

Montreal
1965
May 17
Ottawa
June 10

BETWEEN:

GÉRALD MOLLEUR APPELLANT;

AND

THE MINISTER OF NATIONAL
REVENUE } RESPONDENT.

Income tax—Superannuation or pension fund or plan—Sickness benefit plan—Single payment in satisfaction of rights under—Whether entitled to lower rate—Income Tax Act, R.S.C. 1952, s. 36(1)(a)(i)(C).

In 1962, consequent on an amendment to the Quebec Hydro-Electric Commission's Sickness Benefit Plan, appellant, a long standing employee of the Commission, received a single payment of \$10,740 in full settlement of his accumulated credit days or sickness pay allowances under the Plan. Appellant contended that the single payment was, within the language of s. 36(1) of the *Income Tax Act*,

(a) a single payment

(i) . . . out of or pursuant to a superannuation or pension fund or plan

(C) to which the payee is entitled by virtue of an amendment to the plan . . . ,

and subject to a lower rate of tax under the provisions of s. 36.

Under the Plan, employees received so-called "credit days" for a specified number of days for each working year subject to reduction for absences with pay for sickness and other specified reasons. The Plan provided that an employee on reaching pension age would continue to receive full salary for a number of days equal to his accumulated reserve of unused credit days before his pension began. It also provided that on the death or retirement of an employee his accumulated sick leave credit could be applied in payment of any arrears of the Commission's Pension Plan.

Held, the Commission's Sickness Benefit Plan was not a superannuation or pension fund or plan within the meaning of s. 36(1)(a)(i)(C) of the *Income Tax Act*, predicated "on a single payment out of or pursuant to a superannuation or pension fund or plan".

APPEAL from decision of the Tax Appeal Board.

P. N. Thorsteinsson for appellant.

Paul Boivin, Q.C. and *Paul Ollivier, Q.C.* for defendant.

DUMOULIN J.:—On April 17, 1963, a tax in the sum of \$5,958.18 was levied in respect of the appellant's income for taxation year 1962. The Tax Appeal Board, on September 25, 1964, affirmed this levy¹; hence the instant appeal.

¹ 37 Can. Tax A.B.C. 78.

Gérald Molleur was, in 1962—and still is—a highly remunerated employee of the Quebec Hydro-Electric Commission, being, as such, a member of an “Employees’ Sickness Benefit Plan”, in force since December 31, 1944. (cf. exhibit A-1)

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Under the signature of Mr. L. E. Potvin, then President of the Quebec Hydro-Electric Commission, the main objectives of this Sickness Benefit Plan were outlined in an official communication published in the February 1945 issue of “Entre-Nous”, the employees’ magazine, (cf. ex. A-1) from which are excerpted, in part, these five paragraphs:

. . . I am pleased, on behalf of the Commission, to outline some details of the sickness benefit plan announced at Christmas, a plan which will apply to all permanent employees and will afford substantial relief in the event of illness or other specifically authorized absence.

. . .

Every permanent employee is eligible to benefit under the plan, and the length of his leave-of-absence—with pay—will be in proportion to his years of service at the rate of seven working days for each year prior to December 31, 1944, and of 14 working days for 1945 and for each subsequent year.

The cumulative total of *Credit Days* (all *italics* in these notes are added) will be subject to deductions for absences with pay—after January 1, 1945—due to:

- (a) sickness of the employee,
- (b) death of an immediate relative,
- (c) weddings in the immediate family, and
- (d) other leaves, specifically authorized by the Commission.

On reaching pension age, an employee will benefit from any unused *Credit Days* to the extent that *his full salary* will continue to be paid to him during a number of calendar days equivalent to the *accumulated reserve* he may have built up, *after which he will start drawing his pension* . . .

. . .

The goal of the Commission in adopting this new plan of *sickness pay allowance*, is to provide a greater measure of security. . .

I would, at once, draw attention to the expressions used by the originators of this benevolent initiative to qualify and describe it: “Sickness Benefit Plan; Credit Days; *accumulated reserve* . . . after which he (the employee) will start drawing *his pension*; sickness pay allowance”, so many nouns without analogy to the accepted notion of a real pension. Moreover, this relief fund, referred to as an “accumulated reserve”, is sharply contrasted with the

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Commission's regular pension scheme, of which the periodical instalments fall due only after the foregoing "reserve" is exhausted.

In paragraph 3 of the Notice of Appeal, it is stated that:

3. The said plan in 1962 provided for dollar amounts accumulated as sick leave credits by a member to be applied on the death or retirement of the member first to payment of any arrears of pension contribution of such member to the registered pension plan of the Quebec Hydro-Electric Commission or to any other debt due by the member to the Quebec Hydro-Electric Commission . . .

Here again may be detected a clear enough indication of a specific difference between these "sick leave credits" and the Employees' registered pension plan, any arrears of which must be made good out of such sickness pay allowance. Otherwise, we would have a rather unfrequent instance of a supplementary pension serving, occasionally, to bolster up the principal one, something more akin to a form of insurance than to a true pension.

This Sickness Benefit plan was amended in 1962 and, as a result Molleur received, that year, a single payment of \$10,740.13, in full settlement of his accumulated Credit Days or sickness pay allowances. At a credit rate of 7 working days prior to December 31, 1944, and 14 for subsequent years, so considerable a sum is a sure proof of the appellant's continued streak of unimpaired health over a lengthy span of years, and, also, of the important nature of his functions.

