

BETWEEN:

PAN-AMERICAN TRUST COMPANY, } APPELLANT,

1947
June 23
1949
July 20

AND

THE MINISTER OF NATIONAL REVENUE } RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 2(p), 9B(2)(a), 9B(2)(b), 9B(2)(d), 9B(11), 9B(12), 9B(15), 84—Income received or accruing from a Canadian estate or trust—Dividends exempt from tax under s. 9B(2) by reason of ss. 9B(11) and 9B(12) do not lose exemption through being paid to trustee for non-resident.

A Swiss company had two Canadian subsidiaries, one, its Canadian operating company, Cuba Company Limited, and the other, an investment company, Anglo American Chemicals Ltd., a non-resident-owned investment corporation within the meaning of s. 2(p) of the Income War Tax Act. The dividends paid by these two companies to the Swiss company were exempt from tax under s. 9B(2) by reason of ss. 9B(11) and 9B(12). After the outbreak of the war the Swiss company incorporated the appellant and thereafter the dividends, instead of being paid to the Swiss company, were paid to the appellant which credited them to the Swiss company and paid them into a separate bank trust account. Dominion of Canada bonds were bought with some of the dividends and the interest thereon treated by the appellant in the same way as the dividends. The respondent considered tax was payable on the amounts thus received by the appellant under s. 9B(2) (d) and made a demand on the appellant for payment under s. 84(3).

Held: That where dividends would be exempt from the tax imposed by section 9B(2) by reason of sections 9B(11) and 9B(12), if paid direct to a non-resident, they do not lose their character as tax exempt dividends through being paid to a trustee for the non-resident and credited by such trustee to the non-resident and paid into a separate bank trust account, or thereby become subject to tax under paragraph (d) of section 9B(2) as income received or accruing from a Canadian estate or trust. Archer-Shee v. Baker (1927) A.C. 844 followed.

- 2. That the term "income received or accruing from a Canadian estate or trust" in paragraph (d) of section 9B(2) does not include income from property which a settlor has transferred to a trustee for himself and of which he has never ceased to be the beneficial owner.
- 3. That the Swiss company was the beneficial owner of the interest on the Dominion of Canada bonds in its character as such and not as income received or accruing from a Canadian estate or trust.
- 4. That the interest on the Dominion of Canada bonds was exempt from tax under section 9B(2) by reason of paragraph (b) thereof.

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Appeal under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Thorson, President of the Court, at Montreal, Quebec.

Hon. J. L. Ralston, K.C. and *H. H. Stikeman* for appellant.

J. G. Ahern, K.C. and *J. G. McEntyre* for respondent.

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

THE PRESIDENT now (July 20, 1949) delivered the following judgment:

This is an appeal from a demand under the Income War Tax Act, R.S.C. 1927, chap. 97, as amended, for payment by the appellant of tax in respect of certain sums received by it in 1941, 1942 and 1943 for a Swiss Company known originally as the Society of Chemical Industry in Basle and later as Ciba Limited.

The facts are not in dispute. The Swiss company was organized over 60 years ago under the laws of Switzerland with its head office in Basle. It manufactured and dealt in pharmaceutical supplies, dyes, etc. In addition to operating a plant itself in Switzerland it also had large interests in other concerns in America and the United Kingdom. It is the parent company of the other companies hereinafter referred to. One of these, known as Ciba Company Limited, was incorporated in 1922 under the laws of Canada. It is the Swiss company's Canadian operating company. The other subsidiary, known as Anglo American Chemicals Ltd., is an investment corporation. It was incorporated in 1937 under the laws of Canada, after certain provisions of the Income War Tax Act relating to non-resident-owned investment corporations, designed to attract foreign investors to Canada, had come into effect. This subsidiary acquired all the Swiss company's holdings in the American and United Kingdom enterprises in which it had interests. Thereafter, Anglo American Chemicals Ltd. was recognized as a non-resident-owned investment corporation within the meaning of section 2(p) of the Act, which provides as follows:

