BETWEEN:

JAMES E. WILDER,.....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ...RESPONDENT.

1948
Sept 20
1949
Aug. 31

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 3(b), 5(k)—An Act respecting the Revised Statutes of Canada, S. of C. 1924, c. 65, ss. 3, 8—"Annuities or other annual payments received under the provisions of any contract"—Ambiguity in the Revised Statutes, 1927—Enumerated paragraphs of s. 3 not statements of sources of income—Exemption granted by s. 5(k) confined to income from annuity contracts like those with Dominion Government.

The appellant sold most of his assets to an incorporated company in consideration of one dollar and several covenants by it, one of which was to pay him an annuity during his lifetime of $1,000 per month. The income tax assessments for the years in review included the amounts of the payments thus received by the appellant in his taxable income. On his appeals from the assessments he contended that he was taxable only in respect of that part of the annuity that was truly income and, alternatively, that he was entitled to an exemption in respect thereof.

Held: That if an ambiguity appears in the Revised Statutes of 1927 which did not exist in the Act repealed thereby it should be resolved by adopting the meaning that is consistent with that of the repealed Act.

(1) (1843) 2 Y. & C. Ch. Cas. 376.

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2. That the enumerated paragraphs of section 3 are not statements of sources of income from which only the annual profit or gain is taxable; the subject matter of each is included as an item of taxable income in the definition thereof given by the section.

3. That in order to have the benefit of an exemption in respect of the income from an annuity contract entered into prior to June 25, 1940, under paragraph (*k*) of section 5 as enacted in 1940, the taxpayer claiming such exemption must show that the contract under which he received his annuity was an annuity contract like the annuity contracts with the Dominion Government.

4. That even if it were conceded that the appellant's contract was an annuity contract he has wholly failed to show that it was an annuity contract like the annuity contracts issued by the Dominion Government.

5. That the appellant's contract was not an annuity contract but a contract for the sale and purchase of his assets.

APPEALS under the Income War Tax Act.

The appeals were heard by the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

H. N. Chauvin K.C. for appellant.

P. Dalmé and *E. S. MacLatchy* for respondent.

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

THE PRESIDENT now (August 31, 1949) delivered the following judgment:

These are appeals under the Income War Tax Act, R.S.C. 1927, chap. 97, against assessments for the years 1941, 1942 and 1943. The facts are simple. By a memorandum of agreement in writing and under seal, dated February 6, 1932, the appellant sold practically all his assets, particulars of which are set out in the agreement, to Wilder Norris Limited, a corporation having its principal place of business in Montreal, in consideration of the sum of one dollar and the covenants of the said corporation contained in the said agreement, one of which was as follows:

> (*b*) To pay to the Vendor as and from the first day of December 1931 an annuity during his lifetime of $1,000 per month;

On the assessments for each of the years referred to the sum of $12,000, which the appellant had received from Wilder Norris Limited pursuant to this covenant, was included in his taxable income. He appealed against the

said assessments to the Minister, who affirmed them, and now, being dissatisfied with the Minister's decision, brings his appeals to this Court. The issue in each appeal is the same, namely, whether or to what extent the payments of $1,000 per month received by the appellant as aforesaid constitute taxable income in his hands.

Two arguments were put forward on his behalf; first, that the payments were not annual profit or gain but part of the consideration to him for the sale of his assets and were, therefore, not income but capital payments, notwithstanding that they were described as an annuity, and, secondly, that if they were taxable as annuities he was entitled to an exemption of $5,000 per year in respect thereof under paragraph (*k*) of section 5 of the Act.

It was held by the Minister that the said amounts were income within the meaning of paragraph (*b*) of section 3 of the Act, as enacted in 1940, Statutes of Canada, 1940, chap. 34, sec. 8, which reads as follows:

> (*b*) annuities or other annual payments received under the provisions of any contract, except as in this Act otherwise provided.

In *O'Connor* v. *Minister of National Revenue* (1) I had occasion to consider the meaning of the expression "annuities or other annual payments" as used in paragraphs (*b*) and (*g*) of section 3 and am of the view that the payments here in question were clearly "annuities or other annual payments" within the meaning of paragraph (*b*).

