St. Catharines 1966

Nov. 9-10

Ottawa Dec. 9

BETWEEN:

THE CANADA TRUST COMPANY, surviving Executor of the Estate of Charles Arthur Ansell .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Income tax—Income of estate—Trust for charitable organizations—Payment to charitable organizations deferred—Assessment in year of receipt—Income Tax Act, ss. 16(3), 62(1)(e), 63(4), (7), 65(1).

A testator who died in 1957 by his will gave his estate in trust to pay annuities to his sister and nephew from the estate's income (with power to enroach on capital) and on the sister's death to pay half the residue to certain charitable organizations and the income from the other half to the nephew (with power to encroach on corpus) and on the nephew's death to pay the residue of his half to the three charitable organizations. In 1958, 1959 and 1960 the estate received income in excess of the amounts paid to the testator's sister and nephew and it was assessed to tax for these years on the sums so retained. The assessments were affirmed on appeal to the Tax Appeal Board and the executors of the estate then applied for construction of the will to the Supreme Court of Ontario, which held, *inter alia,* that the income retained by the estate vested in the charitable organizations as of the testator's death (subject to defeasance to secure the annuities to the sister and nephew) but was not payable to the charitable organizations until the sister's death (subject to the *Accumulations Act*). The nephew died in 1961 and the sister in 1965.

Held, the estate was correctly assessed for the years 1958, 1959 and 1960.

1. The estate's share of the income was not paid to the charitable organizations in the year of receipt nor did they have the right to enforce payment thereof in that year: hence the amount was not deductible by the estate in computing its income for that year as being "payable" to a beneficiary in such a year within the meaning of

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s. 63(4) and (7) of the *Income Tax Act*. Section 16(2) is not to be construed to require that an amount is to be treated as "paid" within the meaning of s. 63(7) when in fact it was not paid.

2. If the estate's share of the income was constructively received by the estate for the charitable organizations and therefore required to be included in computing their income for the year of receipt under s. 65(1) as being a benefit from a trust the estate's liability for tax thereon under s. 63 was not affected since the amount was not "payable" to the charitable organizations in such year within the meaning of s. 63(4) and (7).

3. It was irrelevant in assessing the estate for 1958, 1959 and 1960 that because the executors did not exercise their power under the will to encroach upon accumulations of surplus income for the benefit of the sister and nephew they therefore held the surplus income only for the benefit of the charitable organizations during the years in question: the application of the *Income Tax Act* must be determined by the facts as they exist in the taxation year.

4. The income in question was not exempt from tax under s. 62(1)(*e*) as being income of charitable organizations: they had no right to receive it in the year of receipt by the estate and their right to receive it in future was defeasible. Moreover it would be received as capital, not income.

M.N.R. v. Trusts and Guarantee Co. (Birtwhistle Estate) [1940] A.C. 138; *Burns Estate v. M.N.R.* [1950] C.T.C. 393; *McLeod v. Minister of Customs and Excise* [1926] S.C.R. 457, per Duff J. at 460, considered.

APPEAL from Tax Appeal Board.

J. L. G. Keogh, Q.C. for appellant.

D. G. H. Bowman for respondent.

THURLOW J.:—This is an appeal from a judgment of the Tax Appeal Board dismissing an appeal from assessments of income tax for the years 1958, 1959 and 1960. The assessments in question are based on the provisions of section 63 of the *Income Tax Act* and the issue to be determined is the liability of the appellant under this provision for tax on income of the residue of the estate of Charles Arthur Ansell deceased in excess of amounts paid by the appellant in each year to two life beneficiaries pursuant to the provisions of the deceased's will. In their income tax returns in respect of the estate the executors reported the amounts in question but treated them as "distributable to charities" and therefore not taxable as income of the estate. The Minister, however, regarded the amounts as " 'Taxable Income' in the hands of Executor" and assessed tax thereon accordingly.

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The facts are not in dispute and were put before the Court by an agreed statement. The appellant is the surviving executor of the estate of the deceased, Charles Arthur Ansell, who died on November 7, 1957. His sister, Bertha Mabel Bellingham, the other executor named in his will died on June 18, 1965. Reginald Ansell who is also referred to in the will died on September 28, 1961.

