

BETWEEN:

JAMES M. McLEAN APPELLANT;

AND

THE MINISTER OF NATIONAL
REVENUE RESPONDENT.

1947
May 22
Aug. 15

Revenue—Income Tax—Income War Tax Act R.S.C. 1927, c. 97, Rules 2 and 3, s. 3, par. A, of First Schedule—Member of Canadian Military Forces in Western Hemisphere for part of a year entitled only to reduced rate of taxation for that time.

Held: That a member of the Canadian Military Forces in the Western Hemisphere other than in Canada for part of a year and in the Canadian Active Service for the balance of that year is only entitled to the reduced rate of taxation, as per the Schedules in s. 3 of the First Schedule to the Income War Tax Act, in respect to the service pay and allowances received while he was in the Western Hemisphere other than in Canada.

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice O'Connor at Hamilton.

J. M. McLean for appellant.

Harold Minden and *J. G. McEntyre* for respondent.

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

O'CONNOR J. now (August 15, 1947) delivered the following judgment:

The appellant was a member of the Canadian Military Forces in the Western Hemisphere other than in Canada from 1st January, 1943, to 22nd May, 1943, and in the Canadian Active Service in Canada during the balance of the year.

His income during the year 1943, relevant to the issue here, was:

Pay and Allowances received while on duty in the Western Hemisphere other than Canada.....	\$ 992 11
Pay and Allowances received while in the Canadian Active Service in Canada	1,834 36
Net income from other sources	608 19
Total income	<u>\$3,434 66</u>

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If the appellant had not been a member of the Military Forces the tax payable in respect to such income would have been \$984.72.

The appellant filed a T.1 General Return under the Act, and a T.1 Armed Forces Supplemental Form, claiming that under Rules 2 and 3 of Section 3 of Paragraph A of the First Schedule to the Act, instead of paying the tax, otherwise payable in respect of the taxable income, of \$984.72, he paid under Rule 3, only tax on his total service pay and allowances received in 1943 and at one-half the effective rate of tax applicable to his total income and from this should be deducted the tax credit under Rule 2 of \$324.76.

The respondent under Rules 2 and 3 assessed the appellant on the following basis. The appellant was required to pay the tax of \$984.72, but that from this should be deducted a tax credit under Rule 2 of \$324.76. The appellant was entitled to a further credit equal to one-half the effective rate of tax applicable to his total income in respect to his service pay and allowances received only during the period in which he served in the Western Hemisphere other than in Canada.

The question depends on the construction to be placed on Rules 2 and 3 of Section 3, Paragraph A of the First Schedule to the Act, the relevant parts of which are:

Rule 2—The tax payable by any member of the Canadian Naval, Military and Air Forces in the Canadian Active Service Forces in Canada and in receipt of service pay and allowances (exclusive of subsistence allowances up to \$1.70 per day and marriage and dependents' allowances) at a rate of \$1,600 or more per annum shall be reduced by a credit from the tax otherwise payable of an amount equal to the tax payable on \$1,600 in the case of a single person without dependents (or such amount appropriately increased by marriage and dependents' allowances which would be payable if he held the highest rank of warrant or non-commissioned officer in the Service to which he belongs but not including any allowance for more than six children):

Provided that if the taxable service pay and allowances of such member are in excess of \$1,600 per annum in the case of a single person without dependents (or such amount appropriately increased by marriage and dependents allowances which would be payable if he held the highest rank of warrant or non-commissioned officer in the Service to which he belongs but not including any allowance for more than six children) the tax credit to which the member of such forces would otherwise be entitled shall be reduced by the proportion which such excess bears to \$1,600 in the case of a single person without dependents (or to such amount appropriately increased by marriage and dependents' allowances

which would be payable if he held the highest rank of warrant or non-commissioned officer in the Service to which he belongs but not including any allowance for more than six children);

Provided * * *

Provided further that in the case of a member of the said forces who is in receipt of taxable service pay and allowances at a rate in excess of \$1,600 per annum in the case of a single person without dependents (or such amount appropriately increased by marriage and dependents' allowances which would be payable if he held the highest rank of warrant or non-commissioned officer in the Service to which he belongs but not including any allowance for more than six children) (or \$1,200 in the case of the members of the said Women's Forces) and who has been in the said forces for only a portion of the year, the credit from the tax otherwise payable shall be that proportion which the number of days during which he was in the forces bears to three hundred and sixty-five, of the appropriate credit to which he would have been entitled if he had been in receipt of service pay and allowances throughout the year.

