



1965  
May 18  
May 31

BETWEEN :

THE MINISTER OF NATIONAL  
REVENUE .....

APPELLANT;

AND

RANDOL H. GAULT .....RESPONDENT.

*Revenue—Income tax—Contract for sale of insurance brokerage business—  
Consideration half of renewal commissions for three years—Deducti-  
bility of by purchaser—Whether payment on account of capital—  
Whether commissions dependent upon use of or production from  
property—Income Tax Act, ss. 6(1)(j), 12(1)(b).*

The respondent Gault, an insurance broker, entered into a contract in Montreal in March 1960 with the executors of the will of a deceased insurance broker for the purchase of the goodwill and records of the latter's business. The contract provided that the respondent would pay the estate half of renewal and certain other commissions for three years on policies issued to the deceased broker's clients, that he would furnish the estate quarterly statements, and that a representative of the estate should have the right to check the respondent's books and records at all reasonable times. The respondent was assessed to income tax in respect of the sums paid the estate pursuant to the contract in 1960 and 1961. The Tax Appeal Board allowed his appeal [36 Tax A.B.C. 324], and the Minister of National Revenue appealed to this Court, contending that the payments were made in the purchase of a capital asset, i.e. an insurance business, and that their deduction was accordingly prohibited by s. 12(1)(b) of the *Income Tax Act*.

*Held*: That the Minister's appeal be dismissed.

1. The contract was essentially not one of sale but of agency for the collection and equal division between the parties thereto of certain commissions as and when they were received. The contract did not fix a price for the payment of which respondent was responsible in any event, an omission inconsistent with a contract of sale as defined in article 1472 of the Quebec Civil Code. *Schacter v. Minister of National Revenue* [1962] C.T.C. 437, distinguished.
2. Moreover, the amounts received by both parties to the contract were "dependent upon use of or production from property", to wit, the entire office records of the deceased broker, and were therefore required to be included in computing the income of both parties to the contract by virtue of s. 6(1)(j) of the *Income Tax Act*.

1965  
 ———  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 v.  
 GAULT  
 ———

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Dumoulin at Montreal.

*Paul Boivin, Q.C.* for appellant.

*Donald J. Johnston* for respondent.

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

DUMOULIN J. now (May 31, 1965) delivered the following judgment:

The Minister of National Revenue is appealing a decision of the Tax Appeal Board, dated September 24, 1964<sup>1</sup>, allowing the respondent's appeal from the assessments of December 12, 1962, wherein taxes in the amounts of \$5,235.99 for the year 1960, and \$7,408.18 for 1961 were assessed.

During those two material years, the respondent, Randol H. Gault, carried on, in Montreal, an insurance broker's business under the firm name and style of Percy R. Gault Reg'd.

On March 21, 1960, Randol H. Gault acquired from the Toronto General Trusts Corporation the insurance business of his lifelong friend, the late Herbert J. Bulley, also of the City of Montreal, as appears from a photostat of the Sales Agreement produced in this Court, exhibit A-1 of appellant, and annexed to the Tax Appeal Board file.

This transaction implemented an option extended to the respondent by a clause, the eighth one, of the deceased testator's will, hereunder reproduced in its pertinent provision:

<sup>1</sup> 36 Tax A.B.C. 324 at 330.

1965  
 {  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 v.  
 GAULT  
 —  
 Dumoulin J.

I direct my Executors and Trustees, in disposing of my insurance business, that preference be given to my friend, Randall H. Gault, in view of my long and friendly association with him.

The terms and considerations according to which Randol Gault availed himself of this proffered transfer of the late Mr. Bulley's office affairs and goodwill are set out in the deed, exhibit A-1, wherein the Executors of the deceased are called "the Vendors" and the respondent assumes the quality of "the Purchaser".