By paragraph III of his will the deceased gave the whole of his estate to his executors, who were also appointed trustees, upon trust to pay his debts and testamentary expenses as well as succession duties and death taxes, to deliver certain articles of personal property to his sister, Bertha Mabel Bellingham, to permit her to use certain real property for her life and

> (f) To set aside and to invest and keep invested from time to time, all the rest, residue and remainder of my estate which shall hereinafter be referred to as "the residue", and to pay to my Sister, Bertha Mabel Bellingham, the sum of Six Hundred Dollars ($600.00) monthly so long as she shall live, utilizing for such purpose, firstly the income from the said residue and so much of the capital of the said residue as from time to time may be necessary for such purpose. Provided that my Trustees may in their sole discretion from time to time and so often as they may deem it necessary and advisable in order to meet any extra-ordinary financial demands arising out of the illness or otherwise respecting the person of my said Sister, or for her proper maintenance and comfort, make payments to my said Sister in addition to the said sum of Six Hundred Dollars ($600.00) monthly out of the residue of my estate in such amount or amounts as they may consider advisable from time to time, and for such purpose and for the purpose of making the monthly payments aforesaid to my said Sister, I will and direct that my Trustees may encroach upon the capital of the residue of my estate from time to time remaining in their hands to obtain such moneys as may be required additional to the income from the said residue. Provided further that my Trustees may in their sole discretion from time to time and so often as they may deem it necessary and advisable, increase such monthly payments of Six Hundred Dollars ($600.00) to such monthly amounts as they in their sole discretion from time to time may consider necessary to correspond with any substantial increase from time to time after my death and during the life of my said Sister in the Consumer Price Indices and/or Cost of Living Indices published from time to time hereafter by or on behalf of the Government of Canada or the Bureau of Statistrics (Statistics) thereof over and above such Indices and Statistics of the Government of Canada as the same existed at the date of this my Will; and for such purpose and for the purpose of making such increased monthly payments if necessary as aforesaid, to my said Sister, I will and direct that my Trustees may encroach upon the capital of the residue of my estate from time to time remaining in their hands to obtain such moneys as may be required additional to the income from the said residue.

By subparagraph III (g) provision was made for payment of $200 monthly to Reginald Ansell during the life of

Bertha Mabel Bellingham and while he should live, with authority similar to that in subparagraph (f) for the trustees to increase the amount and make additional payments.

Subparagraph III (h) then provided

(h) Upon the death of my said Sister or in the event that she predeceases me, to divide all the residue of my estate then remaining in the hands of my Trustees, into the following four unequal parts or percentages and to pay, transfer and deliver such parts or percentages as follows:

(1) Fifty percent (50%) of the residue of my estate then remaining in the hands of my Trustees, to be held by my Trustees and kept invested by them as hereinafter directed in respect to the residue of my estate and to pay the income from such fifty percent (50%) in equal quarterly payments so far as it may be practical so to do to my Nephew, Reginald Ansell, if he survives my said Sister, Bertha Mabel Bellingham, and during the term of his natural life. Upon the death of my said Sister and if my said Nephew survives my said Sister, my Trustees shall also provide my said Nephew during his lifetime with a suitable residence free of rent and of expense to him either at 56 Albert Street, Port Dalhousie, or by purchasing or renting for him elsewhere from time to time, a suitable residence, duplex or apartment for his own use during his lifetime free of rent and expense by him, including the upkeep and maintenance of such residence and the grounds thereof, and in such manner and for such rent and with payment of such expenses as aforesaid as my Trustees in their sole and uncontrolled and absolute discretion may determine from time to time thereafter as being reasonably suitable as such residence for my said Nephew. And I further direct that in the event of my Trustees in their absolute discretion, deeming it advisable after the death of my said Sister, that moneys be advanced to my said Nephew, Reginald Ansell, or on his behalf for the purpose of establishing him in any business selected by him solely or in partnership, then my Trustees may in their sole, absolute and uncontrolled discretion, encroach upon the corpus fo (of) the Fifty percent (50%) part of the residue of my estate to the income from which my said Nephew shall become entitled as aforesaid for the purpose of defraying the whole or such part of the cost of establishing my Nephew in such business as my Trustees in their sole, absolute and uncontrolled discretion shall deem advisable. In the event of my said Nephew predeceasing me or predeceasing my said Sister or upon the death of my said Nephew, I direct that this fifty percent (50%) part shall be divided equally between the charities set out in subclause (2), (3) and (4) hereof for the purpose therein set forth.