Counsel for the appellant did not attempt to dispute this. His submission was that under the said paragraph (*b*) only that portion of the annuity that represented income was taxable. The opening portion of section 3 of the Act, which defines taxable income, reads as follows:

> 3. For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including

(1) (1943) Ex. C.R. 168.

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and then several paragraphs setting forth various items, of which (*b*) is one, follow. Counsel contended that paragraph (*b*) is qualified by the concluding words of the main body of the section, "the annual profit or gain from any other source", and that the various items enumerated in the several paragraphs are included in the words "any other source". Thus the submission is that the several paragraphs of section 3 are enumerations of sources of income and not items of taxable income. On that assumption it is urged that the "annuities or other annual payments" referred to in paragraph (*b*) are sources of income in respect of which Parliament intended to tax only the annual gain or profit. From this it would follow in the case of the monthly payments in question that only that portion of them that was income would be taxable, and that the balance, being return of capital, would not be.

There are several cases in which a similar submission has been made but, while some support for it may be found in some observations in these cases, there is no judicial decision on the question. Counsel relied particularly on the statement of Davis J. in *Shaw* v. *Minister of National Revenue* (1) where, after citing the concluding words of the opening portion of section 3 to which I have already referred and the provisions of paragraph (*b*), as it then read, relating to policies of insurance, he said:

> It is income that is being taxed and not capital. The governing words of sec. 3, in so far as life insurance policies are concerned, are "and also the annual profit or gain from any other source including". I am unable to read the provision as bringing into charge something which, when its true nature is looked at, is of a capital nature which otherwise would not have been chargeable. Obviously the whole of the $8,400 annual payment, with which this appeal is solely concerned, was not "profit or gain".

There is room in this statement for the inference that Davis J. considered that the items set forth in the enumerated paragraphs of section 3 are sources of income from which only the annual gain or profit is taxable. Certainly, the language of the section lends itself to the possibility of such construction. In *Samson* v. *Minister of National Revenue* (2) I viewed it with favour. There I referred to the salaries, indemnities or other remuneration of members of the Senate and House of Commons and officers

(1) (1939) S.C.R. 338 at 346. (2) (1943) Ex. C.R. 17 at 36.

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thereof, enumerated in paragraph (*d*) of section 3, as a source from which the annual profit or gain was included in taxable income as defined by section 3. In *O'Connor* v. *Minister of National Revenue* (1) it was contended that if the payments there in question came within paragraph (g) of section 3 the appellants were taxable only in respect of the annual profit or gain from such payments on the ground that paragraph (*g*) is merely a statement of one of the sources from which only the annual profit or gain is taxable income. In that case, in view of the conclusion I had reached I found it not necessary to deal with the contention or the argument of counsel for the respondent in reply to it. In *Mahaffy* v. *Minister of National Revenue* (2) it was argued on behalf of the appellant who sought certain deductions from his allowance as a member of the Legislative Assembly of Alberta that it was only his annual profit or gain from his allowance that constituted taxable income and Cameron D. J., as he then was, while disposing of the appeal on other grounds, suggested that as the word "source" was used in the concluding line of the opening portion of section 3 it could be argued that it refers to all the paragraphs of the section and that the various classifications therein detailed are given as "sources" of income rather than items of taxable income. There was no mention of the point in the judgment of the Supreme Court of Canada in that case (3). Finally, I refer to *Lumbers* v. *Minister of National Revenue* (4) in which an argument similar to that raised in this case, while not made in this Court, was presented to the Supreme Court of Canada. It is stated in the appellant's factum in that case that the amendment of section 3 (by which paragraph (*b*) in the form already cited was enacted in 1940) does not extend the definition of "income" to include annuity payments, and that these are still only classed as sources of income and therefore only the income from annuity payments is liable to taxation. There is no reference to this argument in the judgment of the Supreme Court of Canada.

(1) (1943) Ex. C.R. 168.
(2) (1946) Ex. C.R. 18.
(3) (1946) S.C.R. 450.
(4) (1943) Ex. C.R. 202; (1944) S.C.R. 167.

