BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

WILLIAM J. RYAN ..... RESPONDENT.

1964
Sept. 14, 15
1965
Jan. 22

Revenue—Income—Income tax—Profit-making scheme—Time when the four year limitation period for reassessment commences to run—Taxpayer unable to specify nature of payments received—Income Tax Act, R.S.C. 1952, c. 148, ss. 46(4)(b) and 139(1)(e).

The appellant, a life insurance agent in Toronto, Ontario, has been engaged consistently in mining stock ventures as far back as 1925 and down to the years 1955 and 1956, the years for which the respondent's income tax has been reassessed by the appellant, by adding to his taxable income for the two years a total of $50,017.16 received by the respondent from one Bernard E. Smith in one payment on May 5, 1955 and two payments in February 1956.

The respondent was in 1953 a director of Chimo Gold Mines Limited, from the treasury of which he was allotted 90,000 vendors' shares, as a member of the promoters' group In 1954 the respondent was authorized to negotiate the disposal of 1,000,000 shares of Black Bay Uranium Mines Limited, a subsidiary of Chimo Gold Mines Limited, which he did by selling them at $1.00 per share to Bernard E. Smith, a wealthy New York investor, alleging that as a part of the transaction he was required to agree to purchase 10,000 of the shares at $1 00 per share. The respondent was not a member of the syndicate that managed the affairs of Black Bay Uranium Mines Limited and there was no evidence that the respondent ever paid for any shares in that company.

In his Reply to the Notice of Appeal the respondent alleged that the payments he received from Bernard E. Smith constituted "a capital gain being the difference between the agreed purchase price and the price for which the 10,000 shares must have been resold or otherwise disposed of by the said Bernard E. Smith and associates.". On his examination for discovery the respondent said that he assumed the sums were payment for many favours he had done for Smith in the past When the cheques were produced at trial, the respondent said he never was given any reason for obtaining them. Bernard E. Smith died in May 1961, more than three years after the respondent had notice of reassessment, yet he made no effort to determine from Smith before his death why the payments were made.

Held: That the payments were manifestly something else than gifts a permissible deduction enhanced by the fact that each of the three payments is for an odd amount.

2 That there is little doubt that the amount of $50,017 16 received by the respondent in 1955 and 1956 resulted from a profit-making scheme of a promotional kind.

3. That the time limit of four years for reassessing the respondent's income tax did not start to run in this case until the day of receipt of each of the three cheques in question.

4. That the appeal is allowed.

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APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Dumoulin at Toronto.

W. Z. Estey, Q.C. and *M. A. Mogan* for appellant.

J. J. Urie, Q.C. for respondent.

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

DUMOULIN J. now (January 22, 1965) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board, dated February 20, 1961, with respect to income tax assessments for the respondent's taxation years 1955 and 1956[1].

What would seem, at first reading, an involved affair, can be greatly simplified when subjected to careful consideration.

William J. Ryan, the respondent and cross-appellant, although pursuing the business of a life insurance agent in the city of Toronto, consistently engaged in mining stock ventures so far back as 1925 and down to the material years, 1955-1956.

He was, in 1953, a director of a local mining company, Chimo Gold Mines Limited, from whose treasury he received 90,000 "vendors' shares", according to his own expression, as a member of the promoters' group. (cf. exhibits A-3 and A-6, pp. 1 and 2).

Those shares, allotted to Ryan on April 14, 1953, were immediately put in escrow, and thereafter gradually released in blocks of varying quantities, from February 18, 1954, to December 29, 1955, when a balance of 24,660 was discharged.

Chimo Gold Mines Ltd., sometime in 1954, floated on the mining market a subsidiary under the name and style of Black Bay Uranium Mines Limited, the parent body retaining 2,000,000 shares.

Ryan was authorized to negotiate the disposal of one million shares of this issue, a task he successfully achieved, in the fall of 1954, when, pursuant to his endeavours, a wealthy New York investor, one Bernard E. Smith, acquired that large lot of stock at a price of $1.00 a unit.

[1] (1956) 26 Tax A.B.C. 373.

In his evidence, W. J. Ryan said that Smith's son, then present, insisted he should, as a token of good faith, buy a ten thousand slice of this million shares at the stipulated price of one dollar apiece, a request to which the respondent assented.

An underwriters' syndicate, comprising the brokerage firm of Draper-Dobie, Harry William Knight, Frederick Joseph Crawford, these two Toronto brokers, and the New York financier, Bernard E. Smith, attended to the management and speculative destinies of Black Bay Uranium; Smith holding, personally, a 50% overall interest.