(2) Twenty-five percent (25%) of the residue of my estate then remaining in the hands of my Trustees, to be paid, transferred and delivered by them to the Religious Hospitallers of St. Joseph of Hotel Dieu of the Roman Catholic Archdiocese of Toronto in Canada, a corporation having its head office at the Hotel Dieu Hospital at 155 Ontario Street, in the City of St. Catharines, County of Lincoln, to be used by such corporation for the purposes of and at and in connection with the said Hotel Dieu Hospital at St. Catharines. I specifically direct that these moneys shall not be used outside of the County of Lincoln for

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any purpose whatsoever and shall be used only for the purposes of or in connection with the said Hotel Dieu Hospital at the said City of St. Catharines.

(3) Twelve and One-Half Percent (12½%) of the residue of my estate then remaining in the hands of my Trustees, to be paid, transferred and delivered by them to the Salvation Army of Canada, provided specifically that the said moneys so paid to the Salvation Army of Canada, shall be used solely for the relief of the poor and for welfare work within the County of Lincoln. I specifically direct that the moneys shall not be used outside of the County of Lincoln for any purpose whatsoever and I further specifically direct that the said moneys shall not be used for the construction of buildings or the making of other capital expenditures, but shall, as herein directed, be used exclusively for the relief of the poor and for welfare work within the County of Lincoln.

(4) Twelve and One-Half Percent (12½%) of the residue of my estate then remaining in the hands of my Trustees, to be paid, transferred and delivered by them to the Lincoln County Humane Society and it is my desire that the moneys be applied particularly to the investigation and prosecution of cases involving cruelty to animals.

Paragraphs 3 to 7, inclusive, of the agreed statement of facts are as follows:

3. The Respondent admits, for the purposes of this appeal only, that the Lincoln County Humane Society, the Salvation Army of Canada and the Religious Hospitallers of St. Joseph of Hotel Dieu of the Roman Catholic Archdiocese of Toronto in Canada are charitable organizations within the meaning of s. 62(1)(*e*) of the *Income Tax Act*, but objects to the relevancy of such admission.

4. In the taxation years 1958, 1959 and 1960 income was earned on the residue of the estate of the deceased as follows:

1958—$25,059.89, of which $15,769 21 was paid to Bertha Mabel Bellingham and Reginald Ansell and the balance of $9,290 68 was retained by the Estate.

1959—$37,921.24, of which $19,316.07 was paid to Bertha Mabel Bellingham and Reginald Ansell and the balance of $18,605.17 was retained by the Estate.

1960—$39,720.75, of which $19,847.94 was paid to Bertha Mabel Bellingham and Reginald Ansell and the balance of $19,872.81 was retained by the Estate.

5. The estate of the deceased, Charles Arthur Ansell, was at all material times an estate within the meaning of s. 63 of the *Income Tax Act*.

6. The amounts referred to in paragraph 4 hereof were retained by the estate and no portion thereof was paid to the organizations referred to in paragraph 3 hereof in any of the years 1958, 1959 or 1960.

7. Following the dismissal of their appeals to the Tax Appeal Board in respect of the assessments for the 1958, 1959 and 1960 taxation years the executors of the estate of the deceased brought a motion in the Supreme Court of Ontario for the opinion, advice and direction of the Court in respect of certain matters arising in the construction of the said Will

Attached hereto and marked respectively as Exhibits ASF-2 and 3 are a true copy of the Notice of Motion and a true copy of the Judgment of the Honourable Mr. Justice Hughes.

The documents referred to in paragraph 7 show that nine questions were submitted for the opinion of the Court of which eight were answered as follows. The second question was dependent on a negative answer to question 1 and was not answered.

Question (1) Does the surplus income of the estate, (over and above the amounts paid by the Executors in each year to Bertha Mabel Bellingham, the sister of the Testator, and up to his death on September 20, 1961, to Reginald Ansell, the nephew of the Testator) vest in the residuary legatees, (the three charitable organizations named in the Will), as of the date of the death of the Testator, November 7, 1957?

Answer: Yes, and doth order and adjudge the same accordingly.

Question (3) Is the whole of the said surplus income payable to the said residuary legatees upon the date of the death of the Testator's sister, Bertha Mabel Belligham, (subject to *The Accumulations Act*); or is 50% of the surplus income, and 50% of "the residue of my estate" payable upon the date of the death of the Testator's nephew, Reginald Ansell (September 20, 1961) to the said residuary legatees?

Answer: The whole of the surplus income, which falls into residue, is payable to the residuary legatees as accumulated for not more than 21 years after the death of the Testator, upon the death of Bertha Mabel Bellingham. It is clear that the opening words of para. III sub-para. (h) of the Will govern all its provisions; and doth order and adjudge the same accordingly.

Question (4) To whom does the said surplus income (and the income therefrom) in the hands of the Executors belong, before such time of payment of it?