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While the contention seems plausible in the case of the subject matter of some of the enumerated paragraphs of section 3 I have come to the conclusion that it is not sound. There are several reasons for this opinion. The first is an historical one. What makes the contention seem possible is the presence of the word "including" immediately after the word "source", as if it were referable to it, and just before the enumerated paragraphs, as though the subject matter of each were included in the word "source". It is only since the revision of the statutes in 1927 that such a construction has seemed possible. Prior thereto it would not have occurred to any one. Immediately before such revision the opening portion of section 3 was in exactly the same form as that cited, except that after the word "source" there was a semi-colon. Then there were the following words:

including the income from but not the value of property acquired by gift, bequest, devise or descent;

now contained in paragraph (*a*). It was plain from this arrangement that the subject matter of the words following the word "including" was included in the definition of taxable income given by section 3 as an item thereof and not as a source of income from which only the annual profit or gain was taxable. There would not have been even a semblance of plausibility in a contrary construction. It would seem therefore, that such ambiguity as there is in the section was introduced into it by the Commissioners charged with the revision, for there was no such ambiguity there previously. The proper construction, under the circumstances, is indicated by sections 3 and 8 of "An Act respecting the Revised Statutes of Canada", Statutes of Canada, 1924, chap. 65. Section 3 reads in part as follows:

3. The said Commissioners in consolidating the said statutes, and in incorporating therewith the Acts or parts of Acts passed subsequent thereto and selected for inclusion therein as above provided, may make such alterations in their language as are requisite in order to preserve a uniform mode of expression, and may make such minor amendments as are necessary to bring out more clearly what they deem to be the intention of Parliament or to reconcile seemingly inconsistent enactments or to correct clerical or typographical errors.

And section 8 provides in part:

8. The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted.

It follows that if an ambiguity appears in the Revised Statutes which did not exist in the Act repealed thereby it should be resolved by adopting the meaning that is consistent with that of the repealed Act.

A second reason for rejecting the appellant's contention is that it would not make sense as applied to the subject matter of some of the enumerated paragraphs. If it is correct to construe the said paragraphs as statements of sources of income and not items of taxable income such construction must be applicable to all of them. That it cannot be so is obvious in the case of some of them as, for example, in that of paragraph (*a*). If it were accepted it would follow that what is taxable thereunder would be "the annual profit or gain from the income from but not the value of property acquired by gift, bequest, devise or descent". Such a provision would not make sense and the intention to enact it should not be attributed to Parliament in the absence of clear and compelling words. The inapplicability of the construction to other paragraphs of the section could also be shown.

For the reasons given I have now no hesitation in finding that the enumerated paragraphs of section 3 are not statements of sources of income from which only the annual profit or gain is taxable; the subject matter of each is included as an item of taxable income in the definition thereof given by the section.

Counsel for the appellant properly conceded that if the "annuities or other annual payments" referred to in paragraph (*b*) are not sources of income his first contention must fail. He could not then rely upon the statement of Davis J. in the *Shaw* case (*supra*) and look at the true nature of the payments in question and determine their taxability accordingly: *vide* the remarks of Hudson J. in *Lumbers* v. *Minister of National Revenue* (1). The question whether a particular sum is to be included as an item of taxable income does not necessarily depend on whether its true nature is that of income or capital, for if Parliament has decided to make it taxable that is the end of the matter, whatever its so-called true nature may be. The subject of annuities is in point. It could be strongly argued that when a person buys an annuity the payments of it to him

(1) (1944) S.C.R. 167 at 172.

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are a mixture of return of capital and interest, only the latter of which, according to its true nature, is income. Yet such an argument is futile once Parliament has decided, as it did when it enacted paragraph (*b*), to include the whole amount of the annuity as an item of taxable income. The matter is for Parliament to decide. If it should allow an exemption in respect of such income that also is a matter of policy for it.

In my view, the payments of $1,000 per month received by the appellant were within the meaning of the term "annuities or other annual payments" as used in paragraph (*b*) of section 3 and the whole amounts thereof were taxable income in his hands, unless he can show that they are within the ambit of the exception referred to in the paragraph.

