1959

May 14, 15
*Nov. 2

ROBERT B. CURRAN ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income—Lump sum paid under agreement to resign from position and accept new employment—Loss of pension rights and opportunity for promotion—Whether sum income or capital—The Income Tax Act, 1948(Can.), c. 52, ss. 2(1), 3, 5, 24A.

In 1951, under an agreement between the appellant and B, a substantial shareholder of Federated Petroleums which held a large number of shares of Home Oil Company, the appellant, who had been employed by Imperial Oil for many years, was paid by B $250,000 to resign his position and accept employment with Federated Petroleums. Under a separate agreement, signed on the same day, Federated Petroleums undertook to employ the appellant as its general manager, subject to the condition that he should serve as manager of any other company or companies in which Federated Petroleums had a financial interest. The appellant, after resigning from Imperial Oil, became president and managing director of Home Oil at the same salary that he was drawing before but with no superannuation benefits. The Minister assessed the $250,000 as income. The assessment was upheld by the Income Tax Appeal Board and by the Exchequer Court.

Held (Taschereau J. dissenting): The payment of $250,000 received by the appellant was income within s. 3 of the Income Tax Act. In view of *Cameron v. Prendergast,* [1940] A.C. 549, the House of Lords' previous decision in *Hunter v. Dewhurst,* 16 Tax Cas. 637, must be taken to have been decided on its very special facts. *Tilley v. Wales,* [1943] A.C. 386, distinguished.

Per Kerwin C.J. and Locke and Judson JJ. The true nature of the payment made to the appellant was to be found in the terms of the two agreements and the surrounding circumstances including the fact that it did not come from the former employer. The payment was made for personal service only and that conclusion really disposed of the matter as it was impossible to divide the consideration. While, from the point of view of the respondent, no assistance could be obtained from a consideration of s. 24A of the Act, the submission on behalf of the appellant that the section established non-taxability in this case, could not be agreed with.

Per Locke, Martland and Judson JJ.: Considering the two agreements together, the circumstances in this case made it clear that the payment constituted a payment for services to be rendered, and therefore, was income. The argument based upon the proposition that the agreement with B was to provide compensation for loss or relinquishment of a source of income, which source was of itself a capital asset,

*PRESENT: Kerwin C.J. and Taschereau, Locke, Martland and Judson JJ.

could not be entertained. The essence of the matter was the acquisition of services and the consideration was paid so that those services would be made available. The contention, urged by the appellant, that, since the payment was not made by Federated Petroleums or Home Oil, it could not be regarded as income within s. 3 of the Act because so to hold would make s. 24A meaningless in its application, could not be entertained.

Per Taschereau J, *dissenting*: A substantial part of the payment was a capital receipt in this case and was not taxable as such. The payment was divisible, and was made partly as a consideration of the loss of the benefits attached to his former position, and partly for personal services to his new employer. The matter should be referred back to the Exchequer Court so that the apportionment could be made.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], affirming a decision of the Income Tax Appeal Board. Appeal dismissed, Taschereau J. dissenting.

H. H. Stikeman, Q.C., and *P. N. Thorsteinsson,* for the appellant.

W. R. Jackett, Q.C., F. J. Cross and *G. W. Ainslie,* for the respondent.

The judgment of Kerwin C.J. and of Locke and Judson JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal by Robert B. Curran against the judgment of the Exchequer Court[1] affirming the judgment of The Income Tax Appeal Board, which had dismissed his appeal to it from a re-assessment made under the provisions of the *Income Tax Act* of the appellant's income for the taxation year 1951. The re-assessment thus confirmed was with reference to the sum of $250,000 received by the appellant in that year.

The appellant, a geologist and highly regarded in his field, was employed as manager of the producing department of Imperial Oil Limited. He had been connected with the latter for some years and in 1951 was earning $25,000 a year with the expectation that his salary would be increased, and had he continued until the retirement age of sixty-five he would have been entitled to a pension equal to approximately one-half the average of his salary for the five years immediately preceding his retirement. He had been offered a directorship in this company late in 1950 and

[1] [1957] Ex. C.R. 377, [1957] C.T.C. 384, 57 D.T.C. 1270.

