used “for the benefit of the aged and deserving poor,” a class, in the town of Colne (a purpose not improbably to be satisfied by building and maintaining some institution)—not, either as to capital or income, for any particular person or persons. What the settlor established was an arrangement or undertaking for promoting a defined public or social object without reference to the property appropriated for the purpose becoming vested at any time in any particular person or persons. No particular person will ever acquire a right to demand and receive the beneficial interest in the income from the fund or in any part thereof. Therefore s. 11 (2) (the only section suggested as under which the accumulating income is taxable) does not apply. (*Holden v. Minister of National Revenue*, [1933] A.C. 526, distinguished).

Per Hudson J.: The persons intended under s. 11 (2) are persons who might become entitled to specific portions of the fund, and not a

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

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general class who would ultimately get the benefits of the fund in the way of charitable assistance.

Per Kerwin J. (dissenting): Under the agreement between the settlor and the trustee the real beneficiaries of the trust are the aged and deserving poor of Colne. The members of the class who will benefit are unascertained persons within the meaning of s. 11 (2). As to further contentions against the assessments: The income is not exempt as being "income of a charitable institution" within s. 4 (e) of the Act. Interest prior to date of assessment is payable under the Act (s. 55); s. 66 of the Act (considered in conjunction with other sections) does not leave it to the court's discretion whether interest should be exacted; it is merely an enactment establishing the exclusive jurisdiction of the Exchequer Court to deal with the dispute. The question of costs stands in a different position; the appeal should be dismissed without costs.

APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing (without costs) an appeal from the decision of the Minister of National Revenue confirming assessments for income tax. The material facts and circumstances of the case are sufficiently stated in the judgments now reported and are indicated in the above head-note. The appeal to this Court was allowed and the judgment appealed from and the assessments in question were set aside, with costs to the appellant throughout. Kerwin J. dissented.

S. Casey Wood K.C. and *G. M. Jarvis* for the appellant.

John Jennings K.C. and *J. R. Tolmie* for the respondent.

The judgment of the Chief Justice and Crocket and Davis JJ. was delivered by

DAVIS, J.—On the 27th day of May, 1918, Peter Birtwistle, of the city of London, in the province of Ontario, made a deed of settlement of certain real and personal properties to The Trusts & Guarantee Company, Limited, of the city of Toronto, in the said province, as trustee upon the terms and conditions therein set forth. This settlement superseded an earlier settlement of the 20th of October, 1916, with respect to a sum of \$100,000, the investments of which were covered, together with additional property, by the settlement of the 27th of May, 1918. The Trust Company was to administer and manage the trust subject to the directions and control of the

settlor during his lifetime and after his death in its absolute discretion with the usual powers of administration and management of the trust fund. The fund was to be held and accumulated until the expiration of 21 years after the death of the settlor, at which date the trustee was to pay the whole of the then fund to the Municipal Council of the town of Colne in Lancashire, England, to be used by the said Council for the benefit of the aged and deserving poor of the said town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said Council. The exact words of the provision are as follows:

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The Trustee shall pay the whole of the Investment Account, together with accumulations thereon, to the Municipal Council of the Town of Colne in Lancashire, England, at the end of the period of twenty-one years after the death of the Settlor, to be used by the said Council for the benefit of the aged and deserving poor of the said Town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said Council, save and except and the Settlor hereby declares it to be his wish that the said Council should in so far as possible or convenient, leave any of the said fund which is not required for immediate distribution to be held by the Trustee hereunder and invested by the Trustee under an arrangement similar to that comprised in this indenture, the Settlor believing that it will be advantageous for the Council to retain this colonial investment which the Settlor considers likely to return a better rate of interest than can be readily obtained in England.

Peter Birtwistle died on April 19th, 1927; the fund with accumulations would therefore become payable to the Council of the town of Colne on April 19th, 1948. At December 31st, 1936, the fund amounted to \$572,767.88 and it was estimated by the general manager of the Trust Company that if the trust were continued to the expiration of the twenty-one years from the date of death, the fund would then amount to approximately one million dollars. The fund has been earning approximately \$25,000 a year. The town of Colne became desirous of terminating the trust and receiving immediate payment of the fund; the first intimation was a letter from the town clerk to the trustee of the 5th of September, 1933. Subsequently the question was raised in proceedings taken in the Supreme Court of Ontario for approval of a proposed compromise whereby substantial amounts were to be paid over to the town of Colne at that time. Rose, C.J., refused to approve the proposed agreement (1).