This brings me to counsel's second argument, namely, that if the amounts of the payments were items of taxable income the appellant was entitled to an exemption of $5,000 per year in respect thereof under paragraph (*k*) of section 5 as enacted in 1940, Statutes of Canada, 1940, chap. 34, sec. 13, which reads in part as follows:

> 5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*k*) The income arising from any annuity contract entered into prior to the twenty-fifth day of June, 1940, to the extent provided by section three of chapter twenty-four of the statutes of 1930 and section six of chapter forty-three of the statutes of 1932:

To appreciate his argument it is necessary to consider the provisions referred to. The paragraph was first enacted in 1930, Statutes of Canada, 1930, chap. 24, sec. 3, assented to on May 30, 1930, and made applicable to income of the 1929 taxation period and fiscal periods ending therein and subsequent periods. The exemption then granted was in the following terms, in part:

> (*k*) the income to the extent of five thousand dollars only derived from annuity contracts with the dominion or provincial governments or any company incorporated or licensed to do business in Canada effecting like annuity contracts,

The paragraph was amended in 1932, Statutes of Canada, 1932, chap. 43, sec. 6, assented to on May 26, 1932, and made applicable on that date. The exemption granted by the 1932 amendment was, in part, as follows:

> (*k*) twelve hundred dollars only, being income derived from annuity contracts with the Dominion Government or like annuity contracts issued by any Provincial Government or any company incorporated or licensed to do business in Canada:

subject to the following proviso, *inter alia*:

> And provided further that the income arising out of annuity contracts entered into prior to the coming into force of this paragraph (*k*) shall continue to be exempt as heretofore provided by section three of chapter twenty-four of the statutes of 1930;

Under these provisions it was urged that the appellant was entitled to an exemption of $5,000 per year under the paragraph as enacted in 1930 and made applicable to such an annuity as that received by him by its amendment in 1940. The steps in the reasoning leading to this conclusion were as follows, namely, that by the amendment of paragraph (*b*) of section 3 in 1940 "annuities or other annual payments received under the provisions of "any" contract" were first made subject to tax; that by the amendment of paragraph (*k*) of section 5 in the same year the exemption previously granted was extended to "the income arising from "any" annuity contract entered into prior to June 25, 1940," to the extent provided by the enactments of 1930 and 1932; that the words "any annuity contract" in the said amendment mean "any contract by which an annuity is provided" and that the word "extent" was referable only to the amount of the exemption granted in 1930 and 1932; that the annuity received by the appellant was provided by a contract between him and Wilder Norris Limited; that such contract was, therefore, an annuity contract and the payments received under it were income from an annuity contract within the meaning of paragraph (*k*) as enacted in 1940; and that since such contract was entered into on February 6, 1932, before the 1932 amendment of paragraph (*k*) came into effect, the appellant was unaffected by the reduction of the exemption to $1,200 per year effected thereby but entitled to the exemption of $5,000 per year conferred by the 1930 enactment as made applicable to the payments in question by the 1940 amendment.

There are several reasons for not accepting this argument. In the *Lumbers* case (*supra*) I referred to the statement of Sir W. J. Ritchie C.J. in *Wylie* v. *City of Montreal* (1):

> I am quite willing to admit that the intention to exempt must be expressed in clear unambiguous language; that taxation is the rule and exemption the exception and therefore to be strictly construed;

(1) (1885) 12 Can. S.C.R. 384 at 386.

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and, at page 211, put the rule to be applied in dealing with claims of exemption from income tax as follows:

> a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provision of some exempting section of the Income War Tax Act: he must show that every constituent element necessary to the exemption is present in his case and that every condition required by the exempting section has been complied with.