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early in 1951 but declined because he preferred to remain in the position he then occupied and to live in Calgary. The salary attached to the position of a director in Imperial Oil Limited is considerable.

In the spring of 1951 Robert A. Brown Jr. approached the appellant with a view to inducing him to resign his position in Imperial Oil so that he might accept employment with Brown or one of the companies in which the latter was interested. Mr. Brown was a substantial shareholder of Federated Petroleums Limited and president and general manager of that company. The company itself held a large number of shares of Home Oil Company Limited. Calta Assets Limited was a small holding company, the shares of which were wholly owned by Mr. Brown and his brother and sister and it was a substantial shareholder in both Federated and Home Oil. Mr. Brown did not hold any office in Home Oil, of which Major Lowery was president and managing director and exercised both share and management control. Mr. Brown had become dissatisfied with the management of Home Oil and desired to secure the appellant's services as manager of Federated and Home Oil with the expectation that Major Lowery would then relinquish the active management of Home Oil. The negotiations between Brown and the appellant culminated in a written agreement, dated August 15, 1951, between Brown, called therein the grantor, and the appellant, referred to therein as the grantee. As the appellant emphasizes the terms of that agreement, it is set out in full:

WHEREAS the grantee is presently, at the age of 42 years, in charge of all Western Canadian Production for Imperial Oil Limited at a salary of $25,000 per year, having arrived at that position after eighteen years of service with the said Company or its affiliated companies (the said Company and its affiliates under the direction of the Standard Oil Company of New Jersey comprising together one of the largest groups of companies in the oil business with world wide production refining and marketing facilities).

AND WHEREAS the grantee has acquired the right to a pension on retirement from Imperial Oil Limited or any of its affiliates which if his present salary scale remains the same until his retirement will yield to him the sum of $12,500 per year, and the probabilties are that if he remains with his present employers his salary will increase substantially over the years with corresponding increases in the pension payable to him.

AND WHEREAS his pension rights will cease entirely if he voluntarily severs his connection with the said Company and its affiliates.

AND WHEREAS the grantee has been mentioned as a prospective member of the Board of Directors of Imperial Oil Limited which if he were to be so appointed would mean an immediate substantial increase in salary and would in the ordinary course of events lead eventually to one of the senior positions in the oil organization of which Imperial Oil Limited forms a part.

AND WHEREAS it is not the policy of Imperial Oil Limited and its affiliates to re-employ in any part of such world wide organization anyone who has voluntarily left the service of any of the companies in or affiliated therewith.

AND WHEREAS FEDERATED PETROLEUMS LIMITED, a comparatively small oil company operating only in Canada and having no connection with Imperial Oil Limited or any of its affiliates, has recently intimated its willingness to offer the grantee a position as Manager at a salary equivalent to that which he draws from Imperial Oil Limited, which proposed offer the grantee has intimated that he would refuse solely by reason of the fact that he would be obliged to give up his chances of advancement with his present employers and their affiliates, would lose the opportunity for re-employment with them or any of them, thereby greatly limiting his field of possible future employment, and would lose all accumulated and future rights to pension.

AND WHEREAS the grantor holds a substantial interest in Federated Petroleums Limited, is of the opinion that the grantee's experience, capabilities and connections would be valuable to that Company, and is very desirous of persuading the grantee to resign from his present position in order that he may then be free to accept an offer of employment from Federated Petroleums Limited.

AND WHEREAS the grantor recognizes what the grantee is obliged to give up in the way of chances for advancement, pension rights, and opportunities for re-employment in the oil industry if he resigns from his present position in order to be free to accept the offered employment and has agreed to compensate him liberally therefor.