Sufficient evidence, that of Ryan himself, unhesitatingly corroborated by Messrs. H. W. Knight and F. J. Crawford, eliminates the respondent from any membership in that syndicate.

We now reach the start of the several complexities requiring solutions.

To begin with, the 10,000 shares of Black Bay Uranium, above mentioned, supposedly bought by W. J. Ryan at Smith Junior's urging, were not paid for by the former, who never had to comply with this obligation.

Under such circumstances, it does seem odd that the respondent became the recipient of a cheque, dated May 5, 1955, in a sum of $11,581.12 (cf. ex. R-5, p. 2, distribution of March 15, 1955), and of two others on February 8 and 9, 1956, respectively for amounts of $25,377.70 (viz. R-5, p. 6) and $13,058.34, this last also admitted by Ryan but untraced.

The sum total of what, so far, bears all the characteristics of a triple windfall, is $50,017.16.

Needless to say, the income tax people fervently hoped that the fortunate beneficiary of such amounts would oblige with the requisite explanations, the more so since his tax returns for the pertinent years omitted all allusion to this sudden flow of wealth.

As that hope went unsatisfied, the Minister of National Revenue, on February 12, 1958, re-assessed the respondent's income for the 1955 taxation year, adding thereto ". . . the sum of $11,581.12 as the Respondent's share of the profits made during the 1955 taxation year on the underwriting of one million shares of Black Bay Uranium Limited".

The same day of 1958, Ryan was re-assessed by the addition of $25,377.70 to his 1956 reported income, and, on

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January 26, 1960, by the inclusion of $13,058.34 again for the 1956 taxation year, ". . . on the underwriting of the same one million shares of Black Bay Uranium Limited".

Customary objections filed by the taxpayer were as customarily rejected under the assumptions that (cf. Notice of Appeal, para. 3 (*a*)):

> 3. (*a*) The Respondent had a 5% interest in a partnership or syndicate which underwrote one million shares of Black Bay Uranium Limited;

and because, as stated in para. 8:

> 8. The Appellant says that the Respondent's share of the income or profit of the partnership or syndicate which underwrote the one million shares of Black Bay Uranium Limited is income from a business.

Alternatively, if respondent was not a member of a partnership or syndicate then, the appellant argues those amounts were received ". . . by the Respondent for services rendered to the partnership or syndicate, and hence, are income . . . within the provisions of Section 3 and 4 of the *Income Tax Act.*" (cf. Notice of Appeal, para. 10).

At this point it is imperative to inquire into Ryan's own view or rather views of the matter, since these were manifold and conflicting.

In para. 9 of his Reply to the Notice of Appeal, filed on November 14, 1961, he declares accepting:

> . . . the sums hereinbefore set out which he received from or through the said Bernard E. Smith as a capital gain being the difference between the agreed purchase price and the price for which the said shares must have been resold or otherwise disposed by the said Bernard E. Smith and associates.

On June 26, 1964, Ryan, examined on Discovery, struck a different note. Asked by appellant's counsel, Mr. W. Z. Estey, Q.C., to motivate the payment of those considerable amounts, Ryan replied:

> A. I have just told you: over the years I did Mr. Smith a number of favours by putting him in touch with mining deals where I know he made a lot of money.
>
> Q. And you assume that is the reason you received this payment?
>
> A. I assume that, because I don't know. I haven't had a chance to talk to him. As I say, if this thing had been brought up when I could have had him here as a witness, the thing could be cleared up, but the Government has been delaying it and delaying it. (cf. transcript, pp. 30-31)

At page 32, Mr. Estey's question to the witness reads:

> Q. I can't cross-examine you and I don't intend to do so indirectly, but I would like you to tell me, or perhaps to make clear to me, just what your allegation is with regard to the $50,000. To be

specific, I want to know if you received the $50,000 as a result of the prior association with Bernard Smith that you have described, or did you receive it as a result of the agreement with Smith to buy the 10,000 shares?

A. I don't know; all I can do is presume.

Q. What do you presume?

A. I presume he may have wanted to do something for me for past favours, as well as this one. This was a favour to him as well And the fact that he isn't here, there never was a chance to discuss this with him. That is the best I can do.

These answers were read to the witness during his cross-examination at trial and he agreed "that his replies then were and still are true", with the comment that he considered those $50,017.16 "as capital payments and therefore exempted from income tax and from mention in his annual income returns". Yet, as the cheques aforementioned were produced, Ryan told the Court he never was given any reason for obtaining them nor could he find any, save the conjecture that Bernard E. Smith "intended rewarding him for his agreement to purchase a block of 10,000 Black Bay Uranium shares".