Answer: It vests as part of the residue in the residuary legatees from the date of death of Testator subject to defeasance in whole or in part to secure the annuities as provided for in the Will, and doth order and adjudge the same accordingly.

Question (5) Do clause (h) and its subclauses (1), (2), (3) and (4) of paragraph III of the Will empower the Executors to pay all of the said surplus income, and the income therefrom, to the said residuary legatees; or is there an intestacy as to any part, and if so, what part of the said surplus income and the income therefrom?

Answer: Yes. There is no intestacy as to any part of the surplus income and income therefrom until the expiry of the period of limitation on accumulations as provided by *The Accumulations Act,* and doth order and adjudge the same accordingly.

Question (6) Are the powers of encroachment given to the Executors to "encroach upon the capital of the residue of my estate from time to time remaining in their hands to obtain such moneys as may be required additional to the income from the said residue" in clauses (f) and (g) of paragraph III of the said Will, limited to encroachment upon the corpus of the residue?

Answer: No, if by "corpus" is meant the original capital fund less the surplus income which may have augmented it since the death of the Testator, and doth order and adjudge the same accordingly.

Question (7) If question 6 is answered in the negative, have the Executors power to so encroach upon the accumulations of surplus income (and the income therefrom) carried forward from year to year?

Answer: Yes, and doth order and adjudge the same accordingly.

Question (8) Are the provisions authorizing the Executors to utilize "firstly the income from the said residue" in clauses (f) and (g) of paragraph III of the said Will, limited to the income of the particular year in question; or can the Executors thereunder encroach on the accumulated surplus of income (and income therefrom) from previous years?

Answer: Yes, but since the surplus income from previous years has become capitalized the distinction suggested in the question does not exist, and doth order and adjudge the same accordingly.

Question (9) Is it the duty of the Executors under the language of this Will to accumulate the whole of the surplus income from each year (with the income therefrom and interest thereon) until the date of the death of the sister of the Testator, Bertha Mabel Bellingham; or until twenty-one years after the date of the death of the Testator (pursuant to *The Accumulations Act*), whichever date comes earlier; and to then pay it to the said residuary legatees?

Answer: Yes, and doth order and adjudge the same accordingly.

Subsections (1), (2), (3), (4), (6) and (7) of section 63 of the *Income Tax Act* read as follows:

63. (1) In this Act, trust or estate means the trustee or the executor, administrator, heir or other legal representative having ownership or control of the trust or estate property.

(2) A trust or estate shall, for the purposes of this Act, and without affecting the liability of the trustee or legal representative for his own income tax, be deemed to be in respect of the trust or estate property an individual; but where there is more than one trust and

(*a*) substantially all of the property of the various trusts has been received from one person, and

(*b*) the various trusts are conditioned so that the income thereof accrues or will ultimately accrue to the same beneficiary, or group or class of beneficiaries,

such of the trustees as the Minister may designate shall, for the purposes of this Act, be deemed to be in respect of all the trusts an individual whose property is the property of all the trusts and whose income is the income of all the trusts.

(3) No deduction may be made under section 26 or paragraph (*ca*) of subsection (1) of section 27 from the income of a trust or estate.

(4) For the purposes of this Part, there may be deducted in computing the income of a trust or estate for a taxation year such part of the amount that would otherwise be its income for the year as was payable in the year to a beneficiary or other person beneficially interested therein or was included in the income of a beneficiary for the year by virtue of subsection (2) of section 65.

(6) Such part of the amount that would be the income of a trust or estate for a taxation year if no deduction were made under subsection (4) or under regulations made under paragraph (*a*) of subsection (1) of section 11 as was payable in the year to a beneficiary or other person beneficially interested therein shall be included in computing the income of the person to whom it so became payable whether or not it was paid to him in that year and shall not be included in computing his income for a subsequent year in which it was paid.

(7) For the purposes of subsections (4), (4*a*) and (6), an amount shall not be considered to have been payable in a taxation year unless it was paid in that year to the person to whom it was payable or he was entitled in that year to enforce payment thereof.

