

BETWEEN:

PETER BIRTWISTLE TRUST APPELLANT;

AND

THE MINISTER OF NATIONAL }
 REVENUE } RESPONDENT.

1937
 Feb. 11 & 12
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 1938
 Jan. 4.
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Revenue—Income tax—Income War Tax Act, s. 11, ss 2, s. 4, ss e, secs 55 and 66—Income accumulating in trust for the benefit of unascertained persons—Interest—Discretion of Court

B, a Canadian citizen, in his lifetime transferred certain assets to the Trusts and Guarantee Co. Ltd. to be converted into cash and administered by it in accordance with the terms of an agreement entered into by them, which provided that after the expiration of 21 years following the death of B., the fund so established and all accumulations thereon should be paid to the Municipal Council of the Town of Colne in England, to be used by the said Council for the benefit of the aged and deserving poor of the said Town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said Council. B died on April 19, 1927

The income from this fund was assessed for income tax under the Income War Tax Act, such assessment being confirmed by the Minister of National Revenue from whose decision the appellant appealed.

Held: That there is but one trust with two trustees, and the trust fund is being administered by the Canadian trustee, in Canada, where it must remain until 1948, and where the income is taxable.

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2. That the persons who may in the future become beneficiaries of the trust fund are unascertained, and any interest of persons in the trust fund is a contingent one, and therefore the income is taxable as provided for in s. 11, ss. 2, of the Act.
3. That the income here accumulating is not the income of a charitable institution within the meaning of s. 4, ss. e, of the Act.
4. That s. 66 of the Act does not vest a discretionary power in the Court to forego interest on any tax recovered by a judgment of the Court.

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 Maclean, President of the Court, at Ottawa.

S. Casey Wood, K.C., and *Guy M. Jarvis* for appellant.

G. A. Urquhart, K.C., and *J. R. Tolmie* for respondent.

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

THE PRESIDENT, now (January 4, 1938) delivered the following judgment:

This is an appeal from the decision of the Minister of National Revenue affirming the assessment, under the Income War Tax Act, of certain income received and accumulated under and subject to the terms of an indenture, dated May 27, 1918, and made between Peter Birtwistle (hereafter referred to as the Settlor), a Canadian citizen, then resident in the City of London, in the Province of Ontario, and The Trusts and Guarantee Co. Ltd. (hereafter referred to as the Canadian Trustee), a trust company having its head office in the City of Toronto, in the same province. By this indenture it was provided that the principal of a certain fund, called the Investment Account, and certain assets real and personal, mentioned in a schedule to the said indenture, should be transferred in trust to the Canadian Trustee by the Settlor, and that the same, with any proceeds therefrom, and with any accruals thereto, should, save as to certain disbursements therein provided for, be invested and reinvested, administered and managed, by the Canadian Trustee, and that at the expiration of twenty-one years after the death of the Settlor, the whole of the fund, and the proceeds of the assets real and personal so transferred, together with accumulations thereon, should be paid to the Municipal Council of the Town of Colne, in Lanca-

shire, England (hereafter referred to as the Colne Trustee), to be used by the Colne Trustee "for the benefit of the aged and deserving poor of the said Town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said Council." The indenture provided that the real and personal assets transferred by the Settlor should be converted into money, under the terms and conditions and at the time or times therein provided, and added to the Investment Account, and I understand this has already been done. The Settlor died on April 19, 1927. The corpus of the Investment Account, ultimately to be paid to and administered by the Colne Trustee, is estimated to reach the sum of one million dollars and over, at the end of the twenty-one year period, April, 1948.

It may be desirable to explain more fully the origin of the trust in question. On September 20, 1916, the Settlor paid over to the Canadian Trustee, subject to the terms and conditions contained in an agreement of the same date, the sum of \$100,000, and by indenture of even date did transfer to the said Trustee further assets, real and personal, by it to be converted into money and the proceeds thereof added from time to time to the said fund of \$100,000. In this agreement the Settlor was called "the Investor," and the agreement was known as an "Investment Agreement." That agreement was revoked and superseded by another agreement, also known as an "Investment Agreement," made between the same parties, and dated October 20, 1916, pursuant to which the said fund of \$100,000 and all additions thereto made from time to time, was to be held by the said Trustee, subject to the trusts, terms and conditions, therein set out, the said Trustee guaranteeing the payment of the corpus of the fund to such person, persons or corporation as the Settlor might by will or otherwise appoint, at the period of twenty-one years after his decease, with interest at a specified rate. Later, the Settlor being desirous of transferring to the said Trustee certain other assets, real and personal, to be converted and administered by the said Trustee, and being desirous also of determining definitely the corporation to which the said assets, with the accruals thereon, should be paid at the end of the twenty-one year period, another agreement was entered into between the same parties, on May 27, 1918, and it is this agreement with which we are here concerned.