It does appear difficult to reconcile the alternating suggestions of a reward for services rendered, or the payment of capital profit on resale by Bernard E. Smith of the Black Bay Uranium shares for which Ryan did not pay a dollar, or with Ryan's initial declaration that he could think of no motivation whatever for Smith's astonishingly generous gestures. But, more peculiar still was Ryan's complete and persisting aloofness in the matter, he not taking the elementary steps of inquiring from Smith or from Draper-Dobie and Frederick J. Crawford, under what pretence the cheques were issued to him. Moreover, Ryan waived aside the timeless prejudice that a gift calls for a few words of appreciation; and the receipt of cheques for large amounts, even though normally due, for some form of acknowledgement. The respondent never wrote a word to Smith, never called him over the phone and, as already noted, did not seek from him or anyone else an explanatory word; he kept both his peace and the money.

On September 25, 1964, the appeal having been argued on the 14th, the respondent's counsel filed a written argument which, at last, appears to suggest a more plausible

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consideration. On pages 4 and 5 of respondent's memorandum, we read this long but, I believe, all-inclusive statement:

> The explanation as to why he received the money arises, it is submitted, by virtue of the fact that he agreed to purchase 10,000 shares of Black Bay Uranium Mines Limited at a price of $1.00 a share. In view of the quick turn-over of shares, he was never called upon to complete the purchase and, further, in view of the immense profits made by members of the syndicate so quickly and by Mr. Smith in particular, as well as for past favours rendered to Mr. Smith, he was given a share of the profits of Smith out of the syndicate. It was not an "introduction fee" as described by Knight nor did it arise as a result of a contractual obligation between Smith and Ryan. Substantiation of this fact is found in that Smith at no time apparently claimed as an expense the payment to Ryan, and Ryan received no T4 slip indicating payment of the fee or salary from Smith. Apparently the payments were made on the instructions of Smith by Draper, Dobie & Co Ltd. which was the firm representing the syndicate. There is no question that the first two payments, at least, were out of Black Bay Uranium Mines Limited profits, and in particular Smith's share thereof. It would appear equally clear, in view of the evidence submitted above, that the third cheque also came from those profits.

In a more practical vein, though, it would have been of some use to the respondent to get in touch with Bernard E. Smith in New York and elicit from him either in the form of an affidavit or otherwise, the purport of those payments, especially after February 12, 1958, when respondent had been the object of departmental re-assessments which he meant to contest.

Bernard E. Smith, who died only in May of 1961, was, in February 1958 and after, within easy reach of Toronto. Subsequent to the Black Bay Uranium deal, Ryan and Smith had just a casual few minutes' interview in Toronto, during the spring of 1955, and, strangely enough, no mention was made of the fortune paid to the former by the latter.

An immediate appreciation of the Black Bay mining stock, triggered, in the fall of 1954, by a rumor of uranium deposits on the company's property, boosting its shares to a "high" of $3.80 by June 20, 1955 (cf. ex. A-8), might suggest the plausible surmise that Smith's threefold instalments to the respondent simply acknowledged some private, unwritten agreement, whereby he undertook to let Ryan have a percentage of the eventual profits. This assumption is enhanced by the equivalence of a 5% ratio to the amounts distributed on March 15, 1955, viz. $231,662.51, paid to Ryan: $11,581.12 (cf. ex. R-5, p. 2), and a 7.3%

one on February 8, 1956, $348,943.70, paid to Ryan: $25,377.70 (cf. ex. R-5, p. 6). The third cheque of February 9, 1956, is unaccounted for and most likely came from Smith's profits on the sale of the selfsame shares.

A grateful and exceptionally generous speculator could, possibly, have materialized, in donations of lump sums, his gratitude for valuable so-called "tips". But, then, how can one reasonably account for some hundred dollars and, more so, for those few cents conjoined with such figures as eleven thousand ($11,381.12), thirteen thousand ($13,058.34) and twenty-five thousand dollars ($25,377.70). Manifestly, these distributions are something else than gifts.

Nemo prasumitur donare, observed the Roman Jurists many centuries ago, a psychological dictum no less accurate today than in the distant past. There is little doubt that the amount of $50,017.16 received by the respondent in 1955 and 1956 resulted from a profit-seeking scheme of a promotional kind, therefore statutorily assessable, in accordance with s. 139 (1) (*e*) of the Act.

Conversely, of course, in transactions such as these, taxability of income usually entails deductibility of losses pertinent thereto, and this is where another hitch develops, the appellant challenging the qualification attached to the deficits by the respondent.