2. In this Act, and in any regulations made hereunder, unless the context otherwise requires,

(p) "Non-Resident-Owned Investment Corporation" means a company incorporated in Canada, at least ninety-five per centum of the aggregate value of whose issued shares and all of whose bonds, debentures and other securities or evidences of funded indebtedness are beneficially owned by persons who are non-residents of Canada or are owned or held by trustees for the benefit of non-resident persons or their unborn issue, or by a corporation whether incorporated or domiciled in Canada or elsewhere but in all other respects conforming to the foregoing requirements of this paragraph (p), the gross income of which is derived from one or more of the following sources:

- (i) from the ownership of or the trading or dealing in bonds, stocks or shares, debentures, mortgages, hypothecs, bills, notes or other similar property, or any interest therein;
- (ii) from the lending of money with or without security, or by way of rent, annuity, royalty, interest or dividend;
- (iii) from or by virtue of any right, title or interest in or to any estate or trust.

Provided, however, that the definition aforesaid shall not include a corporation the main business of which is the making of loans of five hundred dollars or less.

and, up to the end of 1940, the dividends paid by it to the Swiss company were by reason of section 9B(12) exempt from the tax that would otherwise have been imposed in respect thereof under paragraph (a) of section 9B(2). The provisions of the enactments referred to will be set out later.

After the outbreak of the war, however, the undesirability of sending moneys from Canada to the Swiss company in view of the nearness of the German forces made other arrangements necessary and in 1940 the Swiss company caused the appellant to be incorporated under the laws of Prince Edward Island. Then by an agreement dated January 21, 1941, it transferred to the appellant 100,000 preferred shares and 279,996 common shares of the capital stock of Anglo American Chemicals Ltd., 1,995 shares of the capital stock of Ciba Company Limited and \$280,010.49 in 5 per cent promissory notes of Ciba Company Limited for the purposes and upon the terms and conditions set out in the agreement. Thereafter, in the years in dispute, the dividends on the shares of Anglo American Chemicals Ltd. and Ciba Company Limited, and the interest on the promissory notes of the Ciba Company Limited, instead of being paid to the Swiss company as theretofore, were paid to the appellant. The appellant credited the sums thus received by it to the Swiss company in a special account and kept them in a separate trust bank account called "Trust

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Account No. 1". The appellant bought Dominion of Canada bonds with some of the moneys received by it as dividends and dealt with the interest thereon in the same way as the dividends and the interest on the notes. The appellant had no other business than to look after these Swiss company securities and payments.

The amounts thus received and credited by the appellant in the years in dispute were as follows: in 1941, dividends on the Anglo American Chemical Ltd. shares, \$800,000, and interest on the Ciba Company Limited notes less 15 per cent tax withheld by Ciba Company Limited, \$15,824.23; in 1942, dividends on the Ciba Company Limited shares, \$99,875, interest on Dominion of Canada bonds, \$393.75, and interest on the Ciba Company Limited notes less 15 per cent tax withheld by Ciba Company Limited, \$24,012.50; and in 1943, dividends on the Anglo American Chemicals Ltd. shares, \$500,000, interest on Dominion of Canada bonds, \$1,756.25, and interest on the Ciba Company Limited notes less 15 per cent tax withheld by Ciba Company Limited, \$24,012.50.

The appellant reported the receipt of these amounts in its income tax returns for the years in question and claimed that they were not subject to tax under the Act. The taxing authorities, however, considered that tax was payable under paragraph (d) of section 9B(2) which reads as follows:

9B. (2) In addition to any other tax imposed by this Act an income tax of fifteen per centum is hereby imposed on all person who are non-residents of Canada in respect of

(d) All income for any taxation period received from a Canadian estate or trust, which income shall be deemed to include all income accruing to the credit of non-resident beneficiaries whether received by them or not during such taxation period. The tax payable by virtue of this paragraph shall be deducted by the trustee from the amount paid or credited to such beneficiary at the time of paying or crediting and shall be remitted to the Receiver General of Canada.

and, since the appellant had not withheld any tax from the amounts credited to the Swiss company, sought to hold the appellant itself liable for the amounts of such tax under the following provisions of section 84.

