1957
Apr. 15 & 16
1958
May 8

BETWEEN:

OXFORD MOTORS LIMITED .... APPELLANT.

AND

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

Revenue—Income—Income Tax—The Income Tax Act, R.S.C. 1952, c. 148, ss. 2, 3 and 4—Rebate—Capital or income—Forgiveness of debt—Allowance on sale of cars is income—Appeal dismissed.

Appellant company, an importer and distributor of British motor cars, purchased from the English manufacturer, being in financial difficulties and having a large number of the cars on hand in Vancouver, B.C., was granted a rebate by the manufacturer of $250 on each car sold provided that credit for that amount would be allowed only on the manufacturer being advised that payment by appellant was made on account of indebtedness to it in an amount of the C. I. F. value of the cars on which a rebate was claimed.

Appellant was assessed for income tax for the year 1952 for the total value of the cars sold in that year which assessment was confirmed by respondent and from which appellant now appeals to this Court alleging that the allowance of $250 per car was a capital increment arising from a genuine forgiveness of debt.

Held: That the assessment of appellant for income tax for the year 1952 is confirmed and the appeal dismissed since the unitary allowance of $250, added to each separate sale operates as a broadened margin of possible profits and such gain when earned would be entered into the appellant's Profit and Loss balance account and be gain by way of income to appellant.

APPEAL under *The Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Dumoulin at Vancouver.

D. N. Hossie, Q.C. and *A. B. Ferris* for appellant.

F. J. Cross and *G. R. Schmitt* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

DUMOULIN J. now (May 8, 1958) delivered the following judgment:

This is an appeal from a decision of the Minister of National Revenue, dated October 5, 1954, confirming the previous income tax assessment of the above taxpayer, Oxford Motors Limited, for the year 1952.

The case was heard at Vancouver, B.C., on April 15 and 16, 1957.

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I would immediately note that matters concerning Plimley Automobile Company Ltd., will be dealt with as a distinct issue bearing record No. 98065, one reference only will be made to it presently.

At all times material, Oxford Motors Limited was an importer and distributor of Morris (British) motor cars purchased from the overseas manufacturers, Nuffield Exports Limited (hereinafter referred to as Nuffield), of Cowley, Oxford, England.

On October 1, 1951, appellant and Plimley Automobile, thereafter conducting their respective business jointly, entered upon a partnership agreement (exhibit 1), especially with a view to reduce their operational costs. Section 6 of this covenant reads:

6. The net profits of the business shall be divided between the partners equally and they shall, in like proportion, bear all losses including loss of capital.

The partnership's commercial name and style was: British Car Centre.

Prior to September 30, 1951, Oxford Motors had on hand something like 3,749 Morris cars bought from Nuffield. Since the said date coincided with the end of appellant's fiscal year, its balance-sheet revealed an indebtedness of £513,295:18:5, to the vendors, or the Canadian monetary equivalent of $1,540,789.26.

It is said that official credit restrictions and controls imposed periodically from October 25, 1950, on (see exhibits 47, 48, 49, 51), seriously hampered the automobile trade with the unfortunate result that appellant became overstocked, carrying a heavy load of unsold cars.

Insistence on maturing payments of the overdue instalments would have forced Oxford Motors into bankruptcy, and ensured a meagre measure indeed of satisfaction to Nuffield, who appraised this situation in quite a businesslike manner.

In September, 1951, two representatives of the creditor firm visited Vancouver and after investigating the appellant's financial position, offered, as a way out of this quandary, very helpful terms, clearly outlined in para. (b),

hereunder, of exhibit A, an extract from minutes of Morris Motors Ltd. (Nuffield), of a meeting held September 7, 1951:

(b) To give Canadian distributors a *rebate* (italics are mine) of $250 each on the vehicles which were to remain in Canada, estimated at a total of 3,749 at the end of August. This *rebate* would be effective from September 1st, 1951, *and would not be passed on to customers.*

This proposal, upon acceptance by Nuffield's Board of Directors, was then notified to Oxford Motors Ltd., in a letter (exhibit 20) dated September 18, 1951, essential excerpts of which are:

With reference to the *rebate scheme* already explained to you by Mr. Ian Hay, I have now received cable instructions from England how this will operate and this is as follows:

1. Returns to be made fortnightly, subject at our option to periodical check by local Nuffield representative.
2. Model, chassis number, engine number, date of sale and name of purchaser to be advised to the undersigned.
3. *Credit will be allowed only on receipt of advice from our bankers of payment by distributor of bills corresponding in amount to at least C.I.F. value of cars on which rebate claimed.*
4. *All rebates will be applied exclusively towards liquidation of further outstanding bills.*

. . .

