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Apr. 5, 6

Apr. 7

BETWEEN:

THE INVESTORS GROUP ..... APPELLANT;

AND

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

Revenue—Income—Income tax—Capital cost allowance—Meaning of "franchise, concession or license"—Income Tax Act, R.S.C. 1952, c. 148. s. 11(1)(a)—Income Tax Regulations, Schedule B, Class 14.

In 1960 the appellant acquired a controlling interest indirectly in The Western Savings and Loan Association, a company carrying on the business of selling investment contracts to the public. By virtue of the same contract the appellant purchased the rights owned by W. & F. Limited, created by a contract entered into between Western Savings and Loan Association and W. & F. Limited in 1953, to, *inter alia,* procure salesmen required by The Western Savings and Loan Association in its business of selling investment contracts, pay Western's selling expenses except salesmen's commissions, and provide any financing required for such salesmen in return for payment of $7.50 for every $1,000 of face or maturity value of the investment contracts sold by Western to the public. The contract between Western and W. & F. Limited was to remain in force for twenty-five years from January 1, 1953.

The only issue dealt with on this appeal is whether or not the rights acquired by the appellant from W. & F. Limited constitute a "franchise, concession or license . . . . in respect of property" within the meaning of those words in Class 14 of Schedule B to the Income Tax Regulations, thereby entitling the appellant to capital cost allowance in respect of the capital cost of those rights.

Held: That in their context the words "franchise" and "concession" must be given the meaning or sense in which they are employed by business men on this continent and that, in this sense, they extend, not only to certain kinds of rights, privileges or monopolies conferred by or pursuant to legislation or by governmental authority, but also to analogous rights, privileges or authorities created by contract between private parties.

2. That the words "franchise" and "concession" are not used, in the context under consideration to refer to a contract under which a person is entitled to remuneration for the performance of specified services.
3. That what the appellant acquired from W. & F. Limited was not a franchise, concession or license.
4. That the appeal is dismissed.

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APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Jackett, President of the Court, at Winnipeg.

H. Heward Stikeman, Q.C., Maurice A. Regnier and *Hugh W. Cooper* for appellant.

G. W. Ainslie, D. G. H. Bowman and *T. G. Mathers* for respondent.

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

JACKETT P. at the conclusion of the argument (April 7, 1965) delivered the following judgment, orally:

This is an appeal from a decision of the Tax Appeal Board dismissing an appeal from the assessment under the *Income Tax Act* of the appellant for the 1960 taxation year. The principal issue raised by the appeal is whether the rights acquired by the appellant by assignment of an agreement referred to as a "Sales Management Agreement" constitute a "franchise, concession or license . . . in respect of property" within the meaning of those words in Class 14 of Schedule B to the Income Tax Regulations. A second issue has been raised as to whether the transaction whereby the appellant acquired such rights was a transaction between persons not dealing with each other at arm's length so as to bring into play the rule contained in subsection (4) of section 20 of the *Income Tax Act*.

The basic facts as established before the Board are set out in some detail in the judgment of the Tax Appeal Board and, as so set out, do not differ in any important respect from the facts as established in this Court. I shall, therefore, refer to the facts in quite general terms.

A company, whose name is "The Western Savings and Loan Association" (hereafter referred to as "Western"), carries on a business that, for present purposes, may be described as "selling" investment contracts to the public.

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Under such a contract a "purchaser", in consideration of a payment or payments that he promises to make to Western becomes entitled to have Western make a specified payment or payments to him. Such contracts are "sold" to the public by means of an organization of salesmen operating as independent contractors.

In 1953, Western entered into a contract with a company known as "W. & F. Limited", all the shares of which belonged to two individuals who had, indirectly, a controlling interest in Western. By virtue of the 1953 contract, W. & F. Limited undertook to perform certain services for Western, namely:

(*a*) it undertook to procure and recommend for employment by Western "all salesmen required for offering for sale and obtaining applications" for the investment contracts that it was Western's business to sell;

(*b*) it undertook to pay all of Western's selling expenses except the commissions earned by the salesmen; and

(*c*) it undertook to provide any financing for such salesmen that it might deem necessary or advisable.