Rule 3—Notwithstanding any other provision in this Act contained, any member of the Canadian Naval, Military and Air Forces in the Western Hemisphere other than in Canada, shall be dealt with in the same manner as the persons referred to in Rule 2 of this section, except that any such person, in lieu of paying the tax otherwise payable in respect of his total income, shall in respect of his service pay and allowances be subject to tax at one-half of the effective rate of tax applicable to his total income.

The questions are:

First—are the pay and allowances mentioned in Rule 3 those received during the time the member was in the Western Hemisphere other than in Canada, or do they also include the pay and allowances received by the member in Canada?

Second—does the applicant pay the tax imposed by the general taxing sections of the Act less the credit allowed by Rule 2, and on his service pay and allowances at one-half the effective rate of tax applicable to his total income, or in lieu of paying the tax otherwise payable under the Act in respect to his total income, does he *only* pay on his service pay and allowances and then only at one-half the effective rate of tax applicable to his total income less the tax credit allowed by Rule 2?

Under the Act, in my opinion, there are four groups of members of the Canadian Naval, Military and Air Forces.

(1) The income, including service pay and allowances of those members of the Forces in Canada who are not in the Canadian Active Service, is subject to taxation.

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(2) The income, including service pay and allowances of those members in the Canadian Active Service who are in Canada, is subject to taxation, but under Rule 2 the tax they pay is "reduced by a credit from the tax otherwise payable", ranging from "an amount equal to the tax payable on \$1,600" of pay and allowances, on up.

(3) Under Rule 3 the income, including pay and allowances of all members of the Forces in the Western Hemisphere other than in Canada, is subject to taxation because they, under Rule 3, "shall be dealt with in the same manner as the persons referred to in Rule 2 of this section". And the persons under Rule 2 are given "a credit from the tax otherwise payable". They are then subject to the general taxation provision and receive a credit on their tax, depending on the amount of their pay and allowances as provided in Rule 2. But there is one exception under which they get additional relief. That is, that they "shall in respect of his service pay and allowances be subject to tax at one-half of the effective rate of tax applicable to his total income".

(4) Under Section 4(t)(i) the service pay and allowances of members of the Forces while in the Canadian Active Service Forces and Overseas on the strength of an Overseas Unit outside of the Western Hemisphere and certain others described in subsections (ii) and (iii) is not liable to taxation at all. Their income other than pay and allowances is taxable.

A member of the Forces could be, and no doubt was, in all four groups in the course of one year. But as the Act does not provide otherwise, I come to the conclusion that each exemption would only be applicable to the pay and allowances during the time the member was in that particular group.

Rule 3 is clearly an exempting section and not a taxing section and must, therefore, be construed strictly. *Wylie v. City of Montreal* (1).

In my opinion the appellant is only entitled to the reduced rate of taxation in respect to the service pay and allowances received while he was in the Western Hemisphere other than in Canada.

(1) (1885) 12 Can. S.C.R. 384, 386.

While Rule 3 is difficult and awkward, it must be given a reasonable construction. It is correct that the words "in lieu of paying the tax otherwise payable", appear to indicate that instead of paying the general tax the member is to pay only a tax on his service pay and allowances at a reduced rate. But that meaning can only be given if these words are taken out of their context. The rule *first* provides that the member "shall be dealt with in the same manner as the persons referred to in Rule 2." And as I have already pointed out those persons pay a tax on their income including pay and allowances and that tax * * * shall be reduced by a credit from the *tax otherwise payable* * * * So that under Rule 3 a member pays a tax on his income including pay and allowances and receives the tax credit provided by Rule 2. Then because he is away from Canada the Rule provides that he is to receive a further exemption, i.e., his pay and allowances are taxed at one-half the effective rate applicable to his total income.

If the appellant's contention were correct all private incomes of members in the Western Hemisphere other than in Canada would be exempt from tax. That would be an even greater exemption than given to the fourth group (*supra*) i.e., those serving overseas.

In fairness to the appellant I should add that while he contends that wording of the section places a tax only on pay and allowances and then at one-half the rate applicable to the entire income, he does not suggest that that was the intention of Parliament. But he does contend vigorously that that is what Parliament has done.

I do not agree with either of the appellant's contentions.

While the rule directs that the pay and allowances be taxed at one-half the effective rate of tax applicable to the total income, the respondent has computed the tax at the full rate and has then given a tax credit equal to one-half the rate applicable to the total income on the pay and allowances. This, of course, produces the same result.

The proper construction of the section was admitted by counsel to be difficult. The appellant is a solicitor and issued the Statement of Claim himself, and did not ask for

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costs in the Claim. In addition he appeared on the appeal, so that if the appeal had been allowed, no costs could have been allowed.

For the reasons I have given, the appeal will be dismissed and under the circumstances without costs.

Judgment accordingly.