W. S. Kennah,
Representative,
Nuffield Exports Limited.

The terms alluded to are expressed as follows in s. 12 of appellant's Statement of Facts:

12. As a matter of procedure it was arranged that credit be given the Appellant on its unpaid accepted drafts then held by Nuffield as payments were from time to time made by the Appellant. At the beginning credit was given against payments made from proceeds of sales of Morris cars then on hand, *but after a short period credit was given against payments regardless of source.*

This last assertion, which I italicized, refers to exhibit 40, a written communication of February 11, 1952, from Nuffield to H. Plimley, President of Oxford Motors, intimating a new policy or rather the discontinuance of the rebate scheme as per March 31, 1952.

In part, this document entitled "Rebates" reads:

When the rebate arrangement now in operation was originally announced it was made clear that it could be withdrawn at any time.

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To this inference of a sudden cessation of rebate grants, at Nuffield's option, Mr. Horace Plimley took exception in the course of his evidence.

Reverting to exhibit 40, it goes on to say:

> The basis of the arrangement was that you would qualify for a *rebate* of $250 for each Morris vehicle *sold retail,* either by you or one of your Dealers, from stocks existing at the time of the original announcement, to be credited to you upon receipt by us of a remittance corresponding in value to that of the c.i.f. price of the car sold, and that such credit would be applied by us in retiring other outstanding bills.
>
> It is felt that the time has now come when this arrangement should be reviewed, and we therefore give you notice that we intend to discontinue the granting of rebates after March 31, 1952. . . .
>
> In order to make the arrangement more flexible *during the remainder of its term of operation* we propose
>
> (1) to dissociate the granting of the rebate from actual sales. Between now and the end of March you will be allowed to qualify for the rebate *upon payment of drafts, regardless of whether the funds used for such purposes arise from sales or not.*

Nuffield's second departure, then, obtained merely during the intervening period: February 11 to March 31, 1952, when the arangement of September, 1951, definitely lapsed.

Dealing, as we are, with the appellant's income tax assessment for 1952, it is essential to ascertain in which year the disputed transactions, evidenced by payment of credit bearing drafts, arose.

Mr. Horace Plimley, President of Oxford Motors Ltd., testified that: "On September 30, 1951, appellant owed drafts in the total sum of $1,540,789.26, for debts all incurred in the year ending September 30, 1951. These drafts were drawn by Nuffield Exports for cars delivered to Oxford Motors".

"In the fiscal year of 1952, by Sept. 30," adds this witness, "that indebtedness had subsided to $198,216.30; such reduction resulting from the 25% abatement plan. Credits of $483,185.91, as per Sept. 30, 1952, represented the aggregate car allowances of $250.00 per ($1,000.00) unit."

Mr. Plimley also tells us that: "No new cars had been ordered from Nuffield in 1952", and "all these debits or charges were contracted in 1951, carried over as an outstanding liability to the year 1952, amounting to $1,540,789.26, the final payment made, December 9, 1952, in the fiscal year closing September 30, 1953". Exhibits 53, D and E, were quoted being respectively (53): a breakdown

of the decrease of sales transacted in 1951 by Oxford Motors Ltd., compared with sales for 1950; (D): Financial statement of Oxford Motors Ltd., as at September 30, 1951, and British Car Centre's statement for the fiscal year ending September 30, 1952; (E): Appellant's balance-sheet for fiscal period ending September 30, 1952.

This unitary discount of $250 per car sold was not, even partially, passed on to customers since, in Mr. Horace Plimley's words: " I didn't care to reduce the selling price of the motor cars on hand, because the company needed all the money it could get hold of". Nonetheless, the rebate was extended to some of appellant's dealers, a fact, or more accurately still, a factor hardly consistent with a fixed and static forgiveness of debt, in nowise conditioned by the number of sales, as the claimant would have it appear.