84. Any person who fails to collect or withhold any sum of money as required by this Act or regulations made thereunder, shall be liable for the amount which should have been collected or withheld together with interest at the rate of ten per centum per annum.

(2) Any person who fails to remit any sum of money collected or withheld as required by this Act, or at such time as the Minister may in special cases prescribe, shall in addition to being liable for such sum of money so collected or withheld, be liable to a penalty of ten per centum of the said sum together with interest at the rate of ten per centum per annum.

(3) Where any sum of money is owing by virtue of the provisions of this section, the Minister shall make a written demand by registered letter to the person owing such moneys for the amount thereof and such demand shall constitute a notice of assessment for the purposes of this Act and sections fifty-five to seventy-four, both inclusive, of this Act shall apply *mutatis mutandis*.

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and, pursuant to section 84(3), the Minister, acting through the Deputy Minister of National Revenue (Taxation), made a written demand on the appellant by registered letter, dated March 27, 1945, for the payment of tax for each of the years in dispute at the rate of 15 per cent of the "income accruing to the credit of non-resident beneficiaries" less the tax deducted and remitted by Ciba Company Limited, plus interest at 10 per cent per annum.

Since this demand constituted a notice of assessment the provisions of the Act relating to appeals from assessments were applicable and the appellant took an appeal thereunder to the Minister, who affirmed the assessment on the ground that "the tax was exigible under the provisions of paragraph (d) of subsection (2) of section 9B of the Act and the Appellant was properly assessed under the provisions of section 84 of the Act." Being dissatisfied with the Minister's decision the appellant now brings its appeal to this Court.

I shall deal first with the dividends paid by Anglo American Chemicals Ltd. and Ciba Company Limited to the appellant. It was contended for the appellant that paragraph (d) of section 9B(2) had no application to these dividends and that they were wholly exempt from tax under section 9B(2) by reason of sections 9B(11) and 9B(12), the Anglo American Chemicals Ltd. dividends under the latter and the Ciba Company Limited dividends under the former. Section 9B(11) read as follows:

9B(11) The tax imposed by subsection two hereof shall not apply in the case of dividends paid to a non-resident company by a Canadian Company, all of whose shares (less directors' qualifying shares) which have under all circumstances full rights are beneficially owned by such non-resident company: Provided that not more than one-quarter of the gross income of the Canadian Company is derived from interest and dividends other than interest and dividends received from any wholly owned sub-

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sidiary company: Provided further that such non-resident company is not a company incorporated since the 1st April, 1933; but this proviso shall not apply if the Minister is satisfied that such incorporation was not made for the purpose of evading the tax imposed under subsection two of this section.

And section 9B(12) provided:

9B(12)(a) Dividends paid or deemed to be paid by Non-Resident-Owned Investment Corporations shall not be taxed under subsection two of this section, provided that there has been paid in respect of the income earned between the 1932 fiscal period and the fiscal period first taxed by reason of election under subsection four of section nine of this Act, or in respect of dividends equal in amount to the said income, an amount of tax, equal in the aggregate, to five per centum of the said income.

(b) Any dividends paid after the 1932 taxation period shall be deemed to have been a distribution of income earned after such period.

(c) Interest payable by Non-Resident-Owned Investment Corporations and falling due after the effective date of election under subsection four of section nine of this Act shall not be subject to the tax imposed by this section.

