1958
Feb. 4
Feb. 7

BETWEEN:

GEORGE H. BETHUNE .....APPELLANT;

AND

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

Revenue—Income tax—The Income Tax Act 1948, S. of C. 1948, c. 52, s. 21(1) and 22(3)—Proceeds of sale of property transferred by husband to wife as a gift rightly assessed as income of husband.

Appellant bought real estate paying for it in full and transferred it to his wife as a gift. The property was later sold and the proceeds of the sale price were used by the wife to purchase dividend and interest paying investments taken in her own name.

Held: That the appellant is rightly assessed for tax on the income received by his wife from investments purchased with the proceeds of the sale of the real estate.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cameron at Hamilton.

A. L. Fleming, Q.C. for appellant.

T. Z. Boles for respondent.

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

CAMERON J. now (February 7, 1958) delivered the following judgment:

This is an appeal in which the taxpayer appeals from a decision of the Income Tax Appeal Board dated December 12, 1956, dismissing his appeal from a re-assessment dated March 22, 1955, in respect of the taxation year 1953. In re-assessing the appellant, the Minister had added to his declared income the sum of $979 said to be income arising from an original gift to his wife, said income being made up as follows:

(a) Interest Kern mortgage	$ 300.00
(b) Dividends from 100 shares New York, New Haven and Hartford Railway	679.00
Total	$ 979.00

In so assessing the appellant, the Minister relied as he now does on s-s. (1) of s. 21 and s-s. (3) of s. 22 of *The Income Tax Act,* which were as follows:

21.(1) Where a person has, on or after the 1st day of August, 1917, transferred property, either directly or indirectly, by means of a trust or by any other means whatsoever, to his spouse, or to a person who has since become his spouse, the income for a taxation year from the property or from property substituted therefor shall be deemed to be income of the transferor and not of the transferee.

22.(3) For the purpose of this section and section 21, where a person who did own or hold property has disposed of it and acquired other property in substitution therefor and subsequently, by one or more further transactions, has effected one or more further substitutions, the property acquired by any such transaction shall be deemed to have been substituted for the property originally owned or held.

The main facts are not in dispute. On May 1, 1944, the appellant entered personally into an agreement (Exhibit 1) to purchase the property known as 143 Main Street East, Hamilton, for $3,800, of which amount $1,800 was to be in cash on closing and the remaining $2,000 was to be paid to the vendor from the proceeds of a mortgage for that amount to be secured by the appellant. Before or at the time of closing the purchase, the appellant instructed his solicitor to take the deed of the property in the name of his wife, Annie N. Bethune. This was done and the mortgage to the National Trust Company was signed by his wife alone. The mortgage was paid off in 1949.

By an agreement dated December 24, 1951 (Exhibit 4), Mrs. Bethune agreed to sell the property to one Ford for $11,000, $200 of which was paid as a deposit. The sale was closed on January 15, 1952, and after adjustments for taxes, insurance and like matters, she received $2,743.51, less her solicitor's charges, as well as a mortgage for $8,000. The mortgage was paid off in two instalments, $3,000 principal being received on July 17, 1952, and the remaining $5,000 on October 16 of the same year.

Before considering what investments were made with the monies received from the sale of the Main Street property, I must determine the extent to which the appellant contributed in the acquisition by Mrs. Bethune of that property.

1958

BETHUNE v. MINISTER OF NATIONAL REVENUE

Cameron J.

In the Notice of Appeal to this Court, para. (*g*) reads as follows:

> The appellant further alleges that the income derived by his wife arose in fact from the monies derived by her from the several estates herein mentioned, and by her borrowing from the bank, to enable her to make investments, which in turn yielded income exclusive of any income she might have derived from the monies given to her in the said sum of $3,800, to assist in the purchase of a residence known as 143 Main Street East in the city of Hamilton.

That paragraph might perhaps be construed as an admission that she did receive $3,800 to assist in the purchase of the property and it is not suggested that anyone other than her husband assisted her in the purchase. I prefer, however, to reach my conclusion on the whole of the evidence and the inferences to be drawn therefrom.

It is not disputed that the original down payment of $1,800 was made by the appellant and that it was a gift to his wife.

In Exhibit A, a letter dated October 27, 1955, from Mr. Johnston (who was solicitor for Mr. and Mrs. Bethune at the time of the purchase and sale of the Main Street property and still is their solicitor) and addressed to the Dominion Income Tax Department, the following statement is made:

> At this time, therefore, I should like to respectfully submit that the objection herein is made because the revenue derived from the difference between $3,800 and $11,000, being the original $3,800 advance by Mr. Bethune for the purchase of 143 Main Street E. and the sale price of $11,000 is being charged to Mr. Bethune. In reality it would appear that the ultimate situation herein will develop into Mr. Bethune being assessed for the revenue from $11,000 rather than from the $3,800, and I submit it would appear to be the only fair and equitable answer that if Mr. Bethune is to be charged it should be only on the income from the said $3,800 and not otherwise.