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The Trust Company each year (1919 to 1934 inclusive) reported to the Dominion Government on the regular form required to be filed by trustees, executors, administrators; assignees, receivers and persons acting in a fiduciary capacity, known as Form T-3, the amount of the income received. The purpose of this return is for information and not for taxation at the source. The amount of the income was set out opposite the printed words "Income accumulating in hands of Trustees" and by way of information there were written in under the printed heading "Name and address of Beneficiary" on the form, the words "Income accrues to the Municipal Council of Colne, England, for the benefit of aged and deserving poor."

No assessment for income taxation in respect of the accumulating income from this fund was made by the Dominion of Canada under the *Income War Tax Act, 1917*, and amendments (now R.S.C., 1927, ch. 97) during any of the years 1919 to 1934 inclusive until February 21st, 1936, when assessments were made for all these years at the one time. To the normal tax were added surtaxes and interest aggregating \$36,053.25. Of this sum \$8,794.45 was interest alone. It is rather obvious that the litigation in the Ontario courts in 1935 attracted the taxing officials of the Dominion to endeavour to collect an income tax from this fund. The trust company denied that it was liable to pay a Dominion income tax on the income from the fund. The assessments were actually made against "The Peter Birtwistle Trust" but no objection was taken by the trust company to this error; obviously the fund itself could not be assessed.

Speaking broadly (apart from non-residents) the Dominion income tax legislation does not contemplate taxation at its source but imposes the tax upon the persons or corporations who receive the income. A beneficiary under a will, for instance, receives his income from the estate intact; he is directly assessed by the Dominion upon the sum which he receives. The executor is required to make a return of the income received by him from the estate and to state the names and addresses of the beneficiaries entitled to that income. But there is a section in the *Income War Tax Act*, 11 (2), which provides that where income is accumulating in trust for the benefit of unascertained persons or persons with con-

tingent interests that income shall be taxable in the hands of the trustee. The original enactment was by sec. 4 of ch. 49 of the Statutes of Canada, 1920, and read as follows:

Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of an unmarried person.

By sec. 16 of the 1920 statute, this section was deemed to have come into force at the commencement of the 1917 taxation period. The original enactment remained in force until 1927 when it was reproduced verbatim as sec. 11 (2) of the Revised Statutes of 1927, ch. 97. The section remained in force until 1934, when by ch. 55, sec. 7, of the Statutes of 1934, the section was repealed and the following substituted therefor:

11. (2) Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of a person other than a corporation, provided that he shall not be entitled to the exemptions provided by paragraphs (c), (d), (e) and (i) of subsection one of section five of this Act.

By sec. 18 of the 1934 statute this new section was made applicable to income of the 1933 taxation period and to all subsequent periods. In 1936 by ch. 38, sec. 10, of the Statutes of that year the section was further amended but without any bearing on the question at issue in this appeal.

Section 2 of the *Income War Tax Act* as it was in 1936 contained the following definitions:

(h) "Person" includes any body corporate and politic and any association or other body, and the heirs, executors, administrators and curators or other legal representatives of such person, according to the law of that part of Canada to which the context extends;

(k) "taxpayer" means any person paying, liable to pay, or believed by the Minister to be liable to pay, any tax imposed by this Act.

The *Colne Corporation Act, 1933* (being Imperial statute 23 and 24 George V, ch. 35) by sec. 140 empowers the Corporation of Colne to accept, hold and administer any gift of property, whether real or personal, for any public purpose connected with the borough.

It may be convenient to mention here that sec. 4 of the *Income War Tax Act*, so far as relevant, provides:

The following incomes shall not be liable to taxation hereunder:—

(e) the income of any religious, charitable, agricultural and educational institution, board of trade and chamber of commerce.

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It was contended that upon a proper construction, the exemptions of subsection (e) must be confined territorially to institutions that are within Canada, but it is not necessary, in the view I take of the appeal, to put a construction upon the subsection.