The scheme of these provisions differs from the corresponding provisions of the *Income War Tax Act* under which a number of cases arose including: *McLeod v. Minister of Customs and Excise*[1], *Royal Trust Company v. Minister of National Revenue*[2], *Holden v. Minister of National Revenue*[3], *Minister of National Revenue v. Trusts and Guarantee Co. Ltd. (Birtwhistle Estate)*[4] and *Burns Estate v. Minister of National Revenue*[5]. In that statute section 11(1) provided for taxation of the beneficiary of a trust in respect of "all income accruing to the credit of the taxpayer whether received by him or not during such taxation period". Section 11(2) then provided that "income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests" should be taxable in the hands of the trustee. There were thus two separate charging sections each charging income of a particular description. The importance of this appears from the result of the *Burns Estate* case where income accumulating in the hands of trustees for the benefit of ascertained beneficiaries was held to be not taxable as income of

[1] [1926] S.C.R. 457.
[2] [1931] S.C.R. 485.
[3] [1933] A.C. 526.
[4] [1940] A.C. 138.
[5] [1950] C.T.C. 393.

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the estate. In the present statute the effect of section 63(2) appears to be to bring initially into the computation of the income of the trust and to charge with tax the whole of the income of the trust property (whether it is to be accumulated or not) and the result which would follow from this is then mitigated by section 63(4) and several other provisions under which deductions may be made of certain portions of the income[1] in computing the income in respect of which the trustee is to be taxed. The provisions of section 63 thus appear to be more comprehensive than the corresponding provisions of the *Income War Tax Act* but the general principle of taxing a trustee in respect of income the ultimate right to which remains uncertain during the taxation year seems to be much the same. Under the provisions of the *Income War Tax Act* in the *Royal Trust* and *Holden* cases income was held to be taxable in the hands of the trustee notwithstanding that a beneficiary, whose right thereto though vested was defeasible during the taxation year, was a non-resident and not subject to taxation under the Act.

Thus in the *Royal Trust* case, Anglin, C.J.C. said at page 489:

> Whether the word "trust" means a person or body holding the property, or distributing the trust estate, or means the property itself, or means the trust upon which such property is held, is quite immaterial in view of what is said above.
>
> Those who are at the present time probable beneficiaries of the trust, or some of them, it is true, reside in the United States. But that fact does not prevent this case coming within subsection 6 of section 3 above referred to, nor render exempt from taxation in the hands of trustees income accumulated on a trust for unascertained beneficiaries or beneficiaries having contingent interests. On the contrary, in our opinion, such income accumulating in trust is distinctly a subject of taxation under the subsection referred to, regardless of the residence, if ascertainable, or probable beneficiaries, whose interest is contingent during the taxation period.

This opinion was re-affirmed in the *Holden* case where Lord Tomlin said at page 531:

> Further, their Lordships are satisfied that upon the true construction of the taxing Acts, s. 11, sub-s. 2, fixes the trustee of the accumulating income with liability for the tax, and is a true charging section, and that the position of the section in Part IV under the heading to which reference has been made, does not justify a departure from what in their

[1] *Vide Minister of National Revenue v. Trans Canada Investment Corporation [1956] S.C.R. 49.*

Lordships' view is the natural meaning of the words. It follows from this that the Supreme Court of Canada were, in their Lordships' judgment, correct in treating the place of residence of the testator's children as an irrelevant circumstance.

In the *Birtwhistle Trust* and *Burns Estate* cases claims for exemption of income from taxation in the hands of the trustee on the ground that it was income of a charitable organization failed, in the *Birtwhistle Trust* case on the ground that the beneficiary in question was not a charitable institution within the meaning of the statutory provision exempting the income of such institution and in the *Burns Estate* case on the ground that under the terms of the will the right of the charitable institutions in the money in question was not of an income nature. Thus Lord Greene said at page 397:

With regard to the argument that the last five added appellants are "charitable institutions" entitled to claim exemption the learned Deputy Judge said: "But holding as I have done that no part of the income for any of the relevant years will at any time reach the beneficiaries as income, it is quite unnecessary for me to determine this point and I make no finding in regard thereto."

In the Supreme Court this claim to exemption was held to fail for the same reason although in the opinion of the majority the Lacombe Home and the Salvation Army were religious or charitable institutions. This latter expression of opinion was, however, not necessary to the decision. Their Lordships, while not desiring to throw any doubt on its correctness, prefer to base their decision on the view taken both by the learned Deputy Judge and by all the members of the Supreme Court that the income was not income of any of the five added appellants. The executors are the recipients of the income. It is their duty to accumulate it and ultimately to hand over the accumulation to the Royal Trust Co. That company will receive these accumulations not as income but as a capital fund which will always remain capital in its hands. All that it will disburse, all that the five bodies will receive, will be the income of the capital fund. It is true that the company and the five bodies are entitled to enforce the obligations in respect of the income which the will imposes upon the executors and the five bodies will also be entitled to enforce the obligations in respect of the administration of the accumulated fund and the distribution of its income which are imposed on the company. But this does not make the income received by the executors or the capital fund to be received by the Royal Trust Co. in any sense or at any time the income of those bodies. This being in their Lordships' view a conclusive answer to the whole of the claim based on cl. (e) of s. 4(1) they prefer to express no opinion on the question whether any of the five bodies are institutions within the meaning of that clause.

