

BETWEEN:

JOHN D. FORBES ..... APPELLANT;

AND

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

1952  
Jan. 24,  
28, 29, 30  
May 14

*Revenue—Income tax—Income War Tax Act R.S.C. 1927, c. 97, s. 47—  
Onus is on appellant to show assessment is invalid—Failure to discharge  
onus—Appeal dismissed.*

*Held:* That the onus is on the appellant to prove that the arbitrary assessment for income tax made against him and affirmed by the Minister of National Revenue is erroneous and when that onus is not discharged either by the appellant or by any evidence adduced at the hearing the appeal must be dismissed.

APPEAL under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Archibald at Toronto.

*Joseph Sedgewick, Q.C.* and *Stuart Thom* for appellant.

*G. B. Bagwell, Q.C.* and *D. K. Petapiece* for respondent.

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

ARCHIBALD J. now (May 14, 1952) delivered the following judgment:

This is an appeal against the arbitrary assessment made against the appellant, which assessment was affirmed by the Minister of National Revenue, on the 15th day of May, 1950. The assessment is for the years 1941 to 1948 inclusive. The appellant had filed his income tax return for each of the years in question, and no exception was taken by the income tax inspector until receipt by him prior to December 15, 1949, of a book containing daily records of receipts for the appellant respecting his hotel during the period August 1, 1946 to December 26, 1948. This book is Exhibit "A" in the evidence, and is referred to in the minutes of evidence as the "Black book." It will be so referred to by me throughout this decision. The entries in the Black book corresponded in many details with those in the Day books and Cash books kept by the appellant, but there were many discrepancies as well, and the sum total of the entries in the Black book greatly exceeded those of

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the sum total of the entries shown for a comparable period and corresponding dates in the Day books and Cash books, as shown to the appellant's auditor from time to time and which were employed by the appellant in preparing his income tax returns from year to year.

Archibald J. The appeal was heard before me at Toronto on the 28th, 29th and 30th days of January, 1952.

Owing to the unusual circumstances detailed in the evidence given on the hearing of this appeal, I will refer briefly to the facts involved and comment on the evidence.

The appellant's hotel, hereinafter referred to as the "Forbes' hotel," is located at Shuter and Mutual streets in the city of Toronto. It consisted, at all times relevant to the dates covered in the assessment, of about twenty rooms available for permanent and transient guests, in addition to dining rooms, kitchens, beverage rooms and other rooms required in the operation of the hotel. The property, or at least the major portion of it, was acquired by the appellant, according to his auditor, about fifteen years ago. The appellant was residing in the Forbes' hotel at the time of his marriage to Mrs. Linton Forbes, in May, 1939. For some time after their said marriage, the books of account (Day book, Cash book, etc.), were kept by the appellant, his son "Mickey" Forbes (a son by appellant's first marriage), and others, up to February, 1943, when Mrs. Linton Forbes took charge of the bookkeeping, and the entries are in her handwriting to June 27, 1945. Subsequent to that date, and up to approximately November, 1948, the entries in the books appear in the handwriting of "Mickey" Forbes, who acted as manager for the appellant of the Forbes' hotel operations, the bookkeeping, the returns and other matters affecting the business of Forbes' hotel. Subsequent to that date, according to Mrs. Forbes, the handwriting in the books is that of one, Norman Vale.

The appellant's auditor, Walter Smith, set up a set of books—Day book, Cash book and other records—which he considered adequate for the purpose of the manager of a small hotel and beverage rooms. Each month the books were taken to Smith's office and audited by him and, based on this audit, income tax returns were prepared from year to year. The check of the books made by Mr. Smith from

month to month, seems to have been careful and conscientious, subject to the observation that he depended entirely on the entries and records made by the appellant or some one or other of his managers, bookkeepers or servants, and he, Smith, did not make any adequate independent check of the records so handed him. I should add that I was not impressed by his evidence when, in his evidence, he attempted to estimate the revenue which should have been produced by the sale of the quantities of beer and wine sold by the appellant at his hotel and in the beverage rooms operated by him, as well as the revenue which should have been received from room rentals and other receipts. I should add that Mr. Smith was not convincing as an expert.

Due to the condition of his health, the appellant himself, afforded little or no assistance to the Court in considering his appeal. He was examined for discovery on November 14, 1951, and while the evidence given by him at that time does not, in the written transcript then made, disclose any serious mental disability or impairment, however, prior to being called to the witness box, his doctor, a specialist in neurology and psychiatry, testified that the appellant had been under his care and later in hospital under his observation, in March and April, 1951. He diagnosed appellant as "suffering from a degenerative disease of the brain to such an extent that he had a very serious memory disease" and that in his opinion, "appellant was entirely incapable, as far as being able to look after his affairs, is concerned." In his opinion, reliance could not be placed on appellant's recollection of what happened since 1940 or 1941. Counsel for appellant then called appellant to the witness stand—I assume either to demonstrate to me the force of the doctor's diagnosis, or to discredit and nullify the effect his evidence given on discovery might have on me. In any event, as he appeared before me, his is a sad case, and I do not feel justified in accepting the evidence given by him on discovery, particularly, as his counsel before the examiner called attention to the mental condition of his client.