The ministerial contention is concisely related at page 17 of a brief, dated October 13, 1964; I quote those few lines:

> The position of the Appellant is, however, simply that in each of the taxation years 1955 and 1956, the Taxpayer must include in his taxable income the payments received from Ben Smith by way of the three cheques amounting to $50,017 16, for both years, and may not set off against this income losses on investments.

We shall see, shortly, that this prohibition is aimed at the large holdings of Chimo Gold Mines shares standing in the taxpayer's name, at the material time and issued to him April 14, 1953, in the guise of "vendor's shares".

Exhibit R-1, signed March 18, 1964, some five years after ex. A-2 of July 29, 1959, the taxpayer's first report of his transactions, should not, I believe, for that reason alone, be declared totally unreliable. On its first page, the recapitulation of losses for the 1956-1957 period amounts to $114,434.03. Nowhere have I found any claim against the respondent for 1957 and, accordingly, the loss of $31,531.96

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attributed to that year should be deleted, leaving an outstanding deficit of $82,902.07 for 1956.

The first item of this collective deficit would consist of a $42,725 loss incurred in shares of Chimo Gold Mines Ltd. On page 9 of ex. R-1, listing allegedly the security transactions of William J. Ryan for the year ended December 31, 1956, he is reported as having sold 10,000 Chimo shares for $11,275 as against a market price ("M.V."), at December 31, 1955, of $18,400, a loss of $7,125.

A diligent survey of that belatedly drawn-up document reveals more wishful thinking than worthwhile information and requires a good deal of pruning down. We must revert to the 90,000 Chimo Gold Mines vendor's shares granted on April 14, 1953, to W. J. Ryan (cf. ex. A-3). No evidence, oral or written, shows the price, if any, at which this allotment was consented to the respondent, so that I am unable to ascertain whether or not a market value of $18,400 for 10,000 shares as of December 31, 1955, and a selling rate, at unspecified dates in 1956, of $11,275 for an equal quantity of stock really represents a loss (cf. R-1, p. 9), more especially as Ryan's auditor and brother, Lawrence Ryan, in his "Replies to particulars by M.N.R.", ex. A-3, filed at the hearing of the case, writes that:

> 3. It would appear to me that this 10,000 shares was part of the 90,000 shares acquired by the Respondent Ryan on April 14, 1953.

As for the ensuing entry, listing 40,000 Chimo Gold Mines shares, it is interesting to note that not one of these was sold in that year, 1956. The loss of $35,600, appearing on the financial report, ex. R-1, is simply arrived at by deducting from the market value obtaining on December 31, 1955, $73,600, the December 31, 1956 market value of $38,000, in relation to a block of 40,000 shares.

An accountancy practice of this nature is altogether too easy and cannot be seriously entertained. The proper time to determine the result of transactions in these shares will come up if and when they are disposed of.

I possess no better evidence regarding Trojan Explorations Ltd., in which the taxpayer may presumably have made a regular investment, and, so far, investment gains are free of income tax and losses from identical sources may not be set off against income. Therefore, the alleged

loss of $39,726.08, appearing on pages 9 and 10 of ex. R-1, should not be considered.

The respondent contended in Court, and renews these objections in his written memorandums, that appellant was estopped from re-assessing the income for the material years by s. 46(4)(*b*) of the *Income Tax Act,* restricting to ". . . 4 years from the day of an original assessment in any other case" (when no misrepresentation or fraud is alleged) the Minister's power to do so. His submission that the amounts paid to him, May 5, 1955, and February 8 and 9, 1956, represent profits earned during the 1954 and 1955 taxation years might deserve consideration if those monetary distributions consisted in regular dividends or stock transactions by the taxpayer himself, instead of some undivulged but discernible scheme for profit-sharing of a venture in the nature of trade. Unable or unwilling to give a satisfactory account of his dealings with Bernard E. Smith, and most likely without legal recourse against the man, the time limit foreseen in the Act should run, in Ryan's case, from the day each cheque was received.

Even so, were his argument approved in principle, it would be pointless in fact, since the ultimate deadline applying to the $13,058.34 instalment of February 9, 1956, for which a re-assessment notice issued January 26, 1960, would be February 8 of the latter year.

The respondent's cross-appeal, directed against the Tax Appeal Board's finding that he was a trader, seems substantiated by evidence before this Court, but was of slight importance and went uncontested. It will be allowed without costs.

For all reasons above, the present appeal is allowed with costs in favour of the appellant.

Judgment accordingly.