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By the terms of this agreement the Settlor agreed to assign and set over unto the Canadian Trustee, its successors and assigns, all his right, title and interest, in the assets held by the said Trustee under the agreement of October 20, 1916, and certain additional assets, real and personal, which the Settlor desired to make subject to the terms of the same agreement, all of which was transferred to and received by the Canadian Trustee as "Trustee of Birtwistle Trust." The terms and conditions of this agreement need not be mentioned, with the exception of one paragraph, as all other terms of that trust instrument were stated by counsel not to be relevant to the controversy here. And there is no dispute apparently as to the amount of the yearly income, the assessment of which is here questioned. If the amount of the income is questioned that may be the subject of a reference, if ultimately it is held that the appellant is liable for the tax. Paragraph 4 (b) of the agreement is the important one here, and it reads as follows:—

4. (b) The Trustee shall pay the whole of the Investment Account, together with accumulations thereon, to the Municipal Council of the Town of Colne in Lancashire, England, at the end of the period of twenty-one years after the death of the Settlor, to be used by the said Council for the benefit of the aged and deserving poor of the said Town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said Council, save and except and the Settlor hereby declares it to be his wish that the said Council should in so far as possible or convenient, leave any of the said fund which is not required for immediate distribution to be held by the Trustee hereunder and invested by the Trustee under an arrangement similar to that comprised in this Indenture, the Settlor believing that it will be advantageous for the Council to retain this colonial investment which the Settlor considers likely to return a better rate of interest than can be readily obtained in England.

The assessments in question, for the years 1919 to 1934 inclusive, were made under s. 11, ss.(2) of the Income War Tax Act, Chapter 27 of the Revised Statutes of Canada, 1927, as amended by sections 7 and 8 of Chapter 55 of the Statutes of Canada, 1934. That subsection reads as follows:—

11. (2) Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of a person other than a corporation, provided that he shall not be entitled to the exemptions provided by paragraphs (c), (d), (e), and (v) of subsection one of section five of this Act.

Sec. 4 of the Act defines incomes that are not liable to taxation, and ss. (e) reads:

(e) The income of any religious, charitable, agricultural and educational institution, board of trade and chamber of commerce . . . It is the words "charitable . . . institution" that are of importance here.

It is the contention of the appellant that the income in question is being accumulated for the benefit of the Colne Trustee, or for the Colne Trust, and is not taxable under ss. 2 of s. 11 of the Act, or otherwise, because it is not being accumulated for the benefit of any person or persons within the meaning of the Act, or for the benefit of unascertained persons within the meaning of the Act, or for the benefit of persons resident in Canada within the meaning of the Act; that neither the Colne Trustee nor the Colne Trust, nor any beneficiary of the Colne Trust has or have received any of the income in question; and that the Canadian Trust and the Colne Trust are both charitable institutions and as such excepted from taxation. Alternatively, it was pleaded that if the respondent contended that the income in question should be considered as being accumulated for the benefit of the beneficiaries of the Colne Trust, namely, the aged and deserving poor of the Town of Colne, the income was not taxable in the hands of the Canadian Trustee because the said beneficiaries are not beneficiaries of the Canadian Trust, and have no interest therein; that the income is not taxable because the said beneficiaries are not unascertained persons within the meaning of the Act, and none of them could become liable to taxation in Canada in respect of any sum or sums received out of the fund as being resident in Canada, or as receiving taxable income in Canada or elsewhere; and that if the said income or any part thereof is held to be taxable under the Act, interest should be allowed only in respect of such tax, additional tax and surtax, as is allowed from February 21, 1936, the date when first the assessments in question were made. All these contentions are contested by the respondent. What I have referred to above as the "Canadian Trust" is the trust in question being administered in Canada by the Canadian Trustee.

The case is rather an unusual one. The income here is accumulating for the benefit of a class, of the Town of Colne, the members or units of which are presently unas-

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certainable and will always be fluctuating; in that class the trust estate can never be vested, and they can never discharge the trustee; the individuals of that class may never be the recipients of any portion of the accumulated fund and any benefits received therefrom may be indirect only; and the interest of that class, in any event, will never be more than an equitable interest, that is, the right to enforce in equity the specific execution of the Settlor's intention, to the extent of the particular interest of the beneficiaries therein, which interest may be distributed in one of many forms. The income is not accumulating for the benefit of the Town of Colne. There is little or no authority to assist one upon the major points in issue; most of the authorities to which I was referred by counsel, or those which my own researches have discovered, are based upon the particular language of other statutes, and argument by analogy is unsafe, particularly where taxing statutes are involved.