The undergoing citations are taken from exhibit A-1, entitled "Memorandum of Agreement Entered into at the City and District of Montreal as of the 21st day of March, 1960":

NOW, THEREFORE, IT IS AGREED BETWEEN THE PARTIES:

1. THAT the Vendors hereby sell and transfer to the Purchaser, with warranty as to their own acts and deeds only, all the goodwill of the Insurance business of the late Herbert J. Bulley, together with all existing records such as Expiry Lists, Agent's copies of policies and endorsements, prior correspondence concerning insured property, information concerning previous custom of payment by clients, etc., which are pertinent to the continuation of the said business after the 20th of March, 1960;

2. THAT in consideration of the said sale and transfer the Purchaser hereby undertakes to pay to the Vendors:—

- (a) 50% of all commissions paid on policies issued or renewed for any clients of the late Herbert J. Bulley for an annual term and with an effective date of issue or renewal as at any time during the period from March 21st, 1960 to March 20th, 1963 inclusive;
- (b) 50% of all commissions paid on policies issued or renewed for any clients of the late Herbert J. Bulley for a three-year term and with an effective date of issue or renewal as at any time during the period from March 21st, 1960 to March 20th, 1963 inclusive.
- (c) 50% of all commissions paid on any policies increased or new policies issued for any clients of the late Herbert J. Bulley whether for an annual term or a three-year term with effective date of issue or renewal as at any time during the period from March 21st, 1960 to March 20th, 1963 inclusive;
- (d) From the payments as set forth in sub-paragraphs *a*, *b* and *c* hereof there shall be deducted 50% of any return commissions on any policies issued or renewed for any clients of the late Herbert J. Bulley with effective date of issue or renewal as at any time during the period from March 21st, 1960 to March 20th, 1963, inclusive, and subsequently cancelled or otherwise reduced in premium during the said period;
- (e) From the payments as set forth in sub-paragraphs *a*, *b* and *c* hereof there shall also be deducted the full return commission charged to the purchaser on any policies issued or renewed for any clients of the late Herbert J. Bulley with effective date of issue or renewal as at any time prior to the 21st March, 1960, and

subsequently cancelled or otherwise reduced in premium, during the immediate policy term.

3. . . .

4. . . .

5. THAT at the time of making payment following the end of each quarter or four-month period, as the case may be, the Purchaser shall furnish the Vendors with a statement of all relevant transactions during such quarter or period certified correct by the Purchaser;

6. THAT the Vendors or their authorized representatives shall have the right to check the books and records of the Purchaser at all reasonable times for purposes of verification of statements and figures;

The Minister disallowed the deduction of the stipulated payments made by the respondent as evidencing "the purchase of a capital asset, i.e., an insurance business", in derogation to section 12(1)(b) of the *Income Tax Act*.

On the other hand, the respondent contends that the commissions paid to the Estate did not, at any time, become part of Randol Gault's income for the reasons given in paragraphs 10 and 11 of the Reply to the Notice of Appeal. Those paragraphs read thus:

10. The commissions paid over to the Estate by the Respondent were not part of the purchase price of the insurance brokerage business of the late Herbert J. Bulley but represented the interest retained by the Estate in the receipts of the insurance brokerage business of the late Herbert J. Bulley continued by the Respondent, the whole as indicated by Exhibit A-1.

11. The said commissions received by the Estate being payments dependent upon use of or production from the business of the late Herbert J. Bulley constituted income to it under the provisions of section 6(1)(j) of the *Income Tax Act* and cannot be income of the Respondent at the same time when by agreement said commissions belonged to the Estate and not the Respondent.

The argument derived from section 6(1)(j) will be looked at further down, since I attach greater significance to the plea that the true nature and meaning of the consideration for the so-called "sale and transfer was the undertaking to divide for a period of three years the commissions paid on certain policies issued to clients of the late Herbert J. Bulley".

In despite of certain expressions used, a terminology spontaneously flowing from the pen of laymen with no pretence at technical accuracy, and more intent on recording the material conditions of a deal than its exact legal identity, the question remains whether or not we have here a sale and purchase of a capital asset.

1965  
MINISTER OF  
NATIONAL  
REVENUE  
v.  
GAULT  
Dumoulin J.

1965  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 v.  
 GAULT  
 Dumoulin J.

