
1951
Nov. 12
1952
Dec. 12

BETWEEN:

MOUNTAIN PARK COALS LIMITED..APPELLANT;

AND

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

Revenue—Income and excess profits tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 4, 4(n), 5, 5(p), 9—Meaning of word "losses" in s. 5(p)—The Income Tax Act, S. of C. 1948, c. 55, ss. 26(d), 127(w)—Legislative intent of Act to be gathered from words used—Marginal notes not a legitimate aid to construction—Resolution preceding introduction of bill not admissible to explain meaning of enactment—Act not to be construed by reference to subsequent Act—Meaning of "income as hereinbefore defined" in s. 5—Profit and taxable income not necessarily the same—Loss not the inverse of taxable income—Exempted income not to be excluded from computation of profit or loss.

The appellant contended that the amount of the dividends which it had received from other Canadian corporations, which were exempted from taxation by section 4(*n*) of the Income War Tax Act, should be excluded from the amount of its deductible losses under section 5(*p*). In assessing the appellant the Minister added back the amount of the dividends.

Held: That it is not permissible to interpret words that have a well known ordinary meaning, such as the word "losses", by assuming a legislative intent that involves a departure from or a restriction of such meaning. The legislative intent of an Act must be gathered from the words by which it is expressed and it is the meaning of the words as used that is to be ascertained.

2. That the marginal notes to the section of an Act of Parliament cannot be referred to for the purpose of construing the Act.

3. That the parliamentary history of an enactment, including the resolution preceding its introduction, is not admissible to explain its meaning.

4. That it is not permissible to construe an Act to which the Interpretation Act applies by reference to a subsequent Act unless such subsequent Act directs how the prior Act is to be interpreted.
5. That the expression "'income' as hereinbefore defined" in section 5 of the Act does not mean the income as defined in section 3 less the income exempted by section 4. The expression relates only to the income as defined by section 3. Section 4 has nothing to do with the definition of income.
6. That it is erroneous to say that loss, which is the inverse of profit, is the inverse of taxable income as if profit and taxable income were the same. They may not be.
7. That section 4(*n*) of the Act does not have the effect in the appellant's case of excluding the dividends received by it from the computation of its profit or loss.
8. That the word "losses" in section 5(*p*), as it stood after its amendment in 1944, must be given its ordinary meaning according to ordinary business practice and accepted principles of accounting.

APPEALS from income tax and excess profits tax assessments.

The appeals were heard before the President of the Court at Ottawa.

J. R. Tolmie and *J. M. Coyne* for appellant.

W. R. Jackett Q.C. and *R. G. Decary* for respondent.

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

The PRESIDENT now (December 12, 1952) delivered the following judgment:

These appeals from the appellant's income tax and excess profit tax assessments for 1945, 1946, 1947 and 1948 turn on the meaning of the word "losses" in section 5(*p*) of the Income War Tax Act, R.S.C. 1927, chapter 97, as it stood after its amendment in 1944, and particularly on whether the appellant was entitled to exclude the dividends received by it from other Canadian corporations from the computation of its deductible losses under the section.

The facts are not in dispute. The appellant carried on the business of coal mining in Alberta. For the year ending June 30, 1944, it showed a business operation loss of $65,357.85 and a receipt of dividends from other Canadian corporations of $12,010.13. For the year ending June 30, 1945, it showed a loss of $11,138.76 after deducting from its income for the year the business operation loss of $65,357.85 sustained in 1944, but the Minister, in assessing

