
BETWEEN :

1943

Jan. 21
 Aug. 16

WALTER G. LUMBERS APPELLANT,

AND

THE MINISTER OF NATIONAL
 REVENUE } RESPONDENT.

Revenue—Income—Income War Tax Act, R.S.C. 1927, c. 97, secs. 3 & 5(k)—Exemption provisions of a taxing act must be construed strictly—Claim for exemption under s. 5(k) of Income War Tax Act disallowed—Life insurance endowment contract is not an annuity contract within the meaning of s. 5(k) of the Income War Tax Act—Appeal from the decision of the Minister of National Revenue dismissed.

An insurance company issued a policy of insurance to the appellant whereby in consideration of the payment of an annual premium of \$1,219.13 for twenty years it assured the life of the appellant and promised to pay him a monthly income of \$125 at the end of the endowment period of twenty years, if the assured were then alive, or in the event of the death of the assured during the endowment period to pay the income to the wife of the assured named as beneficiary in the policy. At the end of the endowment period the assured 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. Payments of monthly income were made in 1940. The appellant in his income tax return for the year 1940 claimed exemption under s. 5(k) of the Income War Tax Act on the ground that such payments were income from an annuity contract. The Commissioner of Income Tax disallowed this deduction and assessed the appellant for income tax on the payments received by him. This assessment was affirmed by the Minister of National Revenue from whose decision an appeal was taken to this Court.

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Held: That the exemption provisions of a taxing act must be construed strictly and a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions of some exemption 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.

- 2 That the appellant's contract was not an annuity contract when it was entered into within the meaning of s. 5(k) of the Income War Tax Act.
3. That the exemption from income tax, granted by s. 5(k) of the Income War Tax Act in the case of the income arising from an annuity contract entered into prior to June 25, 1940, does not extend to the monthly income received under a life insurance endowment policy, where the assured, at the end of a specified endowment period and subject to the payment of a specified number of premiums, has the option of receiving the commuted value of the policy in a lump sum upon surrender of the policy or monthly income payments as stipulated in the policy.

APPEAL under the provisions of the Income War Tax Act from the decision of the Minister of National Revenue.

The appeal was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

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

Robert Forsyth, K.C., and *E. S. MacLatchy* for respondent.

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

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THE PRESIDENT now (August 16, 1943) delivered the following judgment:—

This appeal raises the question as to whether the appellant is entitled to any exemption from income tax under the provisions of paragraph (k) of section 5 of the Income War Tax Act, R.S.C. 1927, chap. 97, as amended in 1940, in respect of monthly income payments made by an insurance company under the provisions of a policy whereby it assured the life of the appellant and promised to pay to him a monthly income at the end of an endowment period of 20 years, if he were then living, or, if he should die during the said period, to pay the said monthly income to his wife, the beneficiary named in the policy.

The facts are not in dispute. On December 11, 1918, The Mutual Life Assurance Company of Canada executed and issued a policy on the life of the appellant, whereby the said company, as set out in the policy:

In consideration of the payment upon the delivery of this policy of the sum of Twelve Hundred and Nineteen and 13/100 Dollars, and the further payment of a like amount on or before the first day of January in every year during the continuance of this contract, until the premiums for twenty years shall have been fully paid, HEREBY ASSURES THE LIFE OF WALTER GLEN LUMBERS of Toronto, Ont., Wholesale Grocer, hereinafter called the Assured, and promises to pay, at its Head Office, TO THE SAID ASSURED, subject to the conditions hereinafter given, A MONTHLY INCOME OF ONE HUNDRED AND TWENTY-FIVE DOLLARS commencing the first day of January 1939, at the end of the endowment period of twenty years, if the assured is then living, and provided this policy is in force; or, in the event of the death of the assured during the said endowment period, the Company will pay the said income to the Assured's wife, Alice Louise Lumbers, hereinafter called the Beneficiary, commencing immediately upon receipt and approval of proofs of the death of the assured provided this policy is in force.

