Toronto 1968

Apr. 2, 19

BETWEEN:

JACK CUPPEL OELBAUM ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Income tax—Husband and wife—Loan to wife on demand note—Income from loan—Whether loan a transfer of property—Whether husband taxable on wife's income—Income Tax Act, s. 21(1).

In 1961 appellant loaned his wife $150,000 on three interest-free demand notes and was assessed to tax on the wife's income of $2,460 in 1963 from the investment of the borrowed money.

Held, allowing the appeal, the loan was not a transfer of property within the meaning of s. 21(1) of the *Income Tax Act.*

Dunkelman v. M.N.R. [1960] Ex.C.R. 73, followed.

INCOME TAX APPEAL.

Wolfe D. Goodman and *Arnold L. Cader* for appellant.

F. J. Dubrule and *J. M. Halley* for respondent.

JACKETT P. (orally):—This is an appeal from the appellant's assessment under Part I of the *Income Tax Act* for the 1963 taxation year.[1] The sole question raised by the appeal is whether section 21(1) of the *Income Tax Act* operates to require that an amount of $2,460.09 be deemed to be income of the appellant and not of his wife.

The facts can be stated shortly. The appellant is a man of means who, as a widower, was married in 1961 to his present wife who was, prior to their marriage, a widow. In 1963, his wife was asked whether she had funds available for investment through the agency of a lawyer, Maxwell Lewis, and she asked her husband to loan her the money that she needed to make that investment. He thereupon loaned her $150,000. The money was paid to her by cheque and, shortly thereafter, she executed three promis-

[1] By agreement of counsel, an appeal from the appellant's assessment for the 1964 taxation year was not proceeded with at this time, even though it is contained in the same Notice of Appeal as the appeal from the assessment for the 1963 taxation year.

sory notes payable on demand in favour of the appellant, each for $50,000. The loan, which bears no interest, is still outstanding.

With the money so loaned by the appellant to his wife, she made an investment or investments from which she had income for the taxation year 1963 in the sum of $2,460.09.

The question is whether that amount must be deemed to be income of the appellant by reason of section 21(1) of the *Income Tax Act*, which reads as follows:

> 21. (1) Where a person has, on or after August 1, 1917, transferred property, either directly or indirectly, by means of a trust or by any other means whatsoever, to his spouse, or to a person who has since become his spouse, the income for a taxation year from the property or from property substituted therefor shall, during the lifetime of the transferor while he is resident in Canada and the transferee is his spouse, be deemed to be income of the transferor and not of the transferee.

If the appellant had made a gift to his wife of the $150,000, instead of loaning it to her, and if all other facts had been the same, it is clear that section 21(1) would have been applicable to require that the income of his wife from investments acquired with that amount be deemed to be income of the appellant.

The respondent's reply to the Notice of Appeal does raise a question as to whether the appellant really loaned the money to his wife. Paragraph 6 of the Reply reads in part:

> 6. In making the re-assessments complained of, the Respondent acted on the following assumptions:
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> * * *
>
> (*g*) THAT the three purported notes in the name of the wife of the Appellant as maker, in the total amount of $150,000.00, were never intended by the wife of the Appellant or the Appellant to be promissory notes.

It was not suggested that there is any doubt as to the appellant's honesty in giving evidence before me. I accept his evidence, and, on the basis of that evidence, I find that the $150,000 was *loaned* by the appellant to his wife and was not *given* to her.

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Jackett P.

In these circumstances, the question that I have to decide is whether, when a husband has paid money to his wife by way of loan, he can be said to have "transferred property" to her within the meaning of those words as they are used in section 21(1) of the *Income Tax Act*.

Precisely the same question arose in another case in this court in 1959 with reference to the same words as they are used in section 22(1) of the *Income Tax Act*, which reads as follows:

> 22. (1) Where a taxpayer has, since 1930, transferred property to a person who was under 19 years of age, either directly or indirectly by means of a trust or by any other means whatsoever, the income for a taxation year from the property or from property substituted therefore shall, during the lifetime of the taxpayer while he is resident in Canada, be deemed to be income of the taxpayer and not of the transferee unless the transferee has before the end of the year attained the age of 19 years.

In that case there was a loan by the taxpayer to trustees for his minor children. Mr. Justice Thurlow decided—see *Dunkelman v. Minister of National Revenue*[2]—that section 22(1) did not apply because, in the context in which they are used in that provision, the words "has... transferred property" did not apply to a loan transaction. At pages 81-2, he said:

> I do not think it can be denied that, by loaning money to the trustees, the appellant, in the technical sense, transferred money to them, even though he acquired in return a right to repayment of a like sum with interest and a mortgage on the Butterfield Block as security, or even though he has since then been repaid with interest. But, in my opinion, it requires an unusual and unnatural use of the words "has transferred property" to include the making of this loan. For who, having borrowed money and knowing he must repay it, would use such an expression to describe what the lender has done? Or what lender thinks or speaks of having transferred his property, when what he has done is to lend it? Or again, what casual observer would say that the lender, by lending, "has transferred property"? And, more particularly, who would so describe the lending where, as in this case, the transaction is such that the only purpose to which the money loaned could be turned was in acquiring a property to be immediately mortgaged to the lender? I venture to think, in the terms used by Lord Simonds, that no one, be he lawyer, business man, or man in the street, uses such language to describe such an

[2] [1960] Ex.C.R. 73.

> act. I also think that, if Parliament had intended to include a loan transaction such as the present one, the words necessary to make that intention clear would have been added, and it would not have been left to an expression which, in its usual and natural meaning, does not clearly include such a transaction. To apply the test used by Lord Simonds, I do not think this transaction was one which the language of the subsection, according to its natural meaning, "fairly" or "squarely" hits. I am, accordingly, of the opinion that the making of the loan in question was not a transaction within the meaning of the expression "has transferred property" and that s. 22(1) does not apply.

With that reasoning, with respect, I entirely agree, and I think it applies equally to the interpretation of section 21(1). Counsel for the respondent agreed that the reasoning in the *Dunkelman* decision applies to section 21(1) just as much as it does to section 22(1), but contended that it only applies where there was a more business like transaction than there is in the case at bar. He relied on the fact that, in the *Dunkelman* case, there was a mortgage to the tax-payer by way of security for his loan and contended that that made the facts distinguishable from this case where there is no written record of the loan except promissory notes. With all respect to that submission, I cannot see any possible distinction, from the point of view of the reasoning in the *Dunkelman* case, between the facts in that case and the facts in the present appeal.

The appeal is allowed with costs, and the appellant's assessment under Part I of the *Income Tax Act* for the 1963 taxation year is referred back to the respondent for reassessment on the basis that section 21(1) does not apply to the income of $2,460.09 from the appellant's wife's investments.