From that letter it would appear that Mr. Johnston considered that Mr. Bethune had advanced the full purchase price of the property.

Exhibit B is a letter from the Department of National Revenue to Mrs. Bethune dated December 20, 1954, in which she was asked to state the sources of certain parts of her capital. Paragraph (c) is headed "Gift", and the answer recorded is "Main Street house Gift from my husband Sold 1952 for $11,000". That letter bears the signature of the

appellant and while both husband and wife thought the answer was in the handwriting of the other, Mrs. Bethune agreed that the answer was true.

Then Exhibit C, dated January 4, 1955, is a letter from the Department of National Revenue to Mrs. Bethune. Mr. Croft, the individual assessor in the Hamilton branch of the department and who had written the letter, says that Mr. and Mrs. Bethune called at his office with the letter. He says he interviewed them and asked them for the answers to the questions in the letter and wrote down the answers given by them. This is not denied. Question (a) is "The date and year in which you received the Main Street property as a gift from your husband", and the answer noted is "May 1944". Question (b) is "The location or identity of this particular property?" and the answer noted is "143 Main Street East—Sold for $11,000-1952". Mrs. Bethune admits calling on Mr. Croft and that she answered as best she could.

This question is further complicated by the fact that the appellant, after the property was purchased, collected the rents and paid all disbursements in connection with the property for a period of about five or six years, all receipts going into his own personal bank account and all disbursements being made from the same account. For the first six years the rent appears to have been $45 per month. This was increased to $60 per month for the two years prior to sale, but during that period Mr. Bethune says that the rents were all paid to his wife, but presumably he continued to pay all disbursements. No proper record of receipts and disbursements was kept. However, Mr. Bethune, with the assistance of his solicitor and auditor, prepared the statement Exhibit 6 shortly before the trial. Admittedly, it is an estimate only and was prepared without full or accurate accounts. The rent receipts for the full period of ownership total $4,450 and the disbursements for taxes and water rates and for principal and interest on the mortgage total $4,144.11. The mortgage payment shown therein includes full payment of $2,000 principal as well as interest.

I am quite unable, however, to treat this document as showing the true state of affairs. It does not include any disbursements for insurance or maintenance of the

1958

BETHUNE v. MINISTER OF NATIONAL REVENUE

Cameron J.

property. Morever, when the house was purchased, Mr. Bethune says it was in a very bad state of repair. A new furnace was installed or the old one completely remodelled; new eavestroughs and a veranda were added and the exterior painted. The statement includes nothing for these very substantial outlays. Morever, Mr. Bethune admits that he paid the final instalment of $1,100 and interest on the mortgage out of his own account and it is clear that on the statement itself he then had insufficient rental receipts on hand to make the payments from such rents. Further, the statement is incorrect in that it includes receipts of rent for the last two years totalling $1,440, all of which was received by Mrs. Bethune and was not applied in any way to the maintenance of the house or in repayment of the mortgage. The statement, therefore, is so incomplete and inaccurate that I cannot accept it as evidence that the receipts from the rental of the property were used to pay off the balance of the purchase price represented by the mortgage of $2,000. On the contrary, it tends to support the allegation in the appellant's own pleadings and the statements in Exhibits A, B and D that the property on Main Street was a gift to his wife and that he paid the full purchase price thereof out of his own assets. At the very least, the appellant has failed to satisfy me that such was not the case.

I find, therefore, that the appellant bought the Main Street property and transferred the ownership to his wife and paid for the cost thereof in full. It follows from that conclusion that s-s. (1) of s. 21 and s-s. (3) of s. 22 of the Act (*supra*) apply to the appellant and that the income from the property so transferred or from property substituted or re-substituted therefor is deemed to be the income of the appellant and not that of the transferee—his wife. In this connection, reference may be made to *McLaughlin v. M. N. R.*[1]

There remains the question as to what other property was acquired by Mrs. Bethune in substitution for the Main Street property after it was sold. It is now admitted that the Kern mortgage of $5,000, taken by Mrs. Bethune in November 1952, was an investment made by her out of the proceeds of a final payment of a like amount received by

[1] [1952] Ex. C.R. 225 at 230.

her in October 1952 from the Ford mortgage which formed part of the sale price of the Main Street property. The interest of $300 received on that mortgage in 1953 was therefore properly added to the appellant's income.

The question as to the addition of $679 received in 1953 by Mrs. Bethune from 100 preferred shares of New York, New Haven and Hartford Railway stock, and added to the appellant's declared income, is somewhat more complicated. Mrs. Bethune had other assets of her own, having received a legacy of some $1,100 from her uncle in 1935; she also became the owner of 39 Inverness Ave. West, Hamilton, in 1936, upon the death of her father. By the agreement marked Exhibit 10, she agreed on February 9, 1952, to sell the property for $10,300. The deposit of $500 was apparently paid to the real estate agent. On closing the sale about March 1, 1952, the balance due her was $2,430 and in addition she received a mortgage of $7,500. On March 12, 1952, she deposited $2,400—the proceeds of the sale—in her bank account (Exhibit S). On the same day she borrowed $2,300 from her bank and it was deposited to her credit.