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it for 1945, added back the sum of $12,010.13, being the amount of the dividends received by it in 1944. This left it with a small profit the tax on which was offset by other deductions leaving it non-taxable for 1945. For the year ending June 30, 1946, it showed a profit of $31,278.10 and claimed a deduction of $11,138.76 as the balance of its 1944 deductible loss that was not used up in 1945 but the Minister, in assessing it for 1946, added back this amount. For the years ending June 30, 1947, and 1948 the appellant showed a profit of $109,681.57 in 1947 and a business operation loss of $64,810.85 in 1948 but in the latter year it received dividends from other Canadian corporations of $28,321.89. It claimed a deduction of $64,810.85 from its 1947 income but the Minister, in assessing it for 1947, added back the amount of $28,321.89. There were other adjustments in the assessments for the years in question but these are not in dispute, the only question in the appeals being whether the appellant was entitled to exclude the amounts of the dividends received by it from the computation of the losses it was entitled to deduct under section 5(*p*). The issues are thus confined to the questions whether the loss sustained by the appellant in 1944 which it was entitled to deduct from what would otherwise have been its income in 1945 and 1946 was $65,357.85 or $53,347.72, the difference of $12,010.13 being the amount of the dividends received by it in 1944, and whether the loss sustained by it in 1948 which it was entitled to deduct from what would otherwise have been its income for 1947 was $64,810.85 or $36,488.96, the difference of $28,321.89 being the amount of the dividends received by it in 1948.

The issues in the appeals herein are thus the same as that in *McTaggart, Hannaford, Birks and Gordon, Limited* v. *Minister of National Revenue* in which judgment has just been given. The reasons for judgment in that case are, therefore, *mutatis mutandis*, applicable herein and need not be repeated. In view of the fact, however, that the arguments submitted to the Court in support of the appeals, although essentially the same as those submitted for the appellant in the *McTaggart* case (*supra*), were put somewhat differently and they merit being dealt with accordingly.

Before I deal with them I should point out that, while the appeals are stated to be from the assessments for 1945, 1946, 1947 and 1948, there was a nil assessment for 1945 and there was no notice of assessment for 1948, although it appears from the notice of assessment for 1947 that there was an assessment for 1948 showing no taxability although no separate notice of it was given. It should also be noted that this Court has no jurisdiction to entertain the appeals from the income tax assessments for the years subsequent to 1945 so that in respect of the years 1946, 1947 and 1948 it must confine itself to the appeals from the excess profits tax assessments.

Two main arguments were made for the appellant, one that the word "losses" in section 5(*p*) meant only business operation losses and the other that because the dividends received by the appellant were exempt from taxation by section 4(*n*) of the Act they must be excluded from the computation of the losses that were deductible under section 5(*p*). The second argument was said to be complementary and alternative to the first.

The first submission in support of the contention that the word "losses" meant only business operation losses was that since it was provided in sub-paragraph (iii) of section 5(*p*) that nothing was deductible in respect of a loss unless the taxpayer carried on the same business in the taxation year as he did in the year the loss was sustained Parliament must have intended that the losses to be deducted were business losses. This does not follow. All that the subparagraph does is to lay down a condition of deductibility. It has no bearing on the meaning of the word "losses".

The next submission was that it had been the consistent policy of Parliament ever since 1942 that the losses to be deducted should be business operation losses and that the word "losses" should be construed accordingly. In support of this submission counsel referred to the marginal note opposite section 5(*p*) of the Act, the budget resolution adopted by Parliament in 1944 prior to the introduction of the bill containing the 1944 amendments of the Act and section 26(*d*) and 127(*w*) of The Income Tax Act, Statutes of Canada, 1948, chapter 55.

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There are several reasons for not accepting this argument. In the first place, it is, I think, an erroneous approach to the interpretation of the word "losses" to assume such a legislative intent as counsel for the appellant suggested and then interpret the word accordingly. It is not permissible to interpret words that have a well known ordinary meaning, such as the word "losses", by assuming a legislative intent that involves a departure from or a restriction of such meaning. A sound warning against a somewhat similar approach to interpretation was given by Rand J. in *Commissioner of Patents* v. *Winthrop Chemical Co. Ltd. Inc.* (1). The legislative intent of an Act must be gathered from the words by which it is expressed and it is the meaning of the words as used that is to be ascertained.

