Montreal 1967

Feb. 16

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BETWEEN:

TERRA NOVA PROPERTIES LTD. .....APPELLANT;

AND

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

Income tax—Overpayment of tax—Refund—Interest on overpayment —"Interest", meaning of—Whether taxable—Income Tax Act, R.S.C. 1952, c. 148, ss. 6(1)(b), 57(3) and (3a).

Appellant paid tax for 1959 and 1960 as assessed but following an appeal was reassessed in 1963 at a lesser amount and the overpayment was refunded to appellant in 1963 together with interest thereon of $3,290 65 pursuant to s. 57(3) and (3a) of the *Income Tax Act.*

Appellant was assessed to income tax for 1963 in respect of the said $3,290.65 and appealed, contending that the right to a refund did not arise until the reassessment in 1963 and that the $3,290.65 was therefore not "interest" within the meaning of s. 6(1)(*b*) of the *Income Tax Act,* which word in its ordinary significance implied a borrower-lender relationship, a debtor-creditor relationship, or the use of another's property for a period.

Held, affirming the Tax Appeal Board, the $3,290.65 was "interest" within the meaning of s. 6(1)(*b*) of the *Income Tax Act.* Under s. 57(3) interest is payable on an actual overpayment of tax by a taxpayer. The actual amount of tax payable by a taxpayer is a constant amount determined by the substantive provisions of the Act as distinguished from the Minister's assessment of the taxpayer's liability which may be varied by new assessments or judicial decisions.

In *re Farm Security Act, 1944* [1947] S.C.R. 394, per Rand J. at p. 411, applied.

APPEAL from Tax Appeal Board.

Appellant paid income tax for 1959 and 1960 as assessed by the Minister of National Revenue for those two years but objected to the 1959 assessment. The Tax Appeal Board allowed its appeal from the 1959 assessment but an appeal by the Minister from the judgment of the Tax Appeal Board to the Exchequer Court of Canada was allowed by consent of the parties and the 1959 assessment was referred back to the Minister for reconsideration and reassessment. In result appellant was reassessed in 1963 for both 1959 and 1960 and the tax payable by appellant for both those years was thereby reduced from the amount previously assessed, which had been paid by appellant. The

overpayment was returned to appellant in 1963 and, in accordance with the provisions of s. 57(3) and (3a) of the *Income Tax Act*, R.S.C. 1952, c. 148, interest on the overpayment amounting to $3,290.65 for both 1959 and 1960 was also paid to appellant in 1963. In assessing appellant for 1963 the Minister included the interest so paid, *viz* $3,290.65, as income under s. 6(1)(*b*) of the *Income Tax Act*. An appeal by appellant to the Tax Appeal Board against the assessment in respect of the $3,290.65 was dismissed by Mr. Roland St-Onge on April 12th 1966 (66 D.T.C. 311).

J. Claude Couture, Q.C. for appellant.

M. A. Mogan and *P. F. Cumyn* for respondent.

JACKETT P. (orally):—This is an appeal from a decision of the Tax Appeal Board which was set down for hearing, and was argued before me, on a stated case.

The appeal raises a single question. That question is whether amounts paid as "interest" under subsection (3) of section 57 of the *Income Tax Act*, R.S.C. 1952, chapter 148, as amended,[1] should be included in computing the recipient's income for the taxation year in which they were received. If this question is answered in the affirmative, the appeal is to be dismissed. If it is answered in the negative, the appeal is to be allowed.

I have perused the reasons given by the Tax Appeal Board[2] for concluding that amounts so paid are "interest" within the meaning of that word in paragraph (*b*) of subsection (1) of section 6 of the *Income Tax Act*, and I should be prepared to dispose of this appeal for the reasons so expressed, with which I agree.[3] However, out of respect

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[1] All relevant amendments were made prior to the taxation year in question, being the 1963 taxation year. The stated case raises the question both when the payment is made under subsection (3) of section 57 read alone, and when payment is made under subsection (3) read with subsection (3a), but it was not suggested that there could be any difference between the two cases.

[2] 66 D.T.C. 311.

[3] I do not find it necessary to express any view on the further ground adopted by the Board that such payments were "income" from "property" within the meaning of those words in section 3 of the Act

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for the argument presented by counsel for the appellant, I propose to outline, in my own words, my reasons for dismissing the appeal.