Comment should also be made respecting the evidence given by Mrs. Linton Forbes, the appellant's present wife. Much of her married life to appellant has been spent in residence at the Forbes' hotel. In fact, she lived there all the time, with the exception of the period beginning 1946

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and continuing to November, 1948, when she, with her husband and her two infant children, lived at Port Credit. Her evidence satisfies me that while she was living at the Forbes' hotel, and particularly during the time she kept the books, the entries made by her, were, in the main, those supplied to her by other members of the staff or hotel organization, and that she did nothing to verify the correctness or accuracy of the information given her. For example, the records she furnished the auditor as to beverage room receipts were based on slips and verbal reports from tap men and other servants. She did not check in the cash register receipts or otherwise. So also her information respecting room rentals was vague and uncertain—and the charts and slips respecting them and allegedly kept by her, were not produced to the Court. If the appellant relied on her evidence to show that during any portion of the time the records were so kept and to disprove the Minister's assessment in any particular, then I must say her evidence is woefully inadequate and does not convince me that the records so kept by her tell the whole story of the operations of the Forbes' hotel.

I find that in all the circumstances of this appeal, there is no evidence taken by itself to indicate that the Minister's assessment is erroneous. This brings me to consider whether or not the burden on the appellant is discharged by an examination of the evidence adduced on behalf of the Minister of National Revenue. Counsel for the appellant stresses the importance of the effect of the evidence given by "Mickey" Forbes. I do not see that the evidence given by "Mickey" Forbes can be said to be of assistance to the appellant. "Mickey" Forbes did, if further proof was needed, establish that the Black book was written in his handwriting; that it was a book kept by him and in his custody during the time when he was managing the Forbes' hotel for the appellant, but when he ("Mickey" Forbes) attempted to explain the purpose for which the book was kept, when I had given counsel who called him, leave to cross-examine his own witness, he told a story so fantastic and so inconsistent and utterly improbable, that I cannot accept it as the proper explanation. I reject it and all evidence relied on by counsel for the appellant in support of the contention that "Mickey" Forbes' evidence, or any

part thereof, supports the argument that appellant had discharged the burden required of him to show the Minister's assessment was erroneous.

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There remains for comment the evidence given by E. G. Gowen, an assessor for the Income Tax Department. This witness was called by the respondent. He examined the Black book and compared the entries in it with those in the Day books and Cash books kept by the appellant for the corresponding dates and periods. His investigations were followed by the amended assessment. His examination of the relevant documents and his research were thorough, painstaking and exhaustive. He did not leave his assessment to guess or speculation. His examination of the documents was made with meticulous care and his investigation into returns to the Liquor Control Board of Ontario confirmed in my mind the inescapable conclusion that the entries in the right hand column of the relevant pages in the Black book, referred to as the "Snaff" or "Snuff" column, properly and correctly represented the additional amounts of revenue received by the appellant. This witness was submitted to a searching and exhaustive cross-examination by counsel for the appellant and his evidence was not shaken. One could not fail to be impressed by the accuracy of his evidence and by his fairness to the taxpayer, both in the method followed by him in making his investigations, and also in the manner in which he gave his evidence. His reconstructions and projections of the information and records contained in the Black book to other periods and years not covered by the Black book, were carefully explained by him and conclusively demonstrated to me the accuracy of the arbitrary assessment. I accept his evidence as immeasurably superior to that given by the appellant's auditor, and in all instances, where there is conflict between the two, I accept Mr. Gowen's evidence in preference to that of the auditor.

It is clear that the appellant has not discharged the burden on him to show that the arbitrary assessment affirmed by the Minister of National Revenue, pursuant to the provisions of section 47 of the Income War Tax Act of Canada, is invalid or in error. That the burden is one which the taxpayer must discharge has been clearly set forth in several leading cases. I will refer only to the decision of

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Thorson, P. in *Dezura v. Minister of National Revenue* (1); to the decisions of Rand J. and Kellock J. in *R. W. S. Johnston v. Minister of National Revenue* (2); see also Cameron, J. in *Chernenkoff v. Minister of National Revenue* (3). Counsel for the appellant stressed the effect of the decision of Thorson P. in *Goldman v. Minister of National Revenue* (4). I am of opinion that the language of the learned President in his decision does not assist counsel in this case. The learned President did not vary in any respect the statements of the law already referred to in *Johnston v. Minister of National Revenue* (*supra*).

This appeal will be dismissed with costs.

*Judgment accordingly.*