Moreover, there are objections to the use of some of the aids to the interpretation of the word "losses" on which counsel relied. I shall deal first with his use of the marginal note. The law on this has wavered. In the older cases there were conflicting opinions on whether a marginal note might be referred to in considering the sense in which words are used in a statute but the modern cases are clear that it can afford no legitimate aid to their construction: Craies on Statute Law, 5th edition, page 184. In *Thakurain Balraj Kunwar* v. *Rae Jagatpal Singh* (2) Lord MacNaghten, delivering the judgment of the Judicial Committee of the Privy Council, said that it was well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. *Vide* also *Nixon* v. *Attorney General* (3) where Lord Hanworth M.R. held that marginal notes are not part of an Act of Parliament and the Courts cannot look at them, and *Longdon-Griffiths* v. *Smith* (4) where Slade J. expressed the view that he was not entitled to have regard to the marginal note in interpreting a statute. Moreover, it is well known that marginal notes are frequently incorrect.

It is stated in Maxwell on Interpretation of Statutes, 9th edition, page 29, that it is unquestionably a rule that what may be called the parliamentary history of an enactment is not admissible to explain its meaning. While there

(1) (1948) S C.R. 46 at 55.
(2) (1904) 31 I.A. 132 at 142
(3) (1930) 1 Ch. 566 at 593.
(4) (1950) 2 All E.R. 662 at 672

are many instances where the Courts have resorted to the parliamentary history of an enactment in aid of its construction and while on grounds of principle it may be argued that the so-called rule should be regarded as a counsel of caution rather than a canon of construction, the weight of judicial authority supports the statement in Maxwell. While I have not been able to find any decision directly on the question whether a resolution preceding the introduction of a money bill, such as that preceding the bill containing the 1944 amendments to the Income War Tax Act, can be resorted to for the purpose of interpreting the Act that follows the introduction of the bill I see no reason for excluding it from the scope of the rule denying the use of the parliamentary history of an enactment as an aid to its construction. In any event, in the present case, counsel did not press his argument on this point.

I now come to counsel's use of sections 26(*d*) and 127(*w*) of The Income Tax Act in aid of his interpretation of the word "losses" in section 5(*p*) of the Income War Tax Act. In *Morch* v. *Minister of National Revenue* (1) I touched on the question whether it was permissible to construe an Act in the light of a subsequent Act. There I pointed out that in the United Kingdom there was a conflict of judicial opinion on the subject and then expressed the opinion that it was at least doubtful whether such an aid to construction is permissible in Canada in the case of an Act to which the Interpretation Act, R.S.C. 1927, chapter 1, applies. After further consideration I am of the view that I ought to have gone further. Section 21 of the Interpretation Act provides in part as follows:

> 21. 2. The amendment of any Act shall not be deemed to be or to involve a declaration that the law under such Act was, or was considered by Parliament to have been, different from the law as it has become under such Act as so amended.
>
> 3. The repeal or amendment of any Act shall not be deemed to be or to involve any declaration whatsoever as to the previous state of the law.

In view of these provisions it seems to me that a subsequent Act cannot throw any light on the meaning of a prior one. That was the view taken by Cameron J. in *Luscar Coals Ltd.* v. *Minister of National Revenue* (2)

(1) (1949) Ex C.R. 327 at 388. (2) (1949) Ex. C.R. 83 at 90.

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when he said that he could not draw any inference from the Income Tax Act as to what was meant by the word "losses" under the Income War Tax Act as it stood in 1943. With this view I agree. In my opinion, it is not permissible to construe an Act to which the Interpretation Act applies by reference to a subsequent Act unless such subsequent Act directs how the prior Act is to be interpreted.

There would have been no difficulty in the way of counsel's contention that the word "losses" in section 5(*p*) meant only business operation losses if the words "in the process of earning income" had been retained in it. The appeals would then have come within the decision of Cameron J. in *Luscar Coals Ltd.* v. *Minister of National Revenue* (*supra*) which has been fully discussed in the *McTaggart* case (*supra*). Counsel for the appellant sought to escape from the consequences of the omission of these words in the 1944 amendment of the section by contending that under the previous wording all investment income, regardless of whether it was exempted from taxation by section 4 or not, was excluded from the computation of deductible loss under the section and that all that Parliament intended to do by the omission of the words was to prevent income that was not exempted from taxation from being excluded from the computation. My only comment is that if that was the limit of Parliament's intention, which I do not admit, the language used did not express it. In my judgment, the correct view of the effect of the omission of the words is that expressed by Cameron J. in the *Luscar Coals Ltd.* case (*supra*), where he said, at page 87:

> I think it is clear that if the words "in the process of earning the income" did not appear in the subsection the appellant would have no case.