The policy is described as a "Continuous Monthly Income Endowment in 20 Years Annual Dividends" and identified as "Policy No. 143,113 on the life of Walter G. Lumbers, Monthly Income \$125—240 Payments Guaranteed—Commuted Value—\$21,725—Premium—\$1,219.13—Due 1st January."

The appellant at the end of the 20 year endowment period, after payment of the required premiums, had the right either to take the commuted value of the policy, namely, \$21,725, in a lump sum upon surrender of the policy or to receive the monthly income payments as promised in the policy

The following endorsement appears upon the policy:

As the Endowment period of this policy has been completed the Monthly Income stated on the face hereof will now be payable in accordance with the terms of the policy, the first payment being due the first day of January 1939.

Dated at Waterloo, this fourth day of February 1939.

C. B. SPURGEON,
Assistant Actuary.

R. O. McCULLOCH,
President.

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On December 2, 1938, the appellant and his wife, Alice Louise Lumbers, the beneficiary named in the policy, gave the following direction *re* optional settlement to the company:

We, Alice Louise Lumbers, beneficiary, and Walter Glen Lumbers, the assured under Policy No. 143,113 issued by The Mutual Life Assurance Company of Canada under its present or former name hereby direct that payment under the said policy or policies shall be made as follows:

When this policy matures as an Endowment on January 1, 1939, the monthly income provided by the terms of the said policy shall be paid to Alice Louise Lumbers during her lifetime, thereafter to Walter Glen Lumbers, and upon the death of both the said Alice Louise Lumbers and Walter Glen Lumbers, the commuted value of any remaining guaranteed installments shall be paid in one sum to the executors or administrators of the estate of the said Alice Louise Lumbers.

The receipt of this direction was duly acknowledged by the company and payments of monthly income pursuant to it were made as from January 1, 1939. In his income tax return for the year 1940 the appellant included the sum of \$1,500 as an annuity received from the Mutual Life Insurance Company of Canada and claimed the sum of \$1,200 as an exemption on the said annuity. In the assessment of the appellant's income for the year 1940 this deduction claimed by him was disallowed. From such disallowance the present appeal to this Court is brought.

The narrow issue in the appeal is whether the appellant has a right to the exemption claimed by him under the provisions of section 5 (*k*) of the Income War Tax Act, R.S.C. 1927, chap. 97, as amended in 1940, which, so far as relevant to this appeal, reads as follows:

5. "Income" as hereinafter 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:

In his notice of appeal from the assessment disallowing the exemption claimed, the appellant puts forward two

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alternative contentions. In the first place, he contends that his contract with the Mutual Life Assurance Company of Canada was an annuity contract entered into prior to the 30th day of May, 1930, the date of the amendment of 1930, with a company incorporated or licensed to do business in Canada, which company was effecting annuity contracts like those made by the Dominion Government and that it therefore falls within the provisions of section 5 (*k*) of the Income War Tax Act and section 3 of chapter 24 of the Statutes of 1930. The decision of the Minister does not deal with this specific contention made by the appellant with respect to the 1930 amendment. By the amending legislation of 1930, subsection 1 of section 5 of the Income War Tax Act was amended by adding thereto paragraphs (*i*), (*j*) and (*k*), so that section 5 (*k*), so far as relevant to the matter now under review, reads 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 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, provided, however, that any annuity in excess of the said five thousand dollars purchased by a husband for his wife or *vice versa* shall be taxed as income to the purchaser.

On the hearing, counsel for the appellant elaborated the contention made in the notice of appeal. He argued that it was not necessary for the appellant, in order to come within the 1930 exemption, to show that his contract was an annuity contract like a Dominion Government annuity contract, provided he could show that his contract was "an annuity contract" and that it was with a company incorporated or licensed to do business in Canada, which did in fact effect annuity contracts like those effected by the Dominion Government, even although his particular contract might not itself be like a Dominion Government annuity contract.