It is desirable to consider the place of paragraph (d) in section 9B(2) by which an additional income tax of 15 per cent was imposed on non-residents of Canada in respect of certain kinds of income. The section commences as follows:

9B(2) In addition to any other tax imposed by this Act an income tax of fifteen per centum is hereby imposed on all persons who are non-residents of Canada in respect of.

and then several paragraphs follow, specifying the particular kinds of items of income in respect of which the tax is imposed, as, for example, paragraph (a):

(a) All dividends received from Canadian debtors irrespective of the currency in which the payment was made, and

and paragraph (b):

(b) All interest received from or credited by Canadian debtors, if payable solely in Canadian funds, except the interest from all bonds of or guaranteed by the Dominion of Canada.

Then, after paragraph (d) there are other paragraphs dealing with a variety of kinds of items of income in respect of which tax is imposed. It was admitted that the several paragraphs of section 9B(2) are mutually exclusive of one another. This must be so, for otherwise the same item of income might be subject to tax under more than one paragraph and it ought not to be assumed, in the absence of clear terms, that Parliament intended such double taxation. It follows, therefore, that the "income" received or accruing from a Canadian estate or trust specified in paragraph (d)

must be something other than and different from the “dividends received from Canadian debtors” mentioned in paragraph (a). The result is that if there is to be any tax in respect of “dividends from Canadian debtors”, such tax is exigible only by reason of paragraph (a) and can not be levied under paragraph (d). I think that it is equally clear that sections 9B(11) and 9B(12) expressly exempt from tax under section 9B(2) certain specific kinds of dividends that would otherwise be subject to tax under paragraph (a) thereof.

It was admitted that during the years in dispute Anglo American Chemicals Ltd. was a non-resident-owned investment corporation within the meaning of section 2(p) and that Ciba Company Limited was within the qualifications of section 9B(11). It follows—and this was not disputed by counsel for the respondent—that if Anglo American Chemicals Ltd. and Ciba Company Limited had paid the dividends direct to the Swiss company there could have been no doubt that they would have been exempt from tax under section 9B(2) by reason of sections 9B(12) and 9B(11). If there is any doubt as to whether they are exempt or not it is solely because of the fact that instead of being paid direct to the Swiss company they were paid to the appellant who, immediately upon their receipt, credited them to the Swiss Company in a special account and deposited them in a separate bank trust account. As I see it, the crux of the dispute in this case is whether this fact had the effect, as contended for the respondent, of changing the character of the amounts sought to be taxed from that of dividends within the meaning of sections 9B(11) and 9B(12) to that of income received or accruing from a Canadian estate or trust within the meaning of paragraph (d) of section 9B(2) and thus taking them out of the exemptions under sections 9B(11) and 9B(12) and making them subject to tax under paragraph (d) of section 9B(2). This contention is tantamount to saying that tax would not be payable in respect of the dividends if they went out of Canada to the non-resident but would be payable if they went to a trustee in Canada for the non-resident. I am unable to see what purpose Parliament could have had in making any such differentiation and am

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of the view that, in the absence of clear and compelling words, an interpretation leading to such an anomalous result should not be adopted.

In answer to the respondent's contention counsel for the appellant submitted that when the appellant received the dividends as it did the Swiss company became the beneficial owner of them, that they maintained their identity and character as dividends notwithstanding the fact that they were paid into the bank trust account, and that the Swiss company's entitlement to them was in their character as dividends and not as income received or accruing from a Canadian estate or trust. The majority decision of the House of Lords in *Archer-Shee v. Baker* (1) strongly supports this view. There the appellant's wife, resident in the United Kingdom, was the life tenant of a trust fund under an American will, the trustees of which were resident in New York. The trust fund consisted entirely of foreign government securities, foreign stocks and shares, and other foreign property, the trustees having powers of sale and reinvestment. The income from the fund was paid by the trustees to the order of the appellant's wife at a New York bank. The issue in the appeal against the assessment levied against the appellant in respect of his wife's income was whether such income arose from the specific securities, stocks and shares, and other property constituting the trust fund or from "possessions out of the United Kingdom other than stocks, shares or rents". The House of Lords, reversing the Court of Appeal, held that the appellant's wife was the beneficial owner of the securities, stocks and shares, and other property constituting the trust fund and was entitled to receive and did receive the interest and dividends thereof. In coming to this view they assumed that the law of trusts on this point was the same in New York as in England. That this assumption was erroneous was shown by their subsequent decision in *Garland v. Archer-Shee* (2). That fact, however, does not affect the applicability of the decision in the first *Archer-Shee* case (*supra*) to the facts of the present case, it being assumed that the

(1) (1927) 11 T.C. 749;
 (1927) A.C. 844.