The alternative argument for the appellant revolved around sections 3, 4, 5 and 9 of the Act. Section 3 defines income for the purposes of the Act as meaning "annual net profit or gain or gratuity" and then sets out various particulars of income including dividends. Section 4 opens with the words

> 4. The following incomes shall not be liable to taxation hereunder:—

and then specifies the particular incomes or items of income that are exempt from taxation, including paragraph (*n*), reading as follows:

> (*n*) Dividends paid to an incorporated company by a company incorporated in Canada the profits of which have been taxed under this Act, except as hereinafter provided by sections 19, 22A and 32A.

Section 5 opens with the words

> 5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemption and deductions:—

and then enumerates the various items dealt with by it, including paragraph (*p*). Then section 9, the general charging section of the Act, subjects the income of the person specified by it to the tax imposed by the Act. The argument for the appellant, as I understood it, was that the expression " 'income' as hereinbefore defined" in section 5 meant the income defined by section 3 less the income exempted from taxation by section 4, that the income thus defined was subject to the exemptions and deductions permitted by section 5 and that the net result was the taxable income that was subject to the charge imposed by section 9. This line of argument led to the submission that "loss", within the meaning of section 5(*p*), was the converse of taxable income and should be computed similarly, namely, that the profit or loss for income tax purposes should be computed by ascertaining the profit or loss according to section 3 and excluding from such computation whatever income was exempted from taxation by section 4. It followed that if this method of computation was followed in the appellant's case the "losses" that would be deductible under section 5(*p*) would be greater than if they were computed according to ordinary business practice and accepted principles of accounting by reason of the fact that the amounts of the dividends received would be excluded from the computation of such losses.

This argument is, in my opinion, unsound. In the first place, I do not agree that the expression " 'income' as hereinbefore defined" in section 5 means the income as defined in section 3 less the income exempted by section 4. The expression relates only to the income as defined by section 3. It is that income which is subject to the exemptions and deductions permitted by section 5. Section 4 has nothing to do with the definition of income. As I see the scheme of the Act, it is the income as defined by section

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3 less the exemptions and deductions permitted by section 5 that is the taxable income that is subject to the charge imposed by section 9 except to the extent that it or an item of income in it is exempted from taxation by section 4. This really disposes of the alternative argument.

Moreover, there is a fallacy in the argument in the failure to observe the distinction between profit and taxable income. They are not necessarily the same. The amount of the former is determined according to ordinary business practice and accepted principles of accounting, without regard to liability to tax or otherwise, whereas the amount of the latter depends on the provisions of the taxing Act. Consequently, it is erroneous to say that loss, which is the inverse of profit, is the inverse of taxable income as if profit and taxable income were the same. They may not be for it is possible for a person to have a profit and yet have no taxable income. This is obviously the case where his whole income is exempted from taxation by section 4 or a sufficient item of income is exempted to make him non-taxable. Section 4(*n*) of the Act does not have the effect in the appellant's case of excluding the dividends received by it from the computation of its profit or loss. It has nothing to do with that matter. It is concerned only with their exemption from taxation. In that sense, it assumes that they constitute an item of income and possible profit. Their non-taxability does not change their character as items of income or leave the appellant with a greater loss than would otherwise be the case. Thus the appellant's argument that section 4(*n*) by exempting its dividends from taxation excluded them from its income and left it with the deductible loss claimed by it falls to the ground.

It follows from what I have said that, in the absence of any reason to the contrary, such as that which existed in 1943 when the section contained the words "in the process of earning income", the word "losses" in section 5(*p*) must be given its ordinary meaning, namely, that which it would have according to ordinary business practice and accepted principles of accounting. Since that meaning could not exclude the dividends received by the appellant from the computation of its deductible losses under section 5(*p*) the appellant has failed to show that the assessments appealed against are erroneous, and its appeals must be dismissed with costs. *Judgment accordingly.*