As a background for so doing, I shall first outline, as I understand it, the scheme of the provisions of the *Income Tax Act* having to do with the determination of the amount of income tax payable and with the payment of income tax.

Even before the end of a taxation year, a taxpayer is usually required to make payments on account of his income tax for that year; for example, by way of deductions at the source (section 47); by quarterly payments (section 49); or by monthly payments (section 50). After the end of the taxation year, the taxpayer is required to file an income tax return (section 44) in which he is required to estimate the amount of tax payable by him for that year (section 45). Thirty days after mailing his income tax return, the taxpayer is required to pay any tax then remaining unpaid (section 51). He is further liable to pay interest at 6 per cent per annum on any part of the tax payable that has not been paid before the expiration of the time for filing his return (section 54).

After a taxpayer has filed his return, the Minister is required to assess the tax payable and to send a notice of assessment to the taxpayer (section 46). The taxpayer is then entitled, by sending a notice of objection, to require the Minister to reconsider the assessment (section 58). After such reconsideration by the Minister, he is entitled to have the correctness of the assessment reviewed, first by the Tax Appeal Board (section 59), then by this Court (section 60), and, ultimately, by the Supreme Court of Canada. When it appears, by virtue of an assessment, that there has been an overpayment of tax, there is provision for refund (section 57(1)). Such a refund may also be ordered by the Court (section 101).

Prior to 1951, while there was the provision to which I have already referred for payment of interest *by* a taxpayer on an underpayment of tax, there was no provision for payment of interest *to* a taxpayer in respect of an overpayment of tax, regardless of the length of time that had

elapsed between the time when the taxpayer had paid more than, as ultimately determined, the law required him to pay, and the time that the excess was refunded to him. This situation has now been altered as appears from a reading of subsection (3) and subsection (3a) of section 57, which read as follows:

57. (3) Where an amount in respect of an overpayment is refunded, or applied under this section on other liability, interest at the rate of 3% per annum shall be paid or applied thereon for the period commencing with the latest of

(*a*) the day when the overpayment arose,

(*b*) the day on or before which the return of the income in respect of which the tax was paid was required to be filed, or

(*c*) the day when the return of income was actually filed,

and ending with the day of refunding or application aforesaid, unless the amount of the interest so calculated is less than $1, in which event no interest shall be paid or applied under this subsection.

(3a) Where, by a decision of the Minister under section 58 or by a decision of the Tax Appeal Board, the Exchequer Court of Canada or the Supreme Court of Canada, it is finally determined that the tax payable by a taxpayer for a taxation year under this Part is less than the amount assessed by the assessment under section 46 to which the objection was made or from which the appeal was taken and the decision makes it appear that there has been an overpayment for the taxation year, the interest payable under subsection (3) on that overpayment shall be computed at 6% instead of 3%.

As I have already indicated, on the view that I take of the matter, the only question that needs to be decided to dispose of this appeal is whether "interest" paid pursuant to subsection (3) of section 57 is "interest" within the meaning of that word as it appears in section 6(1)(*b*) of the Act, which reads as follows:

6. (1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year

. . .

(*b*) amounts received in the year or receivable in the year (depending upon the method regularly followed by the taxpayer in computing his profit) as interest or on account or in lieu of payment of, or in satisfaction of interest;

The contention on behalf of the appellant is that as, even though a taxpayer may have launched proceedings to attack the correctness of an assessment made by the Minister, he is required, after having been assessed, to pay the

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amount of the tax as so assessed; it follows that, having made such payment, he has discharged his tax obligation; and he has no right under the statute to receive anything by way of refund until that assessment has been replaced by an amended or corrected assessment. When the assessment has been corrected so as to show that he has paid too much tax, then, for the first time, according to the contention, he has a right to a refund of the overpayment. During this period, so the contention goes, as the taxpayer has no right to receive any amount, there is no amount in respect of which interest, in the ordinary significance of the word, and therefore in the significance in which the word is used in section 6, can be payable. The contention is further that, in its ordinary significance, "interest" in respect of a period implies that, during that period, there was a borrower-lender relationship, a debtor-creditor relationship, or the use of property (money) belonging to one party by another; and that, clearly, there is under the *Income Tax Act* no such state of affairs during the period in respect of which interest is payable under subsection (3) of section 57.

