
BETWEEN:

ERIC CERNY ..... APPELLANT;

AND

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

1954
Jan. 21
Feb. 22

Revenue—Income tax—Undistributed income—Loan by corporation to shareholder deemed to be a dividend—The Income War Tax Act, R.S.C. 1927, c. 97, s. 18(1)—Assessment carries presumption of validity and legality—Onus on taxpayer assessment is erroneous in fact or in law—Presumption of continuance one of fact—Failure to satisfy onus—Appeal from Income Tax Appeal Board dismissed.

Appellant is a shareholder of a company whose fiscal year ends on August 31 of each year. On August 31, 1946, the company had on hand undistributed income and, on September 3, 1946, appellant received from it as a loan the sum of $26,500 which he did not report in his income tax return for that year. That amount was added by the Minister to appellant's net income as being a dividend subject to tax pursuant to the provisions of s. 18(1) of the Income War Tax Act,

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R.S.C. 1927, c. 97. From the assessment appellant appealed to the Income Tax Appeal Board which dismissed the appeal and an appeal from the decision was taken to this Court.

Held: That an assessment carries with it a presumption of validity and legality and the onus of showing that it is erroneous in fact or in law is on the taxpayer who appeals against it. *Johnston* v. *Minister of National Revenue* [1948] S.C.R. 486; *Dezura* v. *Minister of National Revenue* [1948] Ex. C.R. 10 referred to and followed.

2. That the undistributed income in the hands of the Company on August 31, 1946, was still in its hands on September 3, 1946. On that last date the appellant received a loan or advance from the Company. This was found as a fact by the Minister and served as the basis of his assessment of the appellant's income. The presumption of continuance being one of fact, the appellant could have readily adduced evidence to destroy this presumption, if the facts on which the Minister based his assessment were incorrect. The burden of proof to this effect rested on him. He failed to satisfy the onus cast upon him.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Fournier at Montreal.

Clarence Gross for appellant.

Lyon W. Jacobs, Q.C. and *Claude Couture* for respondent.

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

FOURNIER J. now (February 22, 1954) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board of July 11, 1952, dismissing the appellant's appeal from his income tax assessment for 1946, whereby a certain amount which he had received from Fine Silk Limited, a corporation of which he was a shareholder, was added by the Minister to the amount of taxable income reported by him.

The following facts are not disputed. The appellant is a shareholder of Fine Silk Limited (hereinafter called the Company), a corporation whose fiscal year ends on August 31 of each year. On August 31, 1946, it had on hand undistributed income in the amount of $77,426.09. On

September 3, 1946, the appellant received from the Company the sum of $26,500, which was said to be a loan. The appellant's income tax return for the year 1946 made no mention of that amount.

In assessing the appellant the Minister added to the net income of the appellant as reported by him the sum of $11,319.09. To explain this addition, on March 5, 1951, the Minister addressed to the appellant with the notice of assessment a document known as Form T. 7-W which reads partly as follows:

According to section 18 of the Income War Tax Act, the following amount received from Fine Silk Co. is considered as a dividend subject to tax:

Total amount	$26,500.00
1945	15,180.91
1946	11,319.09

Pursuant to the provisions of section 69A of the Income War Tax Act, the appellant served upon the Minister a notice of objection on April 3, 1951, and on April 7 of the same year the appellant was notified by the Minister as follows:

WHEREAS the taxpayer was assessed for income tax by Notice of Assessment in respect of the taxation year ended December 31, 1946,

AND WHEREAS by Notice of Objection the taxpayer has objected to the assessed tax for the reasons therein set forth;

The Honourable the Minister of National Revenue having reconsidered the assessment and having considered the facts and reasons set forth in the Notice of Objection hereby notifies the taxpayer of his intention to amend the said assessment to increase the income by an amount of $15,180.91 in respect of advances from Fine Silk Company Limited and hereby confirms the said assessment in other respects as having been made in accordance with the provisions of the Act and in particular on the ground that the advance to the taxpayer by Fine Silk Company Limited has been deemed to be a dividend and taxed in his hands in accordance with the provisions of section 18 of the Act.

From the assessment so confirmed the appellant appealed to the Income Tax Appeal Board and the appeal was dismissed. The appeal to this Court is from that decision.

The section of the Income War Tax to be construed in deciding this appeal is section 18 which reads:

Sec. 18—1. For the purpose of this Act, any loan or advance by a corporation, or appropriation of its funds to a shareholder thereof, other than a loan or advance incidental to the business of the corporation shall be deemed to be a dividend to the extent that such corporation has on hand undistributed income and such dividend shall be deemed to be income received by such shareholder in the year in which made.

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2. This section shall not apply to a loan or advance made by a corporation in the ordinary course of its business where the lending of money is part of the ordinary business of the company. (R.S., Chap. 97, sec. 18; 1940-41, chap. 18, sec. 20).

It is established that the loan which the Company is said to have made was not incidental to the business of the Company. It is also established that the lending of money was not part of its business, therefore their loan or advance to the appellant could not be covered by section 18(2). It is in evidence that the Company on August 31, 1946, had on hand undistributed income to the amount of $77,426.09.

It is also clear that the Minister found that the Company had on hand on September 3, 1946, undistributed income the extent of which was sufficient to cover the loan or advance made to the appellant.

These are the facts of the case.

This is an appeal from an assessment. An assessment for income tax is deemed to be valid and binding until it is proved to be erroneous. The facts found or assumed by the Minister must be accepted unless disputed by the appellant. The onus is his to establish that the facts are incorrect.

It has been held in the case of *Dezura and The Minister of National Revenue* (1) "that the onus of proof of error in the amount of determination rests on the appellant."

In *Johnston and Minister of National Revenue* (2) it was held:

> That an assessment for income tax is valid and binding unless an appeal is taken from such assessment and the Court determines that such was made on an incorrect basis and where an appellant has failed to show that the assessment was incorrect, either in fact or law, the appeal must be dismissed.

On appeal to the Supreme Court of Canada this decision was affirmed. In that case Mr. Justice Rand, speaking for the Court, said (p. 489):

> . . . the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by the persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted. For that

(1) [1948] Ex. C.R. 10. (2) [1947] Ex. C.R. 483; [1948] S.C.R. 486.

purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, but the onus was his to demolish the basic fact on which the taxation rested.

These decisions establish that an assessment carries with it a presumption of validity and legality and the onus of showing that it is erroneous in fact or in law is on the taxpayer who appeals against it.

In *Phipson on Evidence,* 9th edition, p. 107, under the title "Previous and Subsequent Existence of Facts", it is said:

> Continuance. (*b*) States of mind, persons, or things, at a given time may in some cases be proved by showing their previous or subsequent existence in the same state, there being a probability that certain conditions and relationships continue. The presumption of continuance, which is one of fact and not of law, will, however, weaken with remoteness of time, and only prevails till the contrary is shown, or a different presumption arises from the nature of the case. . . .

Having this in mind, I believe that the undistributed income in the hands of the Company on August 31, 1946, was still in its hands on September 3, 1946. On that last date the appellant received a loan or advance from the Company. This was found as a fact by the Minister and served as the basis of his assessment of the appellant's income. The presumption of continuance being one of fact, the appellant could have readily adduced evidence to destroy this presumption, if the facts on which the Minister based his assessment were incorrect. The burden of proof to this effect rested on him. He failed to satisfy the onus cast upon him.

Under these circumstances I have arrived at the conclusion that the Minister's assessment of the appellant's income was made according to the provisions of section 18 of the Income War Tax Act.

The appeal is dismissed with costs.

Judgment accordingly.