(2) (1930) 15 T.C. 693;
 (1931) A.C. 212.

law of trusts on this point in Prince Edward Island is the same as that of England as laid down in the first *Archer-Shee case (supra)*.

Similarly, it should be held in the present case that when the dividends were paid to the appellant and credited by it to the Swiss company the latter became the beneficial owner of such dividends and entitled to the amounts thereof in their character as dividends and not as income received or accruing from a Canadian estate or trust. I am quite unable to see how the amounts paid to the appellants as dividends could lose their character as such and assume that of income received or accruing from a Canadian estate or trust by reason of the fact that the appellant credited them to the Swiss company and paid them into a separate bank trust account for it. In my opinion, the intervention of the appellant as trustee for the Swiss company did not cause the amounts received by it to lose their character as tax exempt dividends under sections 9B(12) and 9B(11) or to become taxable income under paragraph (d) of section 9B(2).

I also accept counsel's argument that payment of the dividends to the appellant, who received them for the Swiss company, their beneficial owner, was sufficient payment to it to meet the requirements of sections 9B(12) and 9B(11) and entitle them to exemption thereunder.

This conclusion sufficiently disposes of the respondent's contention so far as the dividends are concerned, but if more were needed I would be of the view that the term "estate or trust" in paragraph (d) of section 9B(2) does not extend to a relationship such as that created by the agreement of January 21, 1941, between the Swiss company and the appellant, for while the appellant became the legal owner of the shares and other property thereby transferred the Swiss company never ceased to be the beneficial owner of such property and the income thereof. It also seems to me that the term "income received or accruing from a Canadian estate or trust" must mean something other than the income from property which a settlor has transferred to a trustee for himself and of which he has never ceased to be the beneficial owner.

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In view of what I have said I find it unnecessary to deal with the other arguments of counsel for the appellant against the respondent's claim for tax in respect of the dividends referred to.

Subsequently to the hearing of the appeal and after subsection (15) was added to section 9B in 1948 by Statutes of Canada, 1948, chap. 53, sec. 6(3), upon the application of counsel for the respondent and with the consent of counsel for the appellant I granted leave to the respondent to withdraw his plea that the Swiss company is subject to tax under paragraph (d) of section 9B(2) with respect to the dividends received by the appellant from Anglo American Chemicals Ltd. and to withdraw his claim against the appellant for the amount representing such tax with the interest and penalties related thereto, and pursuant to such leave the respondent on November 30, 1948, withdrew the said plea and claim. While the said withdrawal appears to have been made because of section 9B(15), I am of the view that it would have been equally justified under the law as it stood in the years for which the respondent's claim was made. There was never any basis for it.

Nor can I see any basis for the claim for tax on the interest on the Dominion of Canada bonds. They were bought out of the dividends deposited in the bank trust account kept by the appellant for the Swiss company and it was the beneficial owner of them as it had been of the dividends which they replaced. It was also the beneficial owner of the interest thereon in its character as such and not as income received or accruing from a Canadian estate or trust. Moreover, it seems to me that the interest is clearly exempt from tax under section 9B(2) by reason of paragraph (b) thereof to which I have already referred.

Nor can any valid claim be made in respect of the interest on the Ciba Company Limited notes in view of the fact that it had already withheld and remitted the 15 per cent tax thereon.

There being thus no foundation for the respondent's claim in respect of any of the amounts received by the appellant for the Swiss company, the appeal herein must be allowed with costs.

Judgment accordingly.