1936
*Nov. 25.
1937
*Feb. 2.

CAPITAL TRUST CORPORATION LTD. AND DANIEL J. COFFEY, EXECUTORS OF THE ESTATE OF JOSEPH M. MACKENZIE, DECEASED ..... APPELLANTS;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Direction in will for payment of sum monthly to testator's son, an executor—Construction of will—Whether monthly sum a legacy or remuneration as executor and, as such, taxable income—Payment in one year of lump sum covering arrears for previous years—Imposition of tax in respect of the lump sum—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 9, 11.

A testator by his will named three executors including his son J. Subsequently one of the named executors died. Later, by codicil, the testator appointed two additional executors. By a subsequent codicil he directed that his son J. be paid $500 a month "in addition to any sum which the courts or other proper authorities may allow him in common with the other executors." The testator died on December 5, 1923. Nothing was paid to J. in connection with said direction for payment of $500 a month, until March 5, 1927, when a lump sum of $19,500 was paid him to cover the period from the testator's death to that date. From that date until his death in 1932, J. received the $500 a month. The Minister of National Revenue claimed, under the *Income War Tax Act*, R.S.C. 1927, c. 97, for income tax in respect of the payments so received by J.

Held: (1) On interpretation of the will, the $500 a month directed to be paid to J. was not a legacy, but additional remuneration to him as executor, and, as such, was taxable income.

(2) The said lump sum of $19,500 was assessable for income tax in respect of 1927, the taxation year in which it was actually received, notwithstanding that $18,000 of that sum represented arrears that had fallen due during preceding years (the result being that, under the Act, a higher percentage of taxation was imposed than if $6,000 had been allocated to each of the preceding three years). S. 3 (defining "income") and s. 9 (imposition of tax) of the Act, referred to. S. 11 had no application to the facts of the case.

Judgment of the Exchequer Court of Canada (Angers J.), [1936] Ex. C.R. 163, affirmed.

APPEAL by the executors of the estate of Joseph M. Mackenzie, deceased, from the judgment of Angers J. in the Exchequer Court of Canada (1) affirming the assessment for income tax in respect of certain payments made to the said deceased as set out in the judgment now reported

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

(1) [1936] Ex. C.R. 163.

and in the above headnote. The appeal to this Court was, by the judgment now reported, dismissed with costs.

D. J. Coffey K.C. for the appellants.

W. S. Fisher for the respondent.

The judgment of the court was delivered by

DAVIS J.—This is an income taxation case. The late Sir William Mackenzie of Toronto died on December 5, 1923. By his last will and testament, dated May 20, 1909, he gave and devised all his estate unto three named executors and trustees upon the trusts therein mentioned and provided that his estate should be divided ultimately among his wife and children, and children of any deceased child, as if he had died intestate, with authority to his executors and trustees to make divisions of the estate from time to time when and as in their discretion they should think suitable having regard to the general position of the estate and its future requirements.

This will remained unchanged from 1909 until November 14th, 1923, at which time, one of his sons named as an executor and trustee having died, Sir William appointed by codicil two additional executors and trustees, thereby increasing the number from two to four. The following day, November 15th, 1923, by a second codicil he bequeathed the sum of $5,000 to each of his grandchildren then living. On November 28th, 1923, he made a third codicil, upon which the questions in issue in this case have arisen. This codicil was as follows:

> This is a codicil to the last will and testament of me, William Mackenzie, of Benvenuto, Toronto.
>
> WHEREAS by my said will I appointed my son Joseph Merry Mackenzie and Sir Edmund Byron Walker, President of the Canadian Bank of Commerce, to be two of the executors thereof, AND WHEREAS by codicil to my said will made on the fourteenth day of November, one thousand nine hundred and twenty-three, I appointed Robert John Fleming, formerly General Manager of the Toronto Railway Company, and my son-in-law Frank H. McCarthy to be additional executors of my said will Now I DIRECT that my son Joseph Merry Mackenzie shall be paid Five hundred dollars a month in addition to any sum which the courts or other proper authorities may allow him in common with the other executors. AND in all other respects I confirm my said will, and the codicils thereto made.