I turn now to the submissions put forward on behalf of the appellant. In the first four of these the fact that the three organizations referred to in the will, which for convenience I shall refer to as the "charities" were charitable organizations within the meaning of section 62(1)(*e*) is

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irrelevant the submissions being broad enough to apply even if their rights had belonged to any taxpayer.

The first of these was that though the amounts in question were not paid to the charities in the taxation years and were not recoverable by them from the appellant in those years, under section 16(2) of the Act the amounts were deemed to have been paid to the charities in the years. This subsection reads as follows:

> 16. (2) For the purposes of this Part, a payment or transfer in a taxation year of money, rights or things made to the taxpayer or some other person for the benefit of the taxpayer and other persons jointly or a profit made by the taxpayer and other persons jointly in a taxation year shall be deemed to have been received by the taxpayer in the year to the extent of his interest therein notwithstanding that there was no distribution or division thereof in that year.

The appellant's submission was that the payments of income to the executors were, to the extent of the surplus over the amounts required for the life beneficiaries, payments to another person, that is to say, the executors for the benefit of the three charities jointly, that that is the effect of the will as interpreted by the Supreme Court of Ontario and that accordingly each of the three charities is deemed to have received its share in the year of payment to the executors notwithstanding that there was no distribution of such surplus amounts to any of the charities in that year, that the share of each of them therein must therefore be included in computing its income for the year—whether taxable or not—and was deductible under subsection (4) of section 63 in computing the income of the trustee for the taxation year.

I do not read s. 16(2) as having the effect for which the appellant contends. First I do not think it follows that because an amount may be deemed under s. 16(2) to have been "received" by a beneficiary it must also be deemed to have been "paid" to the beneficiary within the meaning of sections 63(4) and (7). Section 16(2) deals with factual situations and is not a section defining statutory expressions. On the other hand the meaning of "payable" in section 63(4) is restricted by section 63(7) to referring to amounts which were "paid" to a beneficiary in the year and to amounts of which the beneficiary was entitled in the year to enforce payment. Here the word "paid" appears to me to refer only to what has been paid in fact since what

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has not been paid in fact is dealt with by the reference to amounts of which the beneficiary was entitled in the year to enforce payment. I do not think therefore that section 16(2) can apply to require that an amount be treated as having been "paid" within the meaning of section 63(7) when in fact it was not paid. But be that as it may it appears to me that the whole scope of section 16(2) is indicated by the words "notwithstanding that there was no distribution or division thereof in that year". The amount referred to is to be deemed to have been received by the taxpayer notwithstanding the lack of a payment or distribution of it to him. But that is as far as the subsection goes. It does not say that an amount received by a trustee or other person which for any other reason would not be included in computing the income of the taxpayer beneficiary for the taxation year is to be deemed to have been "received" by the taxpayer. Nor does it say that the amount is deemed to have been "paid" by the trustee to the beneficiary in the taxation year. The subsection is one which extends the general concept of income taxable under the Act[1] and it should be given no more extended a meaning than the words plainly call for. I am of the opinion therefore that an amount which was not only not actually received by the taxpayer in the year but was not recoverable by him in the year because his right to it though vested was still imperfect in that it was still defeasible and which on that account cannot be regarded as his income in the ordinary sense of the term cannot properly be included in the computation of the taxpayer's income for the purposes of Part 1 of the Act merely because of the provision of section 16(2). The argument based on the application of section 16(2) therefore fails.

The second position taken by the appellant was that the surplus income of the estate in each year was a benefit to the charities within the meaning of section 65(1) and should therefore be included in computing the income of

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[1] *Vide* Abbott J. in *McArdle Estate v. Minister of National Revenue* [1965] S.C.R. 723 at page 726:

> The general rule under the *Income Tax Act* is that tax is payable on income actually *received* by the taxpayer during a taxation period. There are exceptions to this general rule . . .

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the charities and be deducted in computing the income of the appellant. Section 65 provides:

65. (1) The value of all benefits (other than a distribution or payment of capital) to a taxpayer during a taxation year from or under a trust, estate, contract, arrangement or power of appointment, irrespective of when made or created, shall, subject to subsection (2), be included in computing his income for the year.