The witness, whose statement on this score I carefully noted, specified that: "The company handed down some of this rebate to its dealers. We instituted our own rebate scheme, subject to cancellation at any time, and which varied from $50 to $300. In many cases nothing was allowed to dealers. Our normal percentage of profit for selling a car at list price would mean adding twenty-five per cent (25%) to cost price and passing over eighteen per cent (18%) of that to our dealers retaining seven per cent (7%) for our own profit."

A forgiveness of debt, it would seem, is not usually portioned out in this way.

Regarding the basic nature of the September 1951 deal, Mr. H. J. Jenkins, Nuffield's Commercial Manager, examined on a Commission, at Oxford, England, on the eighth day of October, 1956, does not deny what we already know. This bulky report was gone through in Court; some few quotations will suffice. Mr. R. V. Cusack, for appellant:

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126 Q. . . . What steps, if any, did Nuffield Exports take to assist Oxford Motors to continue the sales of Motor cars?

A. In the first place we authorized them to take whatever steps they considered necessary either to reduce the selling price of cars or to make it possible for them to give larger allowances for tradings [corrected to trade-ins].

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129 Q. I have mentioned, perhaps wrongly, the figure of 1,000 dollars. Was the 250 dollars related in any way to payment in thousands?

A. Very roughly it was about 25 per cent of the total, the average value of a car being about 1,000 dollars.

130 Q. Assuming that credit of 250 dollars was given on a thousand dollars, that would leave 750 actually to be paid over. Is that right?

A. Speaking in estimated figures, yes.

On Mr. Eaton's cross-examination, for the respondent:

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(in fine) 203 Q. What I would like to clarify is this. Would you consider that reduction in the total indebtedness as having taken place at the time when Nuffields received the rebate claim forms or at the time Nuffields issued the credit notes?

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(top) A. *Not until they issued the credit note. There would be nothing on the books until that time.* (Italics are mine).

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308 Q. But it was a condition of the allowance of the credit that Oxford Motors established to the satisfaction of Nuffield that cars in respect of which rebates were claimed had actually been sold?

A. That was originally the arrangement.

At this point may be given the last relevant facts alleged by appellant who, in s. 17, complains that the respondent, on April 28, 1953, levied a tax in the sum of $5,275.67 "in respect of the Appellant's income for the 1952 taxation year", since it is claimed "the Appellant incorrectly reported its 1952 taxable income as being $10,469.42", in lieu of an operational loss, in that year, of $230,856.02, according to s. 19.

Section 18 of the Statement of Facts traces this error to the British Car Centre partnership, Oxford Motors Ltd. and Plimley Automobile Co., each crediting to itself one-half, viz., $241,592.96 of the over-all discounts of $483,185.91 obtained during 1952.

The conclusion reached and the point of law relied upon are made sufficiently clear in s. 3 of Part B hereunder partly reproduced:

3. The assessment is illegal, incorrect, contrary to law and contrary to Sections 3 and 4 of the Income Tax Act in that a capital gain in the amount of $241,592.96 realized by the Appellant in its 1952 taxation year as a result of a forgiveness of part of a debt by a creditor has been improperly included in the income of the Appellant for that year, . . .

Quite naturally, although not decisively, respondent, after a denial of its opponent's pleadings on the law, stresses that Oxford Motors Ltd., was taxed on the strength of its own returns and, at all events, conformably to ss. 2, 3 and 4 of the Act.

The question then to be decided is whether or not this allowance of $250 for each and every auto sold constituted a capital increment arising from a genuine forgiveness of debt. No pay of the maturing drafts, no allowance of $250, had conceded Mr. Horace Plimley, who was succeeded in the witness box by Mr. Lionel Kent, a Vancouver chartered accountant. At Plimley's request, Mr. Kent went over the company's financial statements and records for the material periods. Of this expert and rather concise evidence, the gist is that "the abatement would not give rise to a trading item included in the firm's trading account, but should be listed in the company's surplus account and not on its profit and loss trading sheet", with a consequent opinion that it must be considered a capital gain.

Commenting upon exhibit E (page B, Oxford's Profit and Loss balance-sheet as per September 30, 1952), Mr. Kent declared he considered "the figures of sales incorrect, because they do not exactly show the proper relation between the abatement and the cost of sales by Nuffield; again they fail to establish a correct relation between that reduction to Oxford Motors and its own scheme passed on to its individual dealers".

