BETWEEN:

JOSEPH B. DUNKELMAN .....APPELLANT;

AND

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

1958
June 23
1959
Oct. 26

Revenue—Income tax—The Income Tax Act R.S.C. 1952, c. 148, ss. 22(1), 139(1)(ag)—"Has transferred"—"Has transferred property"—"Or by any other means whatsoever"—Money advanced by way of loan to purchase property in name of trustees—Appeal allowed.

Appellant, in May 1945, arranged for the purchase of certain property by himself and the Toronto General Trusts Corporation from the Canadian Bank of Commerce as trustees for the purposes of a trust which they jointly declared in a document dated May 16, 1945. The money required to finance the purchase was provided by the appellant as a loan made by him to the trustees and secured by a mortgage of the property executed by the trustees in his favour, the loan to be repaid with interest. Both interest and principal were paid by the trustees from rentals of the property, the mortgage being retired in 1952. Since then income from the property has been accumulated in the hands of the trustees, no other assets being included in the property subject to the trust. The trust deed declared the trusts on which the property was held as being on behalf of the children of the appellant, subject to the happening of certain events. Two of the children were during the taxation years in question under the age of 19 years and the third *cestui que* trust apparently had not reached the age of 19 years by December 31, 1953.

The Minister of National Revenue assessed appellant for income tax for the years 1952, 1953, 1954 and 1955 on the income from the property and in so doing relied on s. 22(1) of the *Income Tax Act* R.S.C. 1952, c. 148 which provides that "where a taxpayer has, since 1930, transferred property to a person who was under 19 years of age, either directly or indirectly, by means of a trust or by any other means whatsoever, the income for a taxation year from property or from property substituted therefor shall be deemed to be income of the taxpayer and not of the transferee unless the transferee has before the end of the year attained the age of 19 years."

Appellant appealed to this Court from the assessments made by the Minister.

Held: That the expression "has transferred" in s. 22(1) of the Act means that the taxpayer shall have so dealt with property belonging to him as to divest himself of it and vest it in a person under 19 years of age and the means adopted to transfer property are of no importance as the intention of the subsection is to hold the transferor liable for tax on income from property transferred or on property substituted therefor, no matter what means may have been adopted to accomplish the transfer.

1959

DUNKELMAN v. MINISTER OF NATIONAL REVENUE

2. That the appellant never was the owner of the property purchased nor did he transfer it to any one since at the outset it belonged to the Canadian Bank of Commerce from which it was purchased by appellant and the trust company as trustees.

3. That the making of the loan by appellant for the purpose of purchasing the property was not a transaction within the meaning of the expression "has transferred property" in s. 22(1) of the Act.

4. That the words "or by any other means whatsoever" used in s. 22(1) of the Act are directed to the means or procedure by which transfers may be accomplished rather than to the scope of the expression "has transferred property" and they do not expand that scope beyond the natural meaning of the expression.

APPEAL under the *Income Tax Act.*

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

W. B. Williston, Q.C. and *H. W. MacDonnell* for appellant.

A. A. Macdonald, Q.C. and *J. D. C. Boland* for respondent.

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

THURLOW J. now (October 26, 1959) delivered the following judgment:

These are appeals against assessments of income tax for the years 1952, 1953, 1954, and 1955, the issue in each appeal being the liability of the appellant for tax in respect of an amount which the Minister, in making the assessment, added to the income declared by the appellant in his income tax return.

The amounts added by the Minister were not income of the appellant. They represent income for the years in question from a property which at the material times was held by the appellant and the Toronto General Trusts Corporation upon certain trusts, and the question to be determined in each case is whether or not in the circumstances the appellant is nevertheless liable to be taxed in respect of such income in view of s. 22(1) of *The Income Tax Act,* S. of C. 1948, c. 52, now s. 22(1) of the *Income Tax Act,* R.S.C. 1952, c. 148.