It could hardly be maintained that Randol H. Gault did, essentially, subscribe and agree to anything, beyond an undertaking to collect, during a triennial period, March 21, 1960, to March 20, 1963, the commissions "issued or renewed for any clients of the late Herbert J. Bulley for an annual . . . or, for a three-year term". As his reward for this care, Gault was allotted one half (50%) of all renewal premiums received through his medium. To his obligation of remitting the other half to Bulley's executors at the end of each quarter or four-month period is joined the production of a "statement of all relevant transactions". Provisions are written into the covenant (para. 2, sub-paras. (d) and (e)) for the proper reimbursement of the respondent in cases of reduced or cancelled policies during the life of the agreement.

Each and every obligation assumed by the respondent may be duly fulfilled without any personal disbursement on his part, a feature irreconcilable with the accepted notion of sale.

This Memorandum of Agreement, even though it may be repetitious to say so, does not extend beyond the scope of a mere agency for the purpose of collecting, as and when they fall due, the renewal premiums pertaining to insurance policies originally sold to his erstwhile clients by the now deceased Herbert J. Bulley.

The Memorandum of Agreement foresees no fixed price whatever for the acquittal of which Randol Gault might be responsible, an omission inconsistent with the contract of sale as defined in the first paragraph of article 1472 C.C., hereafter cited:

1472 Sale is a contract by which one party gives a thing to the other for a *price in money* (italics added) which the latter obliges himself to pay.

Sale, in the common law, is also based, generally, upon the factor of a specified pecuniary consideration, in proof whereof we read, in Black's Law Dictionary, Fourth ed., 1951, p. 1503, that:

Sale, is a contract between two parties, called, respectively, the "seller" (or vendor) and the "buyer" (or purchaser), by which the former, in consideration of the payment or promise of payment of a *certain price in money*, transfers to the latter the title and the possession of property.

It could be held that all halved commissions forwarded by the respondent to the executors of the Bulley estate, in the

strict sense of the law, were not "payments" but "remittances" of amounts collected in their stead. Gault's responsibility was exactly co-extensive to the amounts received by him and had he, peradventure, during some period of time, not collected anything, he would then owe nothing.

Moreover, one does not readily perceive the reason for the arbitrary differentiation between the respondent's own share of the premiums and that which he hands over to the estate. The commissions retained by Randol Gault, the collecting agent, are, indisputably, income. Then, why should equivalent sums, of similar origin, remitted to the executors be, at the one time, capital instalments as regards the respondent, and income the moment they reach the estate?

A second submission of the respondent raised the possible applicability of section 6(1)(j), worded as follows:

6. (1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year

(j) amounts received by the taxpayer in the year that were dependent upon use of or production from property whether or not they were instalments of the sale price of the property. . . .

Section 139(1), paragraph (ag) has this definition of "Property":

(ag) "Property" means 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.

It consequently follows, in the language of section 6(1)(j), that "amounts received by the taxpayer", including Gault and the Bulley estate, "were dependent upon use of or production from property", to wit: the entire office records of the deceased, and must, therefore, "be included in computing the *income*" of both.

I might note that paragraph 11 of the Reply to the Notice of Appeal, propounding this argument, elicited no written rebuttal from the appellant.

Of the two precedents urged on the Minister's behalf, that of *Irvin Charles Schacter* and *Minister of National Revenue*<sup>1</sup>, albeit evincing quite a few analogies, is nonetheless distinguishable in that the 70% percentage of the regular annual fees of a retiring chartered accountant,

<sup>1</sup> [1962] C.T.C. 437 at 440.

1965  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 v.  
 GAULT  
 —  
 Dumoulin J.  
 —

selling his professional "goodwill" to Schacter, was definitely consolidated and set at a fixed price of \$17,153.50. This amount was paid by Schacter to the vendor, cash, "at the time of the execution of the indenture". The "purchaser", then, did not attend to the periodical perception of fees owing to the "vendor", but acquitted, *instante*, a price of \$17,153.50, from his personal funds, for the payment of which he, otherwise, might have been sued, even though the deal had eventually proved a losing one.

In conclusion, I would agree with this finding of the learned member of the Tax Appeal Board, Mr. Maurice Boisvert, Q.C., writing: "I am satisfied that the dominant consideration in the memorandum of agreement. . . was that of an agency based upon the division of revenue rather than one of sale".

FOR THE REASONS ABOVE, the appeal is dismissed, with all taxable costs in favour of the respondent.