Now, I lay no claim to any particular training or lore in scientific accountancy, but even so, I feel strongly impelled to hold this latter assertion completely alien to the subject-matter.

Lastly, and on cross-examination, the witness agreed that "if this additional gain (the $250 discount per unit) was earned in the course of selling those cars, then it would become a trading gain".

No technical definitions of such current expressions as "forgiveness of debt" or "rebate" have been penned, explanatory notions only are available. Yet an important distinction, implying contradictory effects, differentiates the one from the other. As mentioned above, forgiving a debt rests on some definitely ascertained result operating *nunc pro tunc,* independently of posterior actuating terms.

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Usually, conditions conducive to a release are antecedent rather than subsequent.

In the Oxford Shorter English Dictionary, V° Rebate, we read:

A reduction from a sum of money to be paid, a discount; also a repayment.

The initial part of this sentence could equally qualify writing off a debt; Black's Law Dictionary affords, it would seem, a more germane suggestion of this word's ordinary meaning:

Rebate . . . A deduction or drawback from a stipulated payment, charge, or rate, (as, a rate for the transportation of freight by a railroad,) *not taken out in advance of payment, but handed back to the payer after he has paid the full stipulated sum.*

A closer approach still to the question at bar may be had in Halsbury's Laws of England, V° Rebate, vol. XVII, p. 148, No. 307.

Whilst in one sense it is not accurate to describe a rebate or allowance off the price of goods or services as a trade receipt, *yet inasmuch as it affects the outgoings payable in respect of goods or services, and thus increases trade profits, it is a proper item to be taken into account in arriving at a balance of profit.* In determining whether or not a rebate allowed is an item affecting profit *the question is, Does the rebate affect an item properly included as an expense in a trading account? If so, the rebate is itself an item on a trading or income account . . .*

The chartered accountant, Mr. Kent, it will be remembered, conceded that "if the gain was earned in the course of selling the cars (in the affirmative, *vide* Plimley's and J. H. Jenkins' testimonies; also exhibits 20 and 40, *inter alia*), then such profit would constitute a trading gain".

A cogent application of a rebate as a trade receipt appears in re *Westcombe v. Hadnock Quarries, Ltd.*[1]

In this case, certain agreements between a railroad company and Hadnock Quarries Ltd. "provided for the construction of siding accommodation at the quarries. The cost of construction was borne by the firm, and the Railway Company agreed to allow to Hadnock Quarries at half-yearly intervals . . . sums equal to 10 per cent of the Railway Company's share of the receipts in respect of traffic conveyed to or from the siding". Rowlatt, J. wrote ". . . it (the 10% discount) is a benefit on revenue account. If in the course of their trading they send some goods and the Great Western Railway Company receive £50 as freight,

[1] (1929-32) 16 R.T.C. 137 at 142-143.

where it passes over their system, on those goods, then the quarry company get £5 given to them, and that diminishes the freight which they have paid to the Railway Company. It is a distinctly revenue matter. If they do not do the annual trade, which is of course what earns the revenue, they do not get the allowance. If they do the trade, they do get the allowance ton by ton, and that, I think, decides that matter in favour of the Crown. . . . that is to say, he (referring to *Jones v. Commissioners of Inland Revenue*) took something which rose or fell with the chances of the business. When a man (or a firm) does that he takes an income; it is in the nature of income, and on that ground I decide the case."

As regards writing off a debt, I would simply refer the parties to the *Mexican Petroleum*[1] and *Geo. T. Davie*[2] cases, wherein the dividing mark between a rebate and a forgiveness is very aptly drawn.

My understanding then of what actually occurred here is that the unitary allowance of $250, tacked on to each separate sale, operates as a broadened margin of possible profits. And such gains, when earned, would of necessity be written into the company's Profit and Loss balance account, and in due course allotted as dividends to shareholders. I must consequently find this assessment to have been levied in accordance with the provisions and requirement of the Act.

Finally, those excuses, tentatively alleged in the last seven lines of respondent's s. 17, did not meet with any supporting evidence.

For the reasons above, this appeal is dismissed, the decision of the Court being that the assessment of appellant's income for taxation year 1952, was properly made in keeping with ss. 3 and 4 of the *Income Tax Act*. The respondent is entitled to be paid his costs after taxation.

Judgment accordingly.

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[1] (1929-32) 16 R.T.C. 587.
[2] [1954] Ex. C.R. 280.