That subsection, as applicable to the years 1952 and 1953, provided:

22. (1) Where a taxpayer has, since 1930, *transferred property* to a person who was under 19 years of age, either directly or indirectly, by means of a trust or by any other means whatsoever, the income for a taxation year from the property or from property substituted therefor shall be deemed to be income of the taxpayer and not of the transferee unless the transferee has before the end of the year attained the age of 19 years.

In the subsection substituted therefor by S. of C. 1954-55, c. 54, s. 4(1), applicable to 1954 and 1955, the words "during the lifetime of the taxpayer while he was resident in Canada" appear between the word "shall" and the words "be deemed."

"Property" was defined in s. 127(1)(*af*) of *The Income Tax Act,* now s. 139(1)(*ag*) of the *Income Tax Act,* as meaning:

property of any kind whatsoever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes a right of any kind whatsoever, a share or a chose in action;

The property from which the income in question was derived was acquired in the following circumstances. In May, 1945, the appellant, being aware of an opportunity which he regarded as advantageous to others, but not to himself, to purchase a property at Belleville, Ontario, known as the Butterfield Block, arranged for the purchase of it by himself and the Toronto General Trusts Corporation as trustees for the purposes of a trust which they jointly declared in a document dated May 16, 1945. The property was purchased from the Canadian Bank of Commerce, and it is admitted in the Minister's replies that it was purchased by the appellant and the Toronto General Trusts Corporation as trustees. The deed was dated May 25, 1945 and appears to have been recorded on June 12, 1945. The whole of the moneys required to finance this purchase were provided by a loan which was made by the appellant to the trustees and secured by a mortgage of the property executed by the trustees in favour of the appellant on or about May 31, 1945. By the terms of the mortgage, the loan was to be repaid in five years, with interest at five per cent per annum payable half-yearly, as well after as before maturity. Both the interest and principal were

1959

DUNKELMAN v. MINISTER OF NATIONAL REVENUE

Thurlow J.

subsequently paid by the trustees from rentals of the property and the mortgage was retired on May 29, 1952. Since then, income from the property has been accumulated in the hands of the trustees. No other assets have been included in the property subject to the trust.

The declaration of trust was as follows:

WHEREAS arrangements have been made by Joseph Dunkelman for the purchase from the Canadian Bank of Commerce of the property in the City of Belleville in the Province of Ontario known as the "Butterfield Block" located at the south-west corner of Bridge and Front Streets and being part of Lot Number 23 on the east side of Front Street and the south side of Bridge Street in the said City of Belleville for the price or sum of Sixteen Thousand Dollars ($16,000.00) as Trustee for the children of the said Joseph Dunkelman as hereinafter set out.

AND WHEREAS the said Joseph Dunkelman has arranged for the title to the said property to be taken in the name of the Toronto General Trusts Corporation and himself as Trustees.

AND WHEREAS the said Joseph Dunkelman intends to advance the said purchase price and to take back in his personal capacity a first mortgage against the said property for the amount of his advance with interest.

AND WHEREAS it is expedient that the said Trustees should declare the trusts on which they hold the said property.

NOW THEREFORE the said Trustees hereby declare that they hold the said property as Trustees for Richard Dunkelman, Peter Dunkelman and Donald Dunkelman, being the children of the said Joseph Dunkelman in equal shares until the youngest surviving child attains the age of twenty-one years when the said property shall be conveyed to the said children then alive absolutely as tenants-in-common or, if the property has in the meantime been sold, the proceeds of the said property shall either be re-invested for their benefit or be paid or transferred to the said children in equal shares as the Trustees may in their sole discretion deem advisable. No child of the said Joseph Dunkelman shall have an indefeasible vested interest in the said property, or, if sold, in the proceeds thereof until the youngest surviving child of the said Joseph Dunkelman shall attain the age of twenty-one years and if any child shall die before that date, leaving issue, the issue of such child shall have no interest in the said property or the proceeds thereof. In the event of the death of all of the said children before the youngest surviving child reaches the age of twenty-one years, then the said property or the proceeds thereof shall be transferred or paid to Jean Dunkelman, the wife of the said Joseph Dunkelman.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals this 16th day of May, 1945.