After giving a most anxious consideration to the construction of s. 11, ss. (2), I am unable to reach any other conclusion than that the income in question is taxable. I think the word "trust" must be construed widely enough to embrace a charitable trust, and no exception is made in favour of charitable trusts. The persons who may in the future become beneficiaries of the trust are certainly unascertained, and any interest of persons in the trust fund is, and must be, a contingent one. In the last analysis the beneficiaries of the trust are persons, and it matters not, I think, that they fall within the class described by the Settlor. The beneficiaries of charitable trusts are usually a class of unascertained persons, and as the income of such trusts, when accumulating, is not excepted from the tax, it is to be presumed that the legislature had not in mind any distinction between the beneficiaries of charitable trusts and any other trust where income was accumulating for unascertained persons, or persons with contingent interest. If I am correct in this there is not much more that can be usefully added. The contention that there is more than one trust is, in my opinion, untenable. There is but one trust, with two trustees, and the trust fund, as conceived and formulated by the Settlor, is being administered by the Canadian Trustee, in Canada, where it must remain until 1948, and where I think the income is taxable.

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Sec. 4 (e) provides that the income of any charitable institution shall not be liable to the tax. A charitable institution is, I think, an organization created for the promotion of some public object, of a charitable nature, and functioning as such, and I do not think it can be said that either the Canadian Trustee or the Colne Trustee, or the Town of Colne, or the trust fund itself, fall within that definition. A charitable institution is, I think, clearly distinguishable from a charity, or a charitable trust. The trust instrument here does not purport to create a charitable institution; its purpose is to set up a charitable trust. In any event the income in question here cannot, I think, be construed as the income of a charitable institution. The income which is here accumulating is not, in the true sense of the word, the income of a charitable institution within the meaning of the Act; such income if belonging to a charitable institution would be something to which it had the right to present enjoyment. There is no charitable institution which can claim the income here. The Australian case, *In Re the Will of MacGregor, Deceased* (1), might usefully be referred to.

A question arises as to whether the appellant is liable for interest upon the tax, prior to the assessment. It appears that annual returns of income were made by the Canadian Trustee on behalf of the "Peter Birtwistle Trust," beginning with the year 1919. The first assessment seems to have been made in 1936, for the years 1919 to 1934 inclusive, and that apparently was the consequence of an application made in the Supreme Court of Ontario by the Colne Trustee, but that application, and the decision of Rose C.J. thereon (2), has nothing to do with the issue here, and no purpose would be served by any discussion of it. Sections 48, 49 and 54 of the Act provide for the imposition of interest, if the tax is not wholly paid at maturity. S. 55 provides for the continuation of liability for any tax where no assessment has been made. It is as follows:—

. . . if no assessment has been made, the taxpayer shall continue to be liable for any tax and to be assessed therefor and the Minister may at any time assess, reassess or make additional assessments upon any person for tax, with interest and penalties.

(1) (1917) 24 Argus Law Re-ports 17. (2) (1935) 4 D.L.R. 137.

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It is the assessment made by the Minister under the powers granted by that section, that is here in question. Then s. 66 provides as follows:—

Subject to the provisions of this Act, the Exchequer Court shall have jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act and in delivering judgment may make any order as to payment of any tax, interest or penalty or as to costs as to the said Court may seem just and proper.

The submission made on behalf of the appellant was that as the terms of the Act in respect of the filing of returns of income were duly complied with, that it would be right and proper if the appeal is dismissed, to relieve the appellant of any interest charges, for the years prior to the assessments in question, and that it was within the discretion of the Court so to do by virtue of s. 66. The language of the latter part of that section is extremely awkward and confusing, whatever was intended. It is arguable that the section is open to the construction that the Court might, in the exercise of its discretion, refuse any claim for interest if it were thought right and proper to do so, by reason of any special circumstances appearing in the case. On the other hand, s. 55 expressly provides for preserving any liability to the tax, and to interest and penalties, if for any reason no assessment has been made. The imposition of interest in respect of any tax not paid when due, seems to be a definite principle of the Act, and therefore indiscriminately to be applied, so unless there is very clearly vested in the Court a discretion to relieve the taxpayer of interest charges, and that in the circumstances of the case it is right and proper so to do, I think the taxpayer must be held liable for the statutory interest, in addition to the tax. Whether the words of the latter portion of s. 66 are to be treated as mere surplusage, or as the bestowal of a discretion in the Court is a question not altogether free of difficulty. It is, however, difficult to believe that the section was intended to mean, for example, that liability for payment of the "tax" was to be a matter in the discretion of the Court, and not something to be determined wholly according to the provisions of the statute. It is difficult also to understand why it was necessary to say that the matter of costs was within the discretion of the Court; as an exception to the rule the Customs Act provides that, in suits brought under that Act for penalties, or to enforce any forfeiture, if the Crown succeeds he

shall be entitled also to recover full costs of suit. I am inclined to the view that this section is not to be construed as vesting a discretionary power in the Court to forego interest on any tax recovered by a judgment of the Court, though conceivably it might be a right and proper thing to do in many cases. Presently, I do not feel warranted in holding that the appellant, whom I find liable for the tax, should escape the interest charges imposed by statute upon any unpaid tax. It may be that the Minister has power to do so.

The appeal is therefore dismissed. This is a case where, I think, in all the circumstances there should be no order as to costs.

Judgment accordingly.

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