The 1953 contract provided that, as "remuneration for the performance of its obligations", W. & F. Limited was entitled to be paid $7.50 for each $1,000 of the face or maturity value of the investment contracts so sold to the public. The 1953 contract contained a clause under which it was to have force and effect for 25 years from January 1, 1953.

In 1960, the appellant acquired a controlling interest indirectly in Western, including all the interest therein of the two individuals who owned the shares in W. & F. Limited. At the same time, and by virtue of the same contract pursuant to which it acquired the controlling interest in Western, the appellant, for a money consideration, became entitled to W. & F. Limited's rights under the 1953 agreement between W. & F. Limited and Western. In other words, pursuant to the acquisition agreement, there was what might be described as a novation arrangement whereby the appellant replaced W. & F. Limited in the 1953 agreement and became obligated to perform for Western the services that W. & F. Limited had been bound by that agreement to perform and became entitled to receive from Western the remuneration that W & F. Limited had been

entitled to receive. In effect therefore, in 1960, the appellant, for a money consideration, acquired W. & F. Limited's rights under the 1953 agreement. Such rights had a substantial value as appears from the fact that the net earnings under the agreement for 1960 were approximately $104,000 before any write-off for amortization or allowance for income tax.

The question raised by the appeal is whether the appellant is entitled to capital cost allowance under section 11(1)(*a*) of the *Income Tax Act* and the relevant regulations in respect of the capital cost of the rights so acquired. It is common ground that the appellant is entitled to such an allowance if such rights constitute a "franchise, concession or license" in respect of property within the meaning of the introductory words of Class 14 of Schedule B to the Income Tax Regulations, which words read:

> Property that is a patent, franchise, concession or license for a limited period in respect of property . . .

Even if the appellant is entitled to such an allowance, the amount of the allowance might be only nominal, by virtue of the rule in section 20(4) of the *Income Tax Act*, if the transaction whereby those rights became vested in the appellant was a transaction between persons not dealing at arm's length.

I shall deal now with the question whether what the appellant acquired was a "franchise, concession or license".

In my view, it is clear that what the appellant acquired is not a license in any ordinary sense in which that word is used and I did not understand the appellant to contend that it was. Whether or not it is a franchise or concession is a more difficult question.

I accept the submission of the appellant that, in their context, the words "franchise" and "concession" must be given the meaning or sense in which they are employed by business men on this continent and that, in this sense, they extend, not only to certain kinds of rights, privileges or monopolies conferred by or pursuant to legislation or by governmental authority, but also to analogous rights, privileges or authorities created by contract between private parties. I do not propose, however, to attempt to formulate a definition of the kinds of rights, privileges or monopolies that can fall within those words. It is sufficient for the

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purposes of this appeal to say that, in my view, those words are used to refer to some right, privilege or monopoly that enables the concessionaire or franchise holder to carry on his business, or that facilitates the carrying on of his business; and that they are not used to refer to a contract under which a person is entitled to remuneration for the performance of specified services. No example was suggested to me of a case where either word was used with reference to what is, in effect, a contract for services and my own understanding of the sense of the words "franchise" and "concession" does not embrace such a contract.

It follows that what the appellant acquired when it acquired W. & F. Limited's rights under the 1953 contract is not a franchise or concession. As I understand that contract, it is a contract under which the appellant is now bound to perform certain services and is entitled to be paid for performing them. If such a contract were a franchise or concession, so would be any other contract to perform a certain class of services for a defined remuneration for a definite period as, for example, a management contract, a contract to provide engineering or accounting services or any of the other similar contracts under which the modern business man avails himself of specialized services that it is uneconomic to provide for himself. To apply either of the words "franchise" and "concession" to contracts of that class would be to give them a meaning far beyond any usage of which I am aware.

In view of the conclusion that I have reached concerning the meaning of the words "franchise, concession or license", it is unnecessary to consider, for the purposes of this appeal, the arguments that have been addressed to the Court concerning the effect of the words "in respect of property" in the introductory words of Class 14.

I am therefore of opinion that the appeal fails on the first issue and that it is unnecessary to deal with the second issue.

The appeal is dismissed with costs.