Section 11 (2), which is a charging section, contemplates income that will vest in and ultimately pass to persons for the time being unascertainable, such, for instance, as unborn issue, or to persons whose rights are for the time being merely contingent interests. The statute is dealing generally with income of persons or corporations. The trust fund with which we are dealing is not intended to pass, either capital or income, to any particular person or persons; the fund was created for a purpose, not for any particular person or persons. The purpose was that the fund should be used "for the benefit of the aged and deserving poor" of the town of Colne. It was an arrangement or undertaking established by the settlor for promoting a defined public or social object without reference to the property appropriated for the purpose becoming vested at any time in any particular person or persons. Aged and deserving poor cannot be regarded otherwise than as a class in the community; to regard them otherwise is to destroy the character of what is obviously a charitable trust. No particular person will ever acquire a right to demand and receive the beneficial interest in the income from the fund, or in any part thereof. The population of the town of Colne is said to be about 25,000 and it is inconceivable that when the town in 1948 receives approximately a million dollars it will distribute it, or any substantial part of it, among particular persons; the purpose of the settlor will not improbably be satisfied by the erection and maintenance of a hospital or a home or some such institution that will serve the needs of the aged and deserving poor of the town. If I understood counsel aright during the argument, that was the sort of use to which the town intended to put the money when it sought in 1935 to obtain from the Ontario court payment over to it of the fund, or substantial portions of it.

The particular section in question, sec. 11 (2), was considered by the Privy Council in *Holden v. The Minis-*

ter of National Revenue (1), and in the judgment of their Lordships delivered by Lord Tomlin the section was said to be a true charging section and fixed the trustee of the accumulating income with liability for the tax. But the accumulating income in that case would, by force of the will of the testator there in question, inevitably become payable as of right at a future date to particular persons who would become entitled to compel payment of such income to themselves. The point in issue now before us did not arise for consideration in that case.

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Under the trust that is before us the income is not being accumulated for persons presently unascertainable or for persons with merely contingent interests within the meaning of sec. 11 (2). It is being accumulated for a purpose—and the purpose is to make provision for the benefit of the aged and deserving poor of the town of Colne. It is not suggested that the accumulating income is taxable except under sec. 11 (2), and as that section does not apply, the income of the fund in the hands of the trust company was never taxable under the statute.

The appeal should be allowed and the judgment appealed from and the assessments in question set aside, with costs to the appellant throughout.

KERWIN, J. (dissenting)—Under the agreement of May 27th, 1918, between the settlor, Peter Birtwistle, and the trustee, The Trusts and Guarantee Company, Limited, the distinction between the borough of Colne and the council of the borough is not maintained. By clause 2 (b) the trustee is to pay the whole of the investment account provided for by the agreement, together with accumulations, to the Municipal Council of the Town of Colne at the end of the period of twenty-one years after the death of the settlor

to be used by the said Council for the benefit of the aged and deserving poor of the said Town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said Council.

On the other hand, under the latter part of clause (d) of paragraph 2,

the Settlor hereby expressly relinquishes and surrenders to the Trustee and the Municipality of Colne all the said income in excess of the amount thereof necessary to cover his expenses of living,

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and under clause (g) it is provided that:—

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Upon the payment over to the Municipality of Colne at the expiration of the period hereinafter determined, together with interest at the rate and in the manner guaranteed hereunder, the securities held by the Trustee in respect of the said Investment Account shall become the property of the Trustee freed from the terms of the trusts hereby created in reference to the said account without any formal assignment or release from the Settlor or the Council of the Municipality of Colne.

I have mentioned the terminology of the agreement in this one respect in order to draw attention to what appears to me to be another inexactitude. Clause 3 of the agreement provides:

The Trustee shall render to the Settlor regular statements in such form as may be required quarterly during the life of the Settlor and thereafter on similar dates to the beneficiaries of the estate.

A careful reading of the agreement leaves no doubt in my mind that there is but one trust with two successive trustees and that the real beneficiaries of the trust are the aged and deserving poor of Colne.

This becomes of importance in considering both main grounds of appeal. The first is whether the members of the class who will benefit are unascertained persons within the meaning of subsection 2 of section 11 of the *Income War Tax Act*:

Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of a person other than a corporation.