NOW THEREFORE THIS INDENTURE WITNESSETH

1. The grantor hereby agrees to pay to the grantee the sum of $250,000 in consideration of the loss of pension rights, chances for advancement, and opportunities for re-employment in the oil industry, consequent upon the resignation of the grantee from his present position with Imperial Oil Limited, the said sum to be paid forthwith upon the grantee informing his present employers that he is leaving their employ and whether or not employment has been offered to him by Federated Petroleums Limited or accepted by him, prior to that time.

2. In consideration of the agreement of the grantor to pay the said sum, the grantee hereby agrees to resign his position with Imperial Oil Limited, such resignation to take effect not later than the 15th day of September, A.D. 1951.

Mr. Brown paid the $250,000 to the appellant, but Calta Assets Limited actually furnished the funds out of its own assets and from money borrowed from a bank. On the same day, August 15, 1951, the appellant entered into an agreement with Federated Petroleums to act as its general

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manager at a fixed salary of $25,000 per year and he was to serve as the directors of that company might determine from time to time as manager of any other company or companies in which Federated had a financial interest either in addition to or in lieu of serving as manager of Federated; but any salary from such other company or companies was to the extent thereof to be deemed satisfaction of the salary which under the terms of the agreement Federated was obligated to pay. The appellant was also given the option, within a limited time, to purchase twenty-five thousand shares of Home Oil Company at a given price.

The appellant resigned his position with Imperial Oil Limited shortly after August 15, 1951. He was never employed by Brown or Federated Petroleums or Calta Assets but became president and managing director of Home Oil at a salary of $25,000 per year with no superannuation benefits. Due to a disagreement with Brown the appellant resigned his position with Home Oil at the expiration of about one year.

Subsection (1) of s. 2 and s. 3 of the *Income Tax Act*, 1948, c. 52, provide:

> 2. (1) An income tax shall be paid as hereinafter required upon the taxable income for each taxation year of every person resident in Canada at any time in the year.
>
> * * *
>
> 3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all
>
> (*a*) businesses,
>
> (*b*) property, and
>
> (*c*) offices and employments

As has been pointed out in the recent judgment of this Court in *Bannerman v. Minister of National Revenue*[1], there is no extensive description of income such as appeared in the *Income War Tax Act*. The word must receive its ordinary meaning bearing in mind the distinction between capital and income and the ordinary concepts and usages of mankind. Under the authorities it is undoubted that clear words are necessary in order to tax the subject and

[1] [1959] S.C.R. 562, 18 D.L.R. (2d) 492, [1959] C.T.C. 214, 59 D.T.C. 1126.

that the taxpayer is entitled to arrange his affairs so as to minimize the tax. However, he does not succeed in the attempt if the transaction falls within the fair meaning of the words of the taxing enactment.

The decision of the House of Lords in *Tilley v. Wales*[1] was relied upon by the appellant. Prior thereto their Lordships had decided *Hunter v. Dewhurst*[2] and *Cameron v. Prendergast*[3]. In the latter case they regarded the Dewhurst case as having been decided on its very special facts and in any event distinguished it on the ground that the payment there was not a profit of the directorship but was a compromise of a future contingent liability, i.e., to pay a lump sum upon Dewhurst's eventual retirement from office. In *Cameron v. Prendergast* the continuance in office was the essence of the bargain which contemplated that Cameron would not resign for at least a reasonable time thereafter. The sum there involved was very large but it was regarded as income since remuneration is still income even though paid once and for all in a lump sum instead of by instalments over a period of years.

When *Tilley v. Wales* came before the House of Lords, Viscount Simon, with whom Lord Atkin and Lord Russell of Killowen agreed, said, at p. 392, that the decision in Dewhurst was regarded and described as arising in very special circumstances, but he thought that the *ratio decidendi* was as he had described, i.e., that a certain sum of £10,000 was not a profit from Dewhurst's employment as director and did not represent salary but was a sum of money paid down by the company which had employed Dewhurst to obtain a release from a contingent liability as distinguished from being remuneration under the contract of employment. He pointed out that apart from previous authority he should take the