(2) Such part of an amount paid by a trust or estate out of income of the trust or estate for the upkeep, maintenance or taxes of or in respect of property that, under the terms of the trust or will, is required to be maintained for the use of a tenant for life or a beneficiary as is reasonable in the circumstances shall be included in computing the income of the tenant for life or other beneficiary from the trust or estate for the taxation year for which it was paid.

In my opinion this submission also fails.

Section 65(1) is a provision of broad application the effect of which appears to me to be to require that a beneficiary bring into the computation of his income all benefits to him arising not only under a trust, but under a contract or arrangement or power of appointment as well, (other than a distribution of the capital of the trust etc.) whether or not from his point of view the benefits receivable by him could be regarded as being of an income as opposed to a capital nature. For example but for this provision a payment of a legacy to be paid out of income of an estate might be regarded as capital in the hands of the beneficiary while the money from which it was paid would have been income in the hands of the trustee. To some extent the provision of this section may overlap that of section 63(6) but their fields of operation are not co-extensive.

It was urged in support of the appellant's submission that under equitable principles of constructive receipt the amounts here in question were constructively received by the trustee for the charities but even accepting that the amounts were received by the trustees for the benefit of beneficiaries who, save for the possible exercise by the trustees of their power of encroachment thereon, were the charities, I do not see how the appellant's position is thereby supported. What is in issue in the present case is the liability of the trustees for tax under section 63 in respect of the surplus income of the estate property. To the issue whether these amounts of surplus income are to be included

in computing the income of the trustee the fact that the same amounts might, under some other provision, be included in computing the income of some person other than the trustee appears to me to be irrelevant except insofar as the statute otherwise provides. Here the statute does make provision in section 63(4) for amounts that might otherwise be included in the income of both trustee and beneficiary by permitting a deduction of amounts from the income of the trustee but while section 63(4) specifically provides that amounts attributed to beneficiaries under section 65(2) may be deducted it says nothing of deducting amounts which are required by section 65(1) to be included in computing the income of beneficiaries beyond what is referred to by the expression "payable in the year" which in turn is restricted by section 63(7) and save for section 63(10), which is inapplicable, there is, so far as I am aware, no other provision of the *Income Tax Act* authorizing a deduction from what is otherwise the income of a trustee under section 63 on the ground that the amount is required by section 65 to be included in computing the income of a beneficiary. This submission, as well, must therefore be rejected.

The third position taken by the appellant was that the charities were "entitled in the year to enforce payment" of the amounts in question within the meaning of that expression in section 63(7) and that the amounts were therefore deductible under section 63(4). The argument was that having a vested interest in the amounts the charities were the legal owners of the money and that at any time in the year they were entitled to enforce the due performance of the trust and for that purpose, if necessary, to restrain the trustee from paying the money to anyone in breach of the trust and that such a right was sufficient to bring the positions of the charities vis-à-vis the amounts in question within the meaning of "entitled in the year to enforce payment thereof" in section 63(7). The precise point was put very neatly by counsel when in reply he said that there is a difference between being "entitled in a year to enforce payment thereof" and being entitled to enforce payment thereof within that year and that if the words "in that

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year" came at the end of section 63(7) he would agree that the words would not fit the present situation.

In my view whatever the rights of the charities were with respect to enforcing the due performance of the trust they did not include a right in the year of the kind required. No doubt a right to prevent payment to anyone else may be indirectly a way of enforcing payment ultimately to the charities but such a meaning seems out of context in a section which refers first to actual payment in the year and then to a right in the year to enforce payment. In any event, however, section 63(7) as I read it is merely restrictive and the expression "entitled in the year to enforce payment" in that subsection does not amplify the ordinary meaning of "payable in the year" in section 63(4). It follows that the submission cannot prevail.

The next point taken was that the Court should hold that the power of the executors to encroach upon the accumulations of surplus income (which, subject to such power of encroachment belonged to the "charities" at all material times) was never exercised in any of the taxation years in question as it was unnecessary for them to do so up to the dates of the deaths of the life beneficiaries, that the trustees therefore held such surplus income in the years in question only for the benefit of and for eventual distribution to the "charities" and that the Court is entitled to deal with this appeal on the basis of these facts even though the deaths occurred after the taxation years in question. In my opinion the relevant time is the taxation year and the application of the *Income Tax Act* in respect of the income in question must be determined by the facts as they existed in that taxation year.[1] There is, in my opinion, no room for taking into account facts which occurred after the end of the taxation period as affecting the application of the statute to the facts as they existed.