Then on December 4th, 1923, another codicil was made providing for the use of the testator's Toronto home by his

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daughters upon certain terms and conditions. The following day Sir William died.

Joseph M. Mackenzie, a son of the testator and one of the executors named in the will, survived his father and died some time in 1932. It was apparently inconvenient for some years for the estate to pay to Joseph M. Mackenzie the $500 a month provided by the third codicil, and nothing appears to have been paid to him in this connection until the 5th of March, 1927, when a lump sum of $19,500 was paid to him to cover the period from the date of the testator's death to that date. During the balance of the year, 1927, the payments amounted to $4,916.67, making a total sum received by him in that year of $24,416.67. During the succeeding years 1928, 1929, 1930 and 1931, and up to the date of his death in 1932, he appears to have received his $500 a month. None of this money was reported by the late Joseph M. Mackenzie in his income tax returns upon the ground, it is said, that he treated these moneys as a legacy to him. Under section 3 (*a*) of the Dominion *Income War Tax Act* these moneys, if a legacy out of capital, would not be taxable, because income as defined by the Act excludes the value of property acquired by gift though not the income from such property.

The first question, then, that arises in this case is whether or not, as a matter of interpretation, the $500 a month directed to be paid to the son was a legacy or additional remuneration to him as an executor and trustee over and beyond whatever his portion might be of the compensation which would be allowed by the Surrogate Judge to the executors and trustees upon the passing of their accounts. If it be determined that these moneys were not a legacy but remuneration, then the further question is raised in this appeal as to whether or not the Department of National Revenue was entitled to assess Mr. Mackenzie for the taxation period 1927 the whole of the sum of $19,500 received by him on March 5, 1927, notwithstanding that $18,000 of that amount represented arrears of monthly payments that had fallen due during the preceding three years. The obvious objection to treating the whole amount as income in the particular year in which it was actually received is that it results in a higher percentage

of taxation upon the total amount than could have been imposed had the payments been made as they fell due month by month during the preceding years. The appellants, the executors of the will of the late Joseph M. Mackenzie, contend that if, contrary to their main contention, the payments are not to be treated as a legacy but as additional remuneration, then the assessments should be revised so as to allocate $6,000 to each of the years in respect of which the amounts were payable, and the tax levied accordingly.

Dealing now with the first question, as to whether or not the $500 a month was a legacy or additional remuneration *qua* executor. It is not unreasonable to assume that the testator realized, or that his attention was called to the fact, that increasing the number of executors from two to four would necessarily involve his son in a substantial decrease of compensation as one of the executors. The codicil does not in precise language say that the $500 a month is additional remuneration to the son as an executor but it is sufficiently definite to express that to be the intention of the testator. The words are,

> Whereas * * * by codicil * * * I appointed * * * additional executors * * * Now I direct that my son * * * shall be paid Five hundred dollars a month in addition to any sum which the courts or other proper authorities may allow him in common with the other executors.

A fair test to apply is to ask oneself, what would have been the position if the son had renounced his executorship? Could he have enforced payment of this monthly sum while declining, as he would have been quite free to do, to act as an executor of his father's will? It must be held, I think, that he could not. If that is so, then it was not a legacy but additional remuneration and as such was taxable income.

But should the total payment of $19,500 have been assessed in respect of the taxation year in which it was actually received? If so, it is apparent that it works an injustice to the taxpayer, but it is almost inevitable that every general taxation statute will in its application to some particular case create an injustice while in its wide application to normal conditions it will work satisfactorily. The statute here by section 3 defines income as "income received" and by section 9 imposes the tax upon "the

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income during the preceding year." Unfortunately in this case the taxpayer is bound to pay a larger amount than could have been levied and collected upon the same income had it been paid in instalments month by month as it became due and payable, but that cannot affect the liability plainly imposed by the statute.

We were pressed to apply the provisions of section 11 to this income as something that "accrued to the credit" of the taxpayer each month, but section 11 has no application to the facts of this case. It relates only to income of a beneficiary of any estate or trust.

We cannot escape from the conclusion, which seems a rather harsh one, that the appeal must be dismissed with costs if asked.

Appeal dismissed with costs.

Solicitors for the appellant: *Coffey & McDermott.*

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