BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

1962
Sept. 17
1964
Sept. 11

AND

ERNEST HENRY MONTAGUE FOOT .... RESPONDENT.

*Revenue—Income tax—Income—Income tax returns—Duty of taxpayer in reporting income—Misrepresentation of taxpayer in declaring income—Meaning of "incorrect", "any misrepresentation"—Income Tax Act, R.S.C. 1952, c. 148, s. 46(4)(a) and (b)—Income Tax Act, 1948 S. of C., c. 52, s. 42(4)(a) and (b)—Income War Tax Act, R.S.C. 1927, c. 97, s. 55.*

This is an appeal by the Minister of National Revenue from a decision of the Tax Appeal Board in respect of re-assessments of the respondent's taxable income by the appellant for the taxation years 1947 to 1951 inclusive.

The respondent resided in Victoria, British Columbia and practiced law there during the years under review. His income included, in addition to his income from the practice of law, revenue from several productive assets, mostly in the real estate category.

The re-assessment of the respondent's income for the entire period of five years was made on June 6, 1958. The respondent admitted all the twenty-six allegations of fact set forth in the appellant's Statement of

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Facts but added, with respect to each material year "that in filing the said returns for the said years and in furnishing the said information and statements he honestly believed in the truth of the information contained therein".

The respondent argued that, the misrepresentation having been innocent, the re-assessments were barred.

*Held:* That in s. 55 of the *Income War Tax Act,* R.S.C. 1927, c. 97 the adjective "incorrect" is a generic expression encompassing all manner of misrepresentation, innocent or fraudulent; and no time limitation restricted the Minister's action whenever an incorrect return necessitated redress.

2. That the words "any misrepresentation" as used in s. 42(4)(*a*) of the *Income Tax Act,* 1948 S. of C. c. 52 and in s. 46(4)(*a*)(i) of the *Income Tax Act,* R.S.C. 1952, c. 148 are synonymous with the expression "incorrect" as used in the *Income War Tax Act* and extend to both wilful and unintentional misrepresentation.

3. That reticence is a passive form of misrepresentation within the meaning of that term as used in s. 42(4)(*a*) of the *Income Tax Act,* 1948 and s. 46(4)(*a*)(i) of the *Income Tax Act,* R.S.C. 1952.

4. That the standard of proof required in a case of this kind is the balance of probabilities; the normal test in civil proceedings, and not proof beyond a reasonable doubt.

5. That the appeal is allowed.

APPEAL from a decision of the Tax Appeal Board.

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

*E. S. MacLatchy, Q.C.* and *R. L. Radley* for appellant.

*W. R. McIntyre* for respondent.

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

DUMOULIN J. now (September 11, 1964) delivered the following judgment:

This is an appeal from the judgment of the Tax Appeal Board[1], dated February 6, 1961, in respect of re-assessments for the respondent's taxation years 1947, 1948, 1949, 1950 and 1951.

The respondent, throughout the five material years, 1947 to 1951, inclusively, resided in the City of Victoria, B.C., practicing there the profession of barrister.

Apart from the income accruing to him as a member of the local Bar, Mr. Montague Foot derived a considerable

[1] (1961) 26 Tax A.B.C. 65 *et seq.*

revenue annually, stemming from several other productive assets, mostly in the real estate category.

Each year, this taxpayer, more or less at his own convenience, filed an income tax return that, after the aggregate five-year period, induced officials of the Income Tax Department, on June 12, 1957 precisely, to seek from him "certain information pursuant to the provisions of subsection (2) of s. 126 of the *Income Tax Act*."

On subsequent dates, Foot delivered additional indications through his accountant, Mr. J. M. LeMarquand, whose services he had retained in the Fall of 1954, in prevision, possible, of such a contingency.

The outcome of these inquiries, in the text of paragraph 6 of the Notice of Appeal "showed that the Respondent had made misrepresentations in filing the said returns of income for the taxation years 1947, 1948, 1949, 1950 and 1951, wherefor the Appellant reassessed the income of the Respondent for these taxation years."