It must be recognized that the mere fact that a statutory or contractual payment is described in the statute or contract, as the case may be, as "interest" does not determine the question as to whether such a payment is "interest" within the meaning of a provision such as section 6(1)(*b*). See *C. George McCullagh Estate v. Minister of National Revenue*[1] and *Huston & Whitehead v. Minister of National Revenue*[2], per Thurlow J. at page 75, *et seq.* The question must be determined as a matter of substance having regard to the sense in which, properly understood, the word "interest" is used in section 6(1)(*b*). On the other hand, when Parliament has used the same word in two different statutes, it is not unreasonable, in the absence of something to indicate to the contrary, to assume that the word has been used with the same meaning in both statutes. Compare *Westminster Bank, Ltd. v. Riches* (*H.L.*)[3]. When it is noted that Parliament has here added to the *Income Tax*

[1] [1959] Ex. C.R. 312. [2] [1962] Ex C R 69.
[3] (1947) 28 T.C. 159.

Act a provision for payments referred to therein as "interest" at a time when this word was already used in section 6(1)(*b*), there is even more justification for assuming that the payment was intended to be a payment of "interest" in the sense in which that word was used in section 6(1)(*b*). The matter may, however, in my view, be decided by reference to the substance of the matter, without relying on any such assumption.

The fallacy that underlies the appellant's contention, in my view, is the failure to distinguish between the actual *amount* of the taxpayer's income tax liability for a particular year as imposed by the substantive provisions of the Act, on the one hand, and, on the other hand, the *determination* of that amount by the Minister's assessment thereof, while it remains in force, by the judgment of the Tax Appeal Board, while it remains in force, or by the judgment of this Court, while it remains in force, or, ultimately, by the Supreme Court of Canada. The actual liability is a constant amount that does not change as long as the facts and the substantive law remain unchanged. The assessed amount as varied by judicial decision, which is the amount which the Minister and all others concerned are bound to assume to be the actual amount of the liability, can change from time to time by virtue of new assessments or judicial decisions.[1]

Once that distinction between the actual amount of the taxpayer's liability[2] and the current assessment of that liability is appreciated, in my view, the problem vanishes.

If the Minister wrongly assesses a taxpayer for an excessive amount of income tax for a year, and if the taxpayer

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[1] This effect has been achieved by the drafting device of providing in the *Income Tax Act* (section 139(1)(*ba*)) that "the tax payable by a taxpayer under Part I...means the tax payable by him as fixed by assessment or re-assessment subject to variation on objection or appeal..." and by such provisions as section 51(1), which requires the taxpayer, after the mailing of the notice of assessment, to pay any part of the "assessed tax" then remaining unpaid. See *Davidson v. The King*, [*1945*] *Ex. C.R. 160*, and *Subsidiaries Holding Company, Limited v. The Queen*, [1956] Ex. C.R. 443.

[2] Which is, as a practical matter, the amount at which it is ultimately determined.

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pays that amount, the taxpayer has made, as will ultimately be determined, an overpayment of tax in respect of which interest will ultimately be payable.

The overpayment occurs when the excess payment is made. The ultimate decision does not create the overpayment; it merely establishes that there was an overpayment. If this were not so, subsection (3) of section 57 would be of little practical value because, under it, the period in respect of which interest is payable commences not earlier than "the day when the overpayment arose". Moreover, this is the view upon which subsection (3a) of section 57 was framed as appears from the fact that it deals with a situation where the ministerial or judicial decision "makes it *appear* that there *has been* an overpayment".

In my view, the "interest" payable under subsection (3) of section 57 on an overpayment falls within the ordinary meaning of the word "interest" no matter how narrow a definition thereof be adopted. Immediately an overpayment of tax has been made, the taxpayer has a right to obtain a refund of the amount of the overpayment by following the procedures set forth in the Act. The interest in question is in respect of an amount of money that the taxpayer has paid to the Crown by reason of some one's error and that he is entitled to have refunded to him. This clearly falls within the description of interest quoted by counsel for both parties from the judgment of Rand J. in *Re Farm Security Act*, 1944[1]:

> Interest is, in general terms, the return or consideration or compensation for the use or retention by one person of a sum of money, belonging to, in a colloquial sense, or owed to, another.

The appeal is dismissed with costs.

[1] [1947] S.C.R. 394.