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[1] *Vide* Duff J. (as he then was) in *McLeod v. Minister of Customs and Excise* [*1926*] *S.C.R. 457 at 460:*

> The fund, in other words, is to accumulate for the benefit of persons who, *for the relevant period* are not ascertained, and such fund is, within the ordinary meaning of the word, it seems abundantly clear to me, a fund held for the benefit of "unascertained persons". (Italics added).

The remaining submission, the pleading of which was amplified by an amendment for which leave was given in the course of the argument, was that since the amounts in question were monies which belonged to the charities they were exempt from taxation under section 62(1)(*e*). This section provides:

> 62. (1) No tax is payable under this Part upon the taxable income of a person for a period when that person was
>
> . . .
>
> (*e*) a charitable organization, whether or not incorporated, all the resources of which were devoted to charitable activities carried on by the organization itself and 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;

As the charities are admittedly charitable organizations within the meaning of this provision the issue is whether the exemption provided by this subsection applies to amounts received by the trustee upon trust for them, subject to the power of encroachment, when the application of section 63 to the trustee in respect of the income of the trust property is being considered.

The issue is similar to issues which were raised in the *Birtwhistle Trust* and *Burns Estate* cases. In the *Birtwhistle Trust* case the taxpayer's submission failed because the beneficiary did not qualify as a charitable institution within the meaning of the exempting provision. In the *Burns Estate* case the submission failed because under the will what the charitable institutions would ultimately be entitled to was not the income in question but the income from a trust fund of which the income in question would constitute a part of the capital. Here that particular feature as well is not present but it appears to me that at the relevant times, that is to say, in the taxation years in question, the right of the charities to the money lacked an essential quality of income of the charities in that the charities did not receive the money in the year, their right to it though vested was a right to receive it only in the future, "upon the death of" the testator's sister, and their right to receive it in the future was subject to defeasance. Their right to receive it was also a right to receive it as

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capital[1] and there is no provision of the Act which would require them to treat the money here in question as income either in a year when, though received by the trustee, it was not receivable by them or in any later year when it became payable by the trustee to them. The right of the charities to the amounts in question in the relevant taxation years accordingly was not such that it could fall within the wording of section 62(1) and be thereby exempted from taxation as being "taxable income" of the charities for those taxation years.

In the result therefore the appeal fails and it will be dismissed with costs.

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[1] See the answer of the Supreme Court of Ontario to Question 8, page 8 supra. A point that seems to have been precisely similar to that under consideration appears to have been raised in the *Burns Estate* case but was not decided. Cameron D.J. (as he then was) said, [1946] Ex. C.R. 229 at page 241:

> The question of vesting or non-vesting of the income in the five named organizations is in my view of no importance in this case because of my finding that the income in the years 1938 to 1941 was not income of a charitable institution in any of those years. Upon that question it is therefore quite unnecessary to pass any opinion.

Reference may be made to the case of *Inland Revenue Commissioners v. Blackwell* where Rowlatt J. said at p. 362:

> The first point which Mr. Latter makes is that it does not matter whether the interest which the eldest son takes under the will is vested or contingent, because, even assuming that this specific bequest is vested in the eldest son, just as the shares in the residue are vested in all the children under the other part of the will, still, inasmuch as there is a trust to accumulate a fund during the infancy of the eldest son, subject to a power to the trustees to apply such sum as they think proper for his maintenance, the part of the income which is accumulated is not the income of the minor. It is a very important point, but I have come to the conclusion that he is right. It is perfectly true to say, as Mr. Harman did, that in a case of that kind the income must come to the infant in the end if the interest which he takes is a vested interest: but in my judgment it will not come to him as income; it will come to him in the future in the form of capital. The trustees are directed to accumulate the surplus income, and they are bound to comply with that direction and to accumulate it. It is income which is held in trust for him in the sense that he will ultimately receive it, but it is not in trust for him in the sense that the trustees have to pay the income to him year by year while he is an infant. All the minor can get while he is an infant is such amount as the trustees allow for his maintenance. I think that view of the case is supported by what was said in *Inland Revenue Commissioners v. Wemyss* (1924) S.C. 284; 61 S.L.R. 262. In my judgment it is fallacious to look into the future and say: This fund that is being accumulated is for his benefit and he will get it all. What you have to do is to ask, whether the surplus income that is accumulated is the annual profits and gains of the year of this infant now? I do not think it is.

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