One Mr. Kenneth Stokes, an assessor of the Minister's Department, attended to the preparation of these re-assessments and there appears hereunder a comparative tableau of (a) the respondent's own returns, (b) those of his accountant, and (c) the definite figures arrived at by Mr. Stokes.

| *Year* | *Foot's* | *LeMarquand's* | *Stokes* |
|---|---|---|---|
| 1947 | $ 5,452.50 | $ 11,979.58 | $ 11,565 24 |
| 1948 | 3,860.00 | 14,612.95 | 19,998.27 |
| 1949 | 15,092.00 | 14,101.37 | 17,854.58 |
| 1950 | 14,485.00 | 10,490.20 | 19,304.70 |
| 1951 | 14,310.00 | 29,394.52 | 25,020 00 |
| | $ 53,199.50 | $ 80,578.62 | $ 93,742.79 |

The two first sums, those of the respondent and of his accountant LeMarquand, attest respectively a difference of $40,543.29 and of $13,164.17 with that of the departmental re-assessment, Mr. Foot's figures constituting the determinative factors of misrepresentation.

On June 6, 1958, having reached the conclusion that the respondent misrepresented his income during the aforesaid five taxation years, the appellant "by virtue of paragraph (a) of section 55 of the *Income War Tax Act,* and paragraph (a) of subsection (4) of section 46 of the *Income Tax Act,* reassessed the taxpayer . . ." for the entire period.

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In his reply, the respondent uniformly admits all the 26 allegations of fact set forth in the Statement of Facts, with only this recurring reservation applied to each material year: "that in filing the said returns for the said years and in furnishing the said information and statements he honestly believed in the truth of the information contained therein."

From then on it became evident that the defence was wholly predicated on the would-be redeeming excuse of innocent misrepresentation and that opponents of the principle affirmed in *Minister of National Revenue* v. *Taylor*[1] were seeking "another day in Court."

It is therefore apposite, as an initial step, to recite the provisions of the successive Acts relied upon by the appellant in section 27 of his Statement of Facts.

Section 55 of the *Income War Tax Act* (R.S.C. 1927, c. 97) enacts that:

> 55. Any person liable to pay the tax shall continue to be liable, and in case any person so liable shall fail to make a return as required by this Act, or shall make an *incorrect* (emphasis mine throughout) or false return, and does not pay the tax in whole or in part, the Minister may *at any time* assess such person for the tax, or such portion thereof as he may be liable to pay . . .

Two particularities in the law of 1927 deserve a special notice. Firstly, the adjective "incorrect" is a generic expression encompassing all manners of misrepresentation, innocent or fraudulent. Secondly, no time limitation restricted the Minister's action whenever an "incorrect" return necessitated redress.

Next, comes s. 42(4) (*a* & *b*) of the *Income Tax Act* (S.C. 1948, c. 52):

> 42. (4) The Minister may at any time assess tax, interest or penalties and may
>
> (*a*) at any time, if the taxpayer or person filing the return has made *any misrepresentation* or committed any fraud in filing the return or supplying the information under this Act, and
>
> (*b*) within 6 years from the day of an original assessment *in any other case*, re-assess or make additional assessments.

The term "incorrect" in the older text now becomes "misrepresentation" preceded and qualified by the adjective "any". If, then, the assumption above is sound, that the

[1] [1961] Ex. C.R. 318 *et seq.*

word *"incorrect"* must include *misrepresentation* of whatever hue, it stands to reason that this latter wording merely is a synonym of the former, nothing is changed. The only difference between ss. 55 of 1927 and 42 of 1948, consists in the shrinkage to 6 years of a heretofore unlimited right of review.

Possibly, it may tax the imagination to conjecture a practical instance of what is meant by the residuary words "in any other case". But is that my problem or the legislator's whose language sometimes detracts from the meaningful standards presumed of it by treatises on "Interpretation of Statutes".

Lastly, section 46(4)(*a*) and (*b*), c. 148 of the 1952 Revised Statutes of Canada goes thus:

> 46. (4) The Minister may at any time assess tax, interest or penalties, under this Part or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the taxation year, and may
>
> (*a*) *at any time* if the taxpayer or person filing the return
>
> i) has made *any misrepresentation* or committed any fraud in filing the return or in supplying any information under this Act
>
> . . .
>
> (*b*) . . . re-assess or make additional re-assessments or assess tax, interest or penalties under this Part, as the circumstances require.

In other conjectural cases, the revisionary delay granted to the Minister is cut down from 6 to 4 years. For the remainder any comment attaching to s. 42(4) of 1948, finds an equally fitting application here, namely, I repeat, that *"any misrepresentation"* is synonymous with the expression "incorrect" in s. 55 of the 1927 Revised Statutes, and, finally, that the preceding qualificative extends to both wilful and unintentional misrepresentation.

Save for unfrequent exceptions requiring technical interpretations, statutory words are given their common, linguistic meaning, and assuredly "incorrect return" should be understood according to its current sense.