In support of this contention, evidence was adduced that in 1918, when the appellant's contract was made, the Mutual Life Assurance Company of Canada did in fact issue annuity contracts like the Dominion Government ones.

This contention means that the words "effecting like annuity contracts," as used in the 1930 amendment, are to be read as merely descriptive of the company rather

than of the contracts made by them. Counsel for the respondent took a different view as to the meaning of these words and suggested that they really meant "in so far as they effect like annuity contracts." In my opinion, this is a more reasonable view to take, having regard to the position of income from annuity contracts. It may, I think, reasonably be assumed that when Parliament enacted the amendment of 1930 above referred to, it felt that some exemption from income tax should be given to persons who had bought annuities and that such exemption from what should otherwise be taxable income should not exceed five thousand dollars, but that any annuity income in excess of five thousand dollars should be taxed, regardless of argument as to whether it was really income in the popular sense of the term or return of capital or partly the one and partly the other. The exemption up to the maximum of \$5,000 was clearly given to the purchasers of Dominion or Provincial Government annuities. If the amending legislation had stopped at such an exemption, it would no doubt have been regarded as unfair discrimination against companies who were selling annuities in competition with the Dominion or Provincial Government annuity branches. Consequently other companies selling annuities were put in the same position as Dominion and Provincial Governments, so far as income tax exemptions in respect of annuities were concerned. I do not think that the 1930 amendment contemplated any further relief, nor should the Court assume a wider scope for an exemption than is necessary to give effect to the relief intended. The policy of Parliament seems to have been to grant a maximum exemption of five thousand dollars in respect of income, in the sense of incoming moneys, from annuity contracts, which was otherwise assumed to be taxable in its entirety, and to grant such exemption to all purchasers of annuities whether the vendors were Dominion or Provincial Governments on the one hand or companies incorporated or licensed to do business in Canada on the other; I do not think it was intended to extend the field of exemption to contracts, which, while they might have some annuity features connected with them, were different from government annuity contracts. It was not intended, in my opinion, to extend the exemption to life insurance endowment income policies, such as the one the appellant had with the Mutual Life Assurance Company of Canada.

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Even if there were acceptance of the contention of the appellant, namely, that in order to come within the exemption granted by section 5 (*k*), as enacted in 1930, he does not have to show that his contract is an annuity contract like a government annuity contract, provided he can show that the Mutual Life Assurance Company of Canada at the time of his contract was effecting annuity contracts like the Dominion Government ones, he must show that in 1930 he had an "annuity contract." Whatever the term "annuity contract," as used in the 1930 amendment, may possibly include in view of the fact that it is not defined in the Act, it is, I think, quite clear that it does not include a life insurance policy. One of the purposes of a life insurance policy is to make provision for the benefit of the beneficiary against the contingency of the death of the assured. The benefit, whether by a lump sum or by way of stated amounts monthly or otherwise, becomes payable on the death of the assured, whether he has paid one premium or more. The amount necessarily payable by the assured by way of premium is at no time, prior to the maturity of the policy, ascertainable. On the other hand, the element of life insurance is not present at all in what are ordinarily termed annuity contracts, and, furthermore, the amount required to be paid by the annuitant, before he becomes entitled to the benefits of the annuity, is fixed. Counsel for the appellant realized that the appellant's contract of December 11, 1918, was not exclusively an annuity contract and suggested that the proper description of it, at any rate prior to its maturity on January 1, 1939, was an "insurance and annuity contract." I would describe it as a life insurance contract contemplating the payment of benefits, perhaps of an annuity nature, upon the completion of the endowment period of 20 years and the payment of premiums during such period. The exemption granted by section 5 (*k*) of the Income War Tax Act, as enacted in 1930, was only in respect of the income derived from "annuity contracts"; it did not extend to income derived from contracts other than annuity contracts, even if such contracts might ultimately result in payments similar to those payable under annuity contracts. In my judgment, the contention of the appellant that he is entitled to the exemption benefit of the amendment of 1930 cannot be accepted.