In my opinion, the appellant cannot meet the requirements of this rule. I am unable to agree with the view that paragraph (*k*) of section 5 as enacted in 1940 extended the exemption granted in 1930 or 1932. Although its language makes such a contention seemingly possible this is due to faulty draftsmanship and all that Parliament intended by it was to preserve the existing exemption only in respect of the income from annuity contracts entered into prior to the twenty-fifth day of June, 1940, and permit no exemption in respect of the income from any annuity contract entered into thereafter. The enactment thus served as a notice that in respect of the income from annuity contracts entered into on June 25, 1940, or subsequently, there would be no exemption. In this view the use of the word "any" in the paragraph does not extend the exemption to income from any annuity contract where there was no exemption previously but is merely an inaccurate and loose way of describing and including all annuity contracts of the kind referred to in the 1930 and 1932 legislation. During the course of the argument I was inclined to the view that the expression "to the extent" in the paragraph was referable only to the amount of the exemption granted in 1930 and 1932 but after further consideration I agree with counsel for the respondent that it is not so limited. The exemption that is preserved is limited not only to the extent of the amounts of the exemption but also to the extent of the kinds of annuity contracts in respect of the income from which there was an exemption under the 1930 and 1932 enactments.

There is support for this construction in the case of *Lumbers* v. *Minister of National Revenue* (1) to which I have already referred. There an insurance company issued a policy of insurance to the appellant on December 11, 1918, whereby in consideration of the payment of an

(1) (1943) Ex. C.R. 202;
(1944) S.C.R. 167.

annual premium for twenty years it assured his life and promised to pay him a monthly income at the end of the endowment period of twenty years, if he were alive, or in the event of his death during such period to pay the income to his wife named as beneficiary in the policy. At the end of the endowment period he had the right either to take the commuted value of the policy in a lump sum upon its surrender or to receive the monthly income payments as promised in the policy. He elected to receive the latter commencing January 1, 1939. On his income tax assessment for the year 1940 the amount of the monthly payments received by him during that year was included as taxable income. In his appeal from the assessment he claimed that he was entitled to an exemption under paragraph (*k*) of section 5, either of the whole amount of the monthly payments, which was less than $5,000, under the 1930 provisions of the paragraph or, in the alternative, of $1,200 under the 1932 amendment. I need not set out the arguments of counsel for the appellant in that case. It is sufficient to say that I held that his contract was not an annuity contract within the meaning of paragraph (*k*) of section 5, on two grounds; first, that even if it were considered an annuity contract it was not like the annuity contracts with the Dominion Government; and secondly, that at the time it was entered into it was not an annuity contract but a life insurance endowment contract with annuity benefits flowing therefrom after certain conditions had been complied with. On appeal to the Supreme Court of Canada the judgment of this Court was affirmed. As I read the reasons for judgment of Hudson J., speaking for the Chief Justice and Kerwin J. as well as for himself, he approved of both of the grounds above referred to, but Rand J., speaking also for Taschereau J., although he considered it extremely doubtful whether, at the time it was made, the contract could properly be described as an "annuity contract" did not find it necessary to decide the point, there being, in his opinion, ample grounds for the ruling that it was not "like" a government annuity contract. Although the argument raised on behalf of the appellant in this case, namely, that the use of the word "any" in the 1940 amendment of paragraph (*k*) indicated an intention by Parliament to extend the exemption beyond the scope

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of that previously granted except as to the extent of the amount thereof, was not raised or suggested in the *Lumbers* case (*supra*) it is clear that the *ratio decidendi* of that case was that in order to have the benefit of an exemption in respect of the income from an annuity contract entered into prior to June 25, 1940, under paragraph (*k*) of section 5 as enacted in 1940 the taxpayer claiming such exemption must show that the contract under which he received his annuity was an annuity contract like the annuity contracts with the Dominion Government.