However, the receipt of so enviable an amount could be an unmitigated blessing only if the appellant's election "to have the said sum of \$10,740.13 taxed, pursuant to the provision of section 36 (1)(a)(i)(C)," were not interfered with, an unfortunate contingency taking form and shape in the Minister's refusal to agree with Molleur's contention that the Sickness Benefit plan constituted "a supplementary non-contributory pension plan".

The appellant, in his written plea and oral argument, attached great significance to the fact that this sickness benefit plan, being amended on February 14, 1962, (cf. ex. 21), not to mention 22 other amendments (cf. exhibits 1 to 23), thereby entitled him to the option extended by s. 36(1)(a)(i)(C), an advantage available in the case, only, of a superannuation or pension fund.

The pertinent provisions of s. 36 enact that:

- 36. (1) In the case of
 - (a) a single payment
 - (i) out of or pursuant to a *Superannuation* or pension fund or plan
 - (A) . . .
 - (B) . . .
 - (C) to which the payee is entitled by virtue of an amendment to the plan although he continues to be an employee to whom the plan is applicable

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. . .

- (c) . . . the payment or payments made in a taxation year may, at the option of the taxpayer by whom it is or they are received, be deemed not to be income of the taxpayer for the purpose of this Part, in which case the taxpayer shall pay, in addition to any other tax payable for the year, a tax on the payment or aggregate of the payments equal to the proportion thereof that
 - (i) the aggregate of the taxes otherwise payable by the employee under this Part for the 3 years immediately preceding the taxation year (before making any deduction under section 33, 38 or 41) is of
 - (ii) the aggregate of the employee's income for those three years.

Obviously, an appreciable degree of fiscal alleviation would enure to the appellant, were he permitted to spread over the aggregate total income of the past 3 years this lump payment, in 1962, of his unused sickness credit days; but, as aforesaid, to this the Minister strongly objected.

This "superannuation or pension fund or plan" foreseen by the statutory text, just related in part, does exist since March 28, 1946, "to assure pensions to the Employees of Hydro-Quebec" (cf. ex. A-3). It was enacted by c. 27, 10 Geo. VI (1946), and amended in 1961 by c. 49, 9-10 Elizabeth II, of the Quebec Provincial Statutes.

The Hydro-Quebec Employees' Pension Plan, duly registered, is similar in all essential respects to the present day style of superannuation funds, providing for:

- (a) A contribution of three per cent of his remuneration or salary to be paid by each employee benefiting from the by-law;
- (b) A contribution by the commission of twice that of its employees (ex. A-3, s. 5). Compulsory contribution to the Pension fund for all employees is decreed by s. 5 of By-Law No. 12 (Revised); s. 25 renders all pensions and one-half pensions non-transferable and exempt from seizure. For all purposes and intents this remains

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the only pension scheme affecting the appellant of which proof was adduced before the Court.

A sickness benefit plan, such as the instant one, differs completely from a superannuation fund. To the differences previously mentioned, could be added several others: its applicability exists long before the beneficiary attains retirement age, to wit: ex. 21, "an Extract of Minutes of the Meeting of the Quebec Hydro-Electric Commission, held at Montreal, Que., on Wednesday, February 14, 1962..." decreeing that (s. 3): "The value of the days exceeding the maximum (130 days) shall be paid to an employee on the anniversary date of his permanency, at the salary rate in effect on the day preceding such date". Furthermore one may permissibly presume that a large number of employees availing themselves of these 14 days sickness leave of absence with pay, each year or practically so, use up, "as they go", any claim to those "credit days". Again, the non-contributory nature of the measure rules out the very fanciful hypothesis of an insurance device, essentially a bilateral contract depending upon payment of a premium by the insured.

Pension allowances or stipends presuppose the retirement or cessation of the pensioner's services, as no one draws from the same employer both a salary and superannuation instalments.

The Shorter Oxford Dictionary (third edition) defines the word thus:

Pension (4): An annuity or other periodical payment made, esp., by a government, a company, or an employer of labour, in consideration of past services or of the relinquishment of rights, claims, or emoluments.

The connotation in Words and Phrases¹ is to the same effect:

Pensions are universally construed as a reward for long-continued service paid upon retirement from service, and all pensions of public employees are paid upon their retirement

P. 552. "A Pension" is a stated allowance or stipend made in consideration of past services or of surrender of rights or emoluments to one retired from service, and is not wages as that word is used in Unemployment Compensation Act provision, wherein wages are defined as remuneration for employment.

Another analysis of the term in Quillet, Dictionnaire de la Langue Française² suggests identical conditions; I cite:

¹ Vol. 31A, at pp. 551-552.

² The 3-volume edition.

Pension de retraite, revenu annuel attribué sous certaines conditions d'âge et de services rendus, à un militaire, à un fonctionnaire, etc., qui a cessé son service.

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In brief, I readily agree with this finding of the learned Tax Appeal Board member, Mr. Maurice Boisvert, Q.C., that "At the very most it sets up a sickness benefit fund (designated in French under the expression of "caisse-maladie"), supplied by an accumulation of salaries withheld from the employees by the employer..." (*supra*, at p. 85).

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Since, therefore, s. 36 of the *Income Tax Act* is predicated "on a single payment out of or *pursuant to a superannuation or pension fund or plan*" and, as the sickness pay allowance or Credit Days at issue herein is something quite different, the statutory enactment aforesaid has no application in the matter.

For the reasons above, the appeal is dismissed with taxable costs in favour of the respondent.

Appeal dismissed.