The appellant put forward an alternative contention which was really his main one. In his notice of appeal he alleged that, in the event of it being held that his annuity was not wholly exempt, it was exempt to the extent of twelve hundred dollars, under the provisions of Section 5 (*k*) of the Income War Tax Act and section 6 of chapter 43 of the statutes of 1932. This section amended section 5 (*k*), so that, as far as it is relevant, it read as follows:

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5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions.—

(*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:

The contention was made that on January 1, 1939, the contract between the appellant and the Mutual Life Assurance Company of Canada was in fact a like annuity contract to one that might be made with the Dominion Government and that there were no terms of such contract in force as of that date that would distinguish it from a Dominion Government annuity contract. In reply to the notice of appeal on this point the Minister affirmed the assessment disallowing the exemption on the ground that under the provisions of section 3 (*b*) of the Act, income includes "annuities or other annual payments received under the provisions of any contract, except as in this Act otherwise provided"; that the provisions of paragraph (*k*) of section 5 of the Act are not applicable as the said annuity contract was not similar to those issued by the Dominion Government; that the decision of the Minister in this respect is final and conclusive and that under no other provisions of the Act is the said annuity exempt from tax.

It will be noticed that two important changes were made by the 1932 amendment. In the first place, the amount of the exemption was reduced from five thousand dollars to twelve hundred dollars and, secondly, it was made quite clear that where an annuity contract was other than a Dominion Government one it would not qualify the holder of it for the exemption granted unless his annuity contract were like a Dominion Government annuity contract. Whatever doubts there may have been as a result of the 1930 enactment were completely removed by the 1932 amend-

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ment. The appellant, if he seeks to bring his claim for an exemption within the ambit of the 1932 amendment must show that his annuity contract, if it is such, is like the annuity contracts issued by the Dominion Government. Counsel for the appellant contended that on January 1, 1939, after the endorsement had been made on the policy, as set out previously, the appellant had an annuity contract; that after that date his contract had no life insurance features or terms; that it was no longer a life insurance contract but exclusively an annuity contract and like the annuity contracts issued by the Dominion Government; and that the appellant was, therefore, entitled to the exemption granted by section 5 (*k*) as enacted in 1940 to the extent granted by the 1932 amendment, namely, twelve hundred dollars. On the assumption, for the time being, that the appellant had an annuity contract, the first question that presents itself is whether it was like the Dominion Government annuity contracts. A number of samples of such contracts were adduced in evidence at the hearing of the appeal. Mr. E. G. Blackadar, Superintendent of the Dominion Government Annuities Branch, called by the appellant, produced four samples of Dominion Government annuity contracts issued in December of 1918 and since then and four similar samples of contracts that were for sale in January of 1939. There were also several other kinds used. On cross-examination by counsel for the respondent as to the differences between the appellant's contract and those issued by the Dominion Government, he drew attention to the provisions in the appellant's contract which did not appear in the Dominion Government annuity contracts. I need refer only to two of these differences: the life insurance provisions, which I have already referred to, and the provisions whereby the endowment policy became payable at the end of the 20-year endowment period, either in the lump sum of \$21,725, which was the cash value of the policy at the time of its maturity, or in continuous monthly income payments of \$125 with 240 payments guaranteed. No such provisions appear in the Dominion Government annuity contracts. In my view this difference is enough to take the appellant's contract, if it is an annuity contract at all within the meaning of section 5 (*k*), out of the class of "like annuity contracts," referred to in the section.

It is a well established rule that the exemption provisions of a taxing Act must be construed strictly. In *Wylie v. City of Montreal* (1) Sir W. J. Ritchie C. J. said:

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;

The rule may be expressed in a somewhat different way with specific reference to the Income War Tax Act. Just as receipts of money in the hands of a taxpayer are not taxable income unless the Income War Tax Act has clearly made them such, so also, in respect of what would otherwise be taxable income in his hands a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions 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. Consequently, since the contract which the appellant had is not "like" a Dominion Government annuity contract, for the reason already given, it does not fall within the requirement of the term "like annuity contracts" in section 5 (*k*) as amended in 1932, and on that ground alone the appellant is not entitled to the exemption from income tax granted by that section.