Moreover, although the wording of the 1940 amendment of paragraph (*k*) is not as clear as it might be and the use of the word "any" seems to open the door to the construction urged by counsel for the appellant, I am of the view, having regard to the circumstances under which the exemption was originally granted and the purpose behind it, that such construction is not a reasonable one. The exemption was first granted soon after the decision of this Court in *Kennedy* v. *Minister of National Revenue* (1) and probably to remedy the situation disclosed by it. There had apparently been controversy as to the taxability of Dominion Government annuities in view of representations on the part of the Crown to purchasers of them that they were exempt from income tax, but Audette J. held that they were taxable income within the meaning of the Act and that any representations to the contrary were without any force or effect and could not change the law as enacted. If Parliament had granted an exemption only in respect of the income from Dominion Government annuities there would no doubt have been cause for complaint of unfair discrimination on the part of provincial governments and companies that were competing with the Dominion Government in the sale of annuities. Consequently, Parliament decided that all purchasers of annuities, whether from the Dominion Government or from Provincial Governments or from companies, should be put on an equal footing in the matter of exemption from income tax, with the qualification that in the case of annuity contracts issued by provincial governments or companies there would be no exemption unless such contracts were like the annuity contracts with the Dominion Government. If there was

(1) (1929) Ex. C.R. 36.

any doubt about this qualification it was wholly removed by the 1932 amendment. The legislation of 1930 and 1932 went no further than this. The reason for the exemption and its limitations was readily understandable. But I can see no reason why Parliament should decide in 1940 to cut off the exemption altogether in respect of the income from all annuity contracts entered into after June 25, 1940, and make the whole of such income taxable and at the same time extend the scope of the existing exemption to cases of annuity contracts where there had been no exemption previously. There would be no purpose in such a course of action and no need for it. While it is true that in 1940 paragraph (*b*) of section 3 was amended this was for the purpose of ensuring that annual payments of the kind that were in question in the *Shaw* case (*supra*) should be subject to tax. There was no extension in the scope of the taxability of income from annuity contracts such as would require any extension of the scope of the existing exemption. There were no considerations similar to those that moved Parliament to grant the exemption in the first place. Under the circumstances, I am of the opinion that the construction put on the paragraph by counsel for the respondent, namely, that in respect of the income from any annuity contract entered into prior to June 25, 1940, Parliament intended merely to preserve the exemption granted under the 1930 and 1932 enactments, is a much more reasonable one than that of counsel for the appellant. I therefore repeat what I said in the *Lumbers* case (*supra*), at page 213:

> I cannot see anything in the amendment of 1940 which would extend the scope of exemption from income tax to income from contracts that would have been excluded from the exemptions granted by the legislation of 1930 or 1932.

It follows from what I have said that in order to succeed in his claim for exemption the appellant must show not only that his contract with Wilder Norris Limited was an annuity contract but also that it was an annuity contract like the annuity contracts with the Dominion Government referred to in the 1930 and 1932 enactments. Since the onus of showing compliance with the requirements of an exempting provision of the Act is on the taxpayer claiming the exemption, it must be held that even if it were conceded that the appellant's contract was an annuity

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contract he has wholly failed to show that it was an annuity contract like the annuity contracts issued by the Dominion Government. On this ground alone his claim for exemption must fail.

I am also of the view that his contract with Wilder Norris Limited was not an annuity contract, even although he received an annuity under one of its provisions. I cannot accept the argument that the words "annuity contract" mean or include every contract by which an annuity is provided. The covenant by Wilder Norris Limited to pay the appellant an annuity of $1,000 per month was only part of the consideration paid by it for the sale by the appellant of his assets. There were several other covenants from which income would arise. The contract was not an annuity contract but a contract for the sale and purchase of the appellant's assets. It was thus more than an annuity contract. Paragraph (*k*) gives an exemption only in respect of the income from an annuity contract. There is no exemption in respect of the income from a contract for the sale and purchase of assets. In my view, it is not permissible to stretch the terms of the paragraph to the extent that would be necessary to give effect to the appellant's contention. Almost the same point came up in the *Lumbers* case (*supra*) where I held, as already stated, that the appellant's contract in that case was not an annuity contract but a life insurance endowment contract with annuity benefits flowing from it and that the exemption from income tax granted by the paragraph did not extend to the income from such a contract. There should, I think, be a similar finding in the present case, namely, that the contract between the appellant and Wilder Norris Limited was not an annuity contract within the meaning of the paragraph and that he is not entitled to any exemption in respect of the monthly payments received by him.

There being no error in the assessments by which such monthly payments were included as taxable income in his hands, his appeal therefrom must be dismissed with costs.

Judgment accordingly.