The next relative entry is a deduction of $4,897.95 on March 13, 1952, representing the purchase of 100 preferred shares of New York, New Haven and Hartford Railway stock. The amount to her credit before and after this transaction was negligible and it is clear that she bought those shares partly out of the proceeds of the sale of the Inverness Street property and partly by a bank loan of $2,300. This bank loan was repaid on July 17, 1952, Mrs. Bethune on the same date having received $3,220 for interest and principal on the Main Street mortgage; prior to that receipt the balance in the bank account was negligible and it is clear, therefore, that $2,300 which came from the Main Street mortgage was used to pay off the bank loan which had been incurred for the purpose of purchasing the first 100 preferred shares of New York, New Haven and Hartford stock.

There was a further purchase of an additional 100 such shares in January, 1953. This was financed by a bank loan of $4,650 on January 12, and a cheque for $4,933.68 in payment for the shares was cashed the following day. I cannot find that this purchase was in any way connected

1958

BETHUNE v. MINISTER OF NATIONAL REVENUE

Cameron J.

with the proceeds of the sale of the Main Street property, the full amount of which had been paid in the previous year. After the Kern mortgage was taken in November 1952, the balance in the bank account was quite negligible.

Mr. Sloan, an Appeals Officer in the Hamilton branch of the Department of National Revenue, stated that he had an interview with the appellant and Mr. Johnston, his solicitor, when it was agreed that $5,000 of the $10,500 net received from the Main Street mortgage was invested in the Kern mortgage; and that due to the difficulty in ascertaining what investment represented the remaining $5,500, it was decided to treat it as having been invested in the first purchase of 100 shares of railway stock. Such an interview no doubt took place. On the facts in evidence before me, however, I must find none of the proceeds of the sale of the Main Street property were actually used in the direct purchase of railway shares, but that $2,300 of such proceeds was used in payment of the bank loan made for the purpose of buying the first 100 shares.

Moreover, the evidence satisfies me that when Mrs. Bethune received the down payment of $2,500 from the sale of the Main Street property which was deposited on January 19, 1952, she immediately used it in payment of the purchase price of 200 shares in Brazilian stock, the cheque for $2,550 in payment thereof being debited in her account on March 25. Again, the bank balance both before and after this transaction was negligible. Mrs. Bethune was of the opinion that the Brazilian shares were purchased with monies arising from the sale of the Main Street property.

The proceeds of approximately $10,500 received from the sale of the Main Street property can therefore be accounted for to the following extent:

(*a*) $2,500 used in the purchase of 200 shares of Brazilian stock in January 1952;

(*b*) $2,300 used in payment of the bank loan of a like amount on July 17, 1952;

(*c*) $5,000 advanced by way of mortgage loan to Kern on November 10, 1952.

The remaining $700 is not shown to have been put into any investment or purchase which produced income. It may possibly have been spent for personal needs or the like. It corresponds precisely with the difference between $3,000 principal received from the Main Street mortgage in July 1952, and the payment of the bank loan of $2,300.

In my view, therefore, any income received by Mrs. Bethune in 1953 from the Brazilian shares so purchased is also to be taxed as income received by the appellant in that year.

The manner in which the $2,300 used in paying off the bank loan should be considered has caused me some concern. Certainly, it cannot be disregarded or treated as if it had simply disappeared. Considering that it was Mrs. Bethune's practice to keep her monies invested on the advice of her husband, and that this sum, while used directly in the purchase of the first lot of 100 shares in New York, New Haven and Hartford Railway stock, was used for the purpose of paying off the bank loan incurred for the purpose of completing that purchase, I have reached the conclusion that it may reasonably be considered as having been used indirectly for the purchase of those shares. Certainly, it had no connection with any other investment. The total cost of the purchase of 100 shares having been approximately $4,900, I find that the $2,300 may be considered as having been used in the purchase of 46 shares thereof.

Accordingly, the appeal will be allowed, but only for the purpose of referring the matter back to the Minister for further re-assesment, namely:

1. By deleting from the re-assessment the sum of $679 said to have been received by Mrs. Bethune in 1953 from 100 preferred shares in New York, New Haven and Hartford Railway stock;

2. By adding thereto:

(*a*) the amount of the dividends received by Mrs. Bethune in 1953 from the purchase of 46 shares forming part of the first 100 shares of that stock purchased by her in March 1952;

(*b*) the amount of the dividends received by Mrs. Bethune in 1953 from the 200 shares of Brazilian stock purchased by her in January 1952.

1958

BETHUNE v. MINISTER OF NATIONAL REVENUE

Cameron J.

The re-assessment having been upheld with only minor adjustments which may or may not benefit the appellant, I see no reason for depriving the respondent of his costs. Such costs will therefore be paid by the appellant to the respondent after taxation.

Judgment accordingly.