There is a further reason for holding that section 5 (*k*) as enacted in 1940 does not apply to the appellant's case. The wording of the section must be carefully analyzed. The section really breaks itself up into two parts: firstly, the income which is exempt and, secondly, the extent to which such income is exempt. I have already discussed the second aspect of the matter: the extent of the exemption is governed by the legislation of 1930 and 1932. Then, with regard to the first part of the section, it should be noted that the exempted income is the income arising from "any annuity contract entered into prior to the twenty-fifth day of June, 1940." Counsel for the appellant contended that as from January 1, 1939, when the monthly income became payable, the contract of the appellant, whatever terms it may have had originally and whether it then had life insurance features, was exclusively an annuity contract and

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that it was entered into before June 25, 1940. His own description of it is that prior to January 1, 1939, it was an "insurance and annuity contract," but that after that date it was only an annuity contract, with no life insurance features left in it. He also argued that whatever the contract may have been in any year prior to 1940 was of no importance for the purpose of determining whether the payments made under it in 1940 are or are not exempt from income tax: that the payments made in 1940 flowed from a set of obligations covered by the name of a contract and that it was the obligations of 1940 under the contract that must be looked at in order to get the real nature of the contract and determine whether it were an annuity contract within the meaning of the exempting section. I cannot accept this construction of the section. I think it is clear that it was intended to exempt only income arising from a contract that was an annuity contract at the time it was entered into. The appellant must bring himself within the express terms of the exemption section and must show that his contract, not the obligations resulting from it at any particular time, was an annuity contract when it was entered into. The term used in the exempting section is "contract." While that term is sometimes loosely used to express various ideas, Anson on Contract says that "Contract results from a combination of the two ideas of agreement and obligation" and that "contract is that form of agreement which directly contemplates and creates an obligation; the contractual obligation is that form of obligation which springs from agreement." It is not enough, therefore, for the appellant to show that in 1940 the obligations of the Mutual Life Insurance Company of Canada under his contract with him had become fixed to pay him a monthly income. If the appellant could show that on January 1, 1939, he had entered into a new contract with the Mutual Life Assurance Company of Canada, his counsel's contention might well be accepted, but such was not the case. It is the contract as it was entered into that must be looked at. The appellant did not enter into a contract with the Mutual Life Insurance Company of Canada on January 1, 1939, but on December 11, 1918. At that time it was a life insurance endowment contract imposing an obligation upon the company to make the monthly payments to his beneficiary, if he should die before the end of the endowment period, and to him at the end

of the endowment period if he were then still alive. On either maturity of the policy the person entitled to the benefits could take a lump sum payment instead of the monthly income. Such a contract was, in my view, not an annuity contract when it was "entered into" in 1918. The fact that on January 1, 1939, the monthly income became payable did not result from any new contract, but from the exercise by the appellant of an option, under the provisions of a contract, which he had entered into on December 11, 1918, at which date the contract was one of life insurance and not an annuity contract within the meaning of section 5 (k) of the Income War Tax Act.

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.

In these reasons for judgment I have confined myself to a consideration of the narrow question as to whether the appellant is entitled to the exemption claimed by him and must hold, for the reasons given, that he has failed to establish his right to such exemption within the clear terms of the exempting section under discussion. In my opinion, the exemption from income tax, granted by section 5 (k) of the Income War Tax Act in the case of the income arising from an annuity contract entered into prior to June 25, 1940, does not extend to the monthly income received under a life insurance endowment policy, where the assured, at the end of a specified endowment period and subject to the payment of a specified number of premiums, has the option of receiving the commuted value of the policy in a lump sum upon surrender of the policy or monthly income payments as stipulated in the policy. The appeal will, therefore, be dismissed with costs.

Judgment accordingly.

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