It has been determined in *Holden v. Minister of National Revenue* (1) that this is a true charging section, and in my opinion the question whether such members are unascertained persons within the ambit of that provision should be answered in the affirmative. Until the period of distribution arrives the recipients of the settlor's bounty are unascertainable.

The second ground raised by the appellant is that the income is income of a charitable institution within the meaning of those words as used in section 4 (e) of the Act, and therefore exempt from taxation. What has already been said disposes of the suggestion that the income is income of anyone other than the unascertainable aged and deserving poor of Colne and I do not find any assistance in the English cases referred to, which deal with

(1) [1933] A.C. 526.

statutes expressed in terms totally unlike the enactment under consideration.

It has also been urged that in any event no interest is payable upon the tax prior to the date of assessment. Commencing with the year 1919, the trustee furnished annual returns under the Act, and under the heading "Name and Address of Beneficiary" inserted "Income accrues to the Municipal Council of Colne, England, for the benefit of aged and deserving poor." No assessment was made until 1936,—apparently in consequence of the publicity occasioned by the report of a decision of the Supreme Court of Ontario (1), given on an application made by the trustee for approval of a proposed agreement between it and the Mayor, Aldermen and Burgesses of the Borough of Colne. The assessment was then made for the years 1919 to 1934 inclusive and included interest at the statutory rate from the times each annual tax was payable.

Interest is provided for by sections 48, 49 and 54, and section 55 enacts:—

Notwithstanding any prior assessment, or if no assessment has been made, the taxpayer shall continue to be liable for any tax and to be assessed therefor and the Minister may at any time assess, re-assess or make additional assessments upon any person for tax, interest and penalties.

It is suggested that in applying the provisions of these sections a difficulty arises by virtue of section 66:—

Subject to the provisions of this Act, the Exchequer Court shall have exclusive jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act and in delivering judgment may make any order as to payment of any tax, interest or penalty or as to costs as to the said Court may seem right and proper.

It is contended that this provision leaves it to the Court's discretion whether interest should be exacted from the taxpayer.

The suggested difficulty disappears, however, when section 66 is considered in conjunction with the sections dealing with the rights of a party assessed who objects to the amount at which he has been assessed for income tax or who considers that he is not liable to taxation. By section 58 such a person may serve a notice of appeal upon the Minister of National Revenue who shall then "duly consider the same and shall affirm or amend the assessment appealed against and shall notify the appel-

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lant of his decision by registered post" (section 59). If the appellant is dissatisfied with the Minister's decision, he may notify the Minister that he desires his appeal to be set down for trial, and furnish a statement of facts (section 60). The Minister is to reply thereto (section 62) and transmit to the Exchequer Court certain documents and the matter is thereupon deemed to be an action in that Court (section 63). Section 65 provides for the Court permitting any fact or statutory provision not set out in the notice of appeal or notice of dissatisfaction to be pleaded or referred to and empowers the Court to refer the matter back to the Minister for further consideration. Then comes section 66 already quoted.

In my opinion, this section is merely an enactment establishing the exclusive jurisdiction of the Exchequer Court to deal with the dispute. The power of the Court to make any order as to payment "of any tax, interest or penalty" is similar to the power conferred upon the Minister by section 55 to "assess, re-assess or make additional assessments upon any person for tax, interest and penalties." In any event the opening words of section 66, "Subject to the provisions of this Act," make it evident, I think, that the Court has no power to disregard the plain provisions of the Act imposing upon the taxpayer a liability for interest. The question of costs stands in a different position and there appears to be nothing in the Act to prevent the Court withholding costs from the Minister of National Revenue when successful, and, as a matter of fact, that is what was done by the President of the Exchequer Court in the present case.

I would dismiss the appeal without costs.

HUDSON, J.—The charging section of the *Income War Tax Act* applicable to this case, if any, is section 11 (2), and after much hesitation I have come to the conclusion that income accumulated in the trust here is not for the benefit of unascertained persons within the meaning of that section. I think that the persons there intended are persons who might become entitled to specific portions of the fund, and not a general class who would ultimately get the benefits of the fund in the way of charitable assistance.

For this reason I think that the appeal should be allowed and the judgment appealed from and assessment set aside.

Appeal allowed with costs.

Solicitors for the appellant: *Wood & Jarvis.*

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

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