Funk and Wagnalls' New Standard Dictionary, 1942 edition, defines the adjective "incorrect" as something "not in agreement with . . . (2) truth", whilst in Webster's Unabridged Dictionary, it is an assertion "not in accordance with the truth; inaccurate; not exact; as, an *incorrect* (emphasis in the text) statement, narration or *calculation*" (italics added).

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Clearly, no ethical specification attaches to the notion of "incorrect"; it is considered objectively, not subjectively, and was looked upon in that light by Parliament. Additional plausibility for this view may be found in the proviso to s. 47(1) of the *British Income Tax Act* 1952, determining the moral nature of the vitiating fiscal infraction; I cite:

> Provided that where any form of fault or *wilful* default has been committed by or on behalf of any person in connection with or in relation to income tax, assessments, additional assessments, and surcharges on that person to income tax for that year may, for the purpose of making good to the Crown any loss of tax attributable to the fraud or *wilful* default, be amended or made as aforesaid *at any time*.

Except for fraud or wilful default, prescription intervenes after six years in favour of the taxpayer. Opposition is manifest between the English Act based upon intentional infringement and the Canadian one, wholly unconcerned with any similar intent.

Furthermore, common sense and equity cannot be easily reconciled with the bestowal of a compassionate treatment upon error and negligence.

Why, for instance, should anyone, especially a well-off man, careless in writing his income papers, gain, after four years, a remission of taxes on undeclared revenues of over $40,000 when a normally diligent citizen acquits himself to the last dollar of his fiscal obligations? One might presume this consideration did not escape our law-makers' wisdom as they drafted a section of the *Income Tax Act* more stringent than its English counterpart. Acting otherwise could blaze a path to an eventual subversion of the Income Tax policies.

Three years ago, Mr. Justice Cameron, late of our Court, wrote an exhaustive review of this identical matter in the *Taylor* case (*supra*) as previously said. In his lucid pronouncement, the learned Judge dealt at some length with the differentiating traits of innocent and fraudulent misrepresentation, more particularly at pages 325 and 326 of the official report. My humble approach to the question, along slightly different lines, induces me to refer the litigants to that authoritative judgment, with which I am in full agreement, particularly as to the following enunciations:

On page 324 ([1961] Ex. C.R., 318):

> For the purpose of this case (equally true of the instant issue), it is unnecessary to determine whether fraud has been committed since, in my

opinion, the Minister has established that in each of the years the respondent made a misrepresentation in filing his returns or in supplying information under the Act.

On page 327:

It is to be noted also that the section refers to "any misrepresentation" and it would be improper, therefore, to construe the term as excluding a particular sort of misrepresentation. I have reached the conclusion that the words "any misrepresentation", as used in the section, must be construed to mean any representation which was false in substance and in fact at the material date, and that it includes both innocent and fraudulent misrepresentation.

I would moreover point out a passive form of misrepresentation: reticence, which may well qualify the practice resorted to by the respondent. Halsbury, (Laws of England, Third Ed. vol. 26, no. 1562) with customary clarity, affords us this conclusive commentary:

1562. There are two main classes of cases in which reticence may contribute to establish a misrepresentation, namely (1) where known material qualifications of an absolute statement are omitted; and (2) where the circumstances raise a duty on the representor to state certain matters, if they exist, and where, therefore, the representee is entitled as against the representor to infer their non-existence from the representor's silence as to them.

The second part (2) of the passage above fits the actual situation to a nicety if my view of the case is correct. Surely, the "representee" was justified in his expectation that the "representor", a lawyer and business man, had fulfilled his duty "to state certain matters" exactly since, each year, he read the "representor's" signed certificate affirming that:

I hereby certify that the information given in this return and in any document attached, is true, correct and complete in every respect, and fully discloses my income from all sources.

This last paragraph also serves the purpose of declaring the standard of satisfaction a judge should require in a case of this kind, namely, the balance of probabilities, a normal test in civil proceedings, in contradistinction to satisfaction beyond reasonable doubt, the test in criminal matters (cf. *Amis* v. *Colls*[1]).

Consequently, for the reasons stated, the appeals of the Minister for the taxation years 1947, 1948, 1949, 1950 and 1951 will be allowed, the decision of the Tax Appeal Board set aside, and the re-assessments made upon the respondent affirmed. The appellant is entitled to his costs after taxation.

*Judgment accordingly.*

[1] [1960] T.R. 213 at 215.