SIGNED, SEALED AND DELIVERED in the presence of "I. Levinter"

"J. Dunkelman" [Seal]

TORONTO GENERAL TRUSTS CORPORATION

"Chas. McCrea"
President

"H. M. Forbes"
Assistant General Manager

Throughout 1952, 1953, 1954, and 1955, both Peter Dunkelman and Donald Dunkelman were under 19 years of age, and neither had reached that age at the time of the hearing of the appeal. Richard Dunkelman had reached 22 years of age by November, 1957. He had, therefore, reached 19 years of age by November, 1954, though how much earlier he had reached that age does not appear. In particular, it does not appear that he had reached that age by December 31, 1953.

The problem turns on whether or not the income from the Butterfield Block, which the Minister assessed to the appellant, was income from property transferred or from property substituted for property transferred by the appellant to a person under 19 years of age, within the meaning of s. 22(1). It goes without saying that, if the rule set out in s. 22(1) applies, the appellant will be liable for tax on the income in question, regardless of how harsh or unjust the result may appear to be. But, as it is not within the purview of the general taxing provisions of the statute to tax one person in respect of the income of another, the subsection must, in my opinion, be regarded as an exception to the general rule, and while it must be given its full effect so far as it goes, it is to be strictly construed and not extended to anything beyond the scope of the natural meaning of the language used, regardless again of how much a particular case may seem to fall within its supposed spirit or intendment.

In *David Fasken Estate v. Minister of National Revenue*[1], the President of this Court, in discussing the meaning of "transfer" in s. 32(2) of the *Income War Tax Act*, said at p. 592:

> The word "transfer" is not a term of art and has not a technical meaning. It is not necessary to a transfer of property from a husband to his wife that it should be made in any particular form or that it should be made directly. All that is required is that the husband should so deal with the property as to divest himself of it and vest it in his wife, that is to say, pass the property from himself to her. The means by which he accomplishes this result, whether direct or circuitous, may properly be called a transfer. The plain fact in the present case is that the property to which Mrs. Fasken became entitled under the declaration of trust, namely, the right to receive a portion of the interest on the indebtedness, passed to her from her husband who had previously owned the whole of the indebtedness out of which the right to receive a specified portion of

[1] [1948] Ex. C.R. 580.

1959

DUNKELMAN v. MINISTER OF NATIONAL REVENUE

Thurlow J.

the interest on it was carved. If David Fasken had conveyed this piece of property directly to his wife by a deed such a conveyance would clearly have been a transfer. The fact that he brought about the same result by indirect or circuitous means, such as the novation referred to by counsel involving the intervention of trustees, cannot change the essential character of the fact that he caused property which had previously belonged to him to pass to his wife. In my opinion, there was a transfer of property from David Fasken to his wife within the meaning of the Act.

And in *St. Aubyn v. Attorney-General*[1], Lord Radcliffe put the matter in almost the same way when he said at p. 53:

> If the word "transfer" is taken in its primary sense, a person makes a transfer of property to another person if he does the act or executes the instrument which divests him of the property and at the same time vests it in that other person.

The expression "has transferred" in s. 22(1) has, in my opinion, a similar meaning. All that is necessary is that the taxpayer shall have so dealt with property belonging to him as to divest himself of it and vest it in a person under 19 years of age. The means adopted in any particular case to transfer property are of no importance, as it seems clear that the intention of the subsection is to hold the transferor liable for tax on income from property transferred or on property substituted therefor, no matter what means may have been adopted to accomplish the transfer. Nor is the scope of the provision affected or qualified by expressions such as "as if the transfer had not been made," which appeared in the corresponding section of the *Income War Tax Act. Vide McLaughlin v. Minister of National Revenue*[1]. On the other hand, it is also clear that the subject matter of a transfer that is within the section must be property of the transferor, not that of some other person, and if the subsection is to apply, such property must have been vested by him in a person under 19 years of age.

The Minister's contention in support of the assessments is that the appellant transferred money to the trustees by way of a loan, that the Butterfield Block was purchased with that money and is, therefore, property substituted for it within the meaning of the subsection, that the three children immediately became the owners of the property

[1] [1952] A.C. 15.

[1] [1952] Ex. C.R. 225.

or of an interest in it which gave them the right to the income arising therefrom, and that, accordingly, for the purposes of the *Income Tax Act*, the income therefrom or from such interest is to be deemed income of the appellant. As an alternative, it was submitted that, viewing the substance of the transaction as a whole, the Butterfield Block itself was property transferred by the appellant to the trustees for the benefit of his children.

In my opinion, it cannot be said on the facts that the appellant ever was the owner of the Butterfield Block or that he transferred it to anyone. The fact is that at the outset the Butterfield Block belonged to the Canadian Bank of Commerce, and it is admitted that the property was purchased by the appellant and the Toronto General Trusts Corporation as trustees. The alternative submission, accordingly, fails.

The Minister's other submission, that by making the loan the appellant transferred property to the trustees within the meaning of s. 22(1), presents a more difficult problem, but I have come to the conclusion that it, too, must be rejected. The expression "has transferred property" in s. 22(1) must be given its natural meaning. The problem is to determine how wide that natural meaning is in the context in which the expression is found, having due regard to the definition of property contained in the statute.

In *St. Aubyn v. Attorney-General* (*supra*), the House of Lords divided three to two on the interpretation to be put upon the words "where a person *has made* to a company to which this section applies *a transfer of any* property," which appeared in s. 46 of the *Finance Act*, 1940, the question before the house being whether a payment of money to such a company for shares therein was a *transfer of any property* within the meaning of that section. Lord Radcliffe was clearly of the opinion that the payment was a transfer. He said at p. 57:

> Lastly, there is the £100,000 which Lord St. Levan paid as his subscription for the preference shares. My Lords, I must say quite briefly that in my opinion, when he did this, he made a transfer of £100,000 to the company within the meaning of this statute. Certainly the company got £100,000 as part of their resources: first a cheque, then a credit with Messrs. Glyn, Mills & Co. Certainly Lord St. Levan by giving the cheque

1959

DUNKELMAN v. MINISTER OF NATIONAL REVENUE

Thurlow J.

which led to the transfer of bank credit reduced his own credit by an equivalent amount. I have spoken of Lord St. Levan as having given a cheque for £100,000, for I assume that he must have. In any event he must have given some authority to the bankers to debit his account with £100,000 and to credit the company with a like amount, and that is, I think, sufficient for the purpose. Whatever form the authority took, it was a disposition made by him and it was an essential part of the transaction by which the company's resources were augmented by this £100,000. I am bound to say that in that state of affairs Lord St. Levan seems to me plainly to have made a transfer of £100,000 to the company for the purposes of section 46 as interpreted by section 58(2).

Lord Tucker was more doubtful but reached the same opinion. He said at p. 60:

As to the £100,000 paid for the preference shares, I agree that to refer to money paid by way of subscription for shares as a transfer of property to the company is an unusual use of words, none the less, not without some doubt, I have come to the conclusion that the words in their present context are wide enough to include payment in cash or by cheque. It must be remembered that the companies referred to are only those to which the section applies and that one of the commonest ways in which benefits of the kind enumerated in section 47 are obtained is as a result of payment of money. Furthermore, section 58(2) once again requires consideration and, although it does not elucidate the meaning of the word property, it would be odd if a sum of money which "comes to be included in the resources of the company" is not property. Some support for this view is, I think, also to be obtained from section 51.

The other three law lords were of the contrary opinion. Lord Simonds, with whom Lord Oaksey concurred, said at p. 32:

The first point arises on the subscription by Lord St. Levan for 100,000 preference shares. For these he paid cash according to the ordinary use of language. Did he then "transfer property" to the company within the meaning of section 46? My Lords, I have no hesitation in saying that the payment of cash to a company upon a subscription for shares is not a transfer of property to the company. No one, lawyer, business man or man in the street, was ever heard to use such language to describe such an act and I decline to stretch the plain meaning of words in an Act of Parliament in order to comply with what is said to be its purpose. Lord Wensleydale's familiar words (as Parke B. in *In re Micklethwait*, (1855) 11 Ex. 452, 456), which were cited by Lord Halsbury, L.C. in *Tennant v. Smith* [1892] A.C. 150, 154, may again be repeated: "It is a well-established rule, that the subject is not to be taxed without clear words for that purpose; and also, that every Act of Parliament must be read according to the natural construction of its words." Lord Halsbury adds that in a taxing Act it is impossible to assume any intention or governing purpose in the Acts to do more than take such tax as the statute imposes: it

must be seen whether the tax is expressly imposed. This is true doctrine which I must bear in mind as I listen to the constant refrain of learned counsel for the Crown that this or that is just the transaction at which this or that section is aimed. The question is not at what transaction the section is, according to some alleged general purpose, aimed but what transaction its language, according to its natural meaning, fairly and squarely hits. Applying this, the one and only proper test, I say that when Lord St. Levan paid for his shares he did not transfer property to the company.

Lord Normand put his view thus at p. 43:

> The first point is whether Lord St. Levan, when he paid £100,000 for the preference shares in the company, made a transfer of property within the meaning of section 46. My opinion is that "transfer of property" are not the usual words which would be naturally selected to describe a payment of money, though it cannot be denied that money is property or that payment is a transfer. I think that if it had been intended to strike at money payments the simple words necessary to make that intention clear would have been added.

The opinions of Lord Simonds and Lord Normand were commented on and considered to be limited to the meaning of "transfer" in the particular section of the statute and, therefore, of no assistance in *Thomas v. Marshall*[1] at p. 949, where the appellant had deposited money in a Post Office Savings Bank to the credit of his children and the problem was whether or not this transfer was a settlement within the extended meaning of that term as defined in the statute there under consideration. The present problem is, however, much more similar in principle to that considered in *St. Aubyn v. Attorney-General,* and the reasoning of the majority seems to me to point the way to the interpretation that should be put on the words "has transferred property" in s. 22(1). I do not think it can be denied that, by loaning money to the trustees, the appellant, in the technical sense, transferred money to them, even though he acquired in return a right to repayment of a like sum with interest and a mortgage on the Butterfield Block as security, or even though he has since then been repaid with interest. But, in my opinion, it requires an unusual and unnatural use of the words "has transferred property" to include the making of this loan. For who, having borrowed

[1] (1953) 2 W.L.R. 944.

1959

DUNKELMAN v. MINISTER OF NATIONAL REVENUE

Thurlow J.

money and knowing he must repay it, would use such an expression to describe what the lender has done? Or what lender thinks or speaks of having transferred his property, when what he has done is to lend it? Or again, what casual observer would say that the lender, by lending, "has transferred property"? And, more particularly, who would so describe the lending where, as in this case, the transaction is such that the only purpose to which the money loaned could be turned was in acquiring a property to be immediately mortgaged to the lender? I venture to think, in the terms used by Lord Simonds, that no one, be he lawyer, business man, or man in the street, uses such language to describe such an act. I also think that, if Parliament had intended to include a loan transaction such as the present one, the words necessary to make that intention clear would have been added, and it would not have been left to an expression which, in its usual and natural meaning, does not clearly include such a transaction. To apply the test used by Lord Simonds, I do not think this transaction was one which the language of the subsection, according to its natural meaning, "fairly" or "squarely" hits. I am, accordingly, of the opinion that the making of the loan in question was not a transaction within the meaning of the expression "has transferred property" and that s. 22(1) does not apply.

In reaching this conclusion, I have also considered the wide words "or by any other means whatsoever," but I think that they are directed to the means or procedure by which transfers may be accomplished, rather than to the scope of the expression "has transferred property" and that they do not expand that scope beyond the natural meaning of the expression.

It follows that the appeals must be allowed and the assessments referred back to the Minister to be revised accordingly. The appellant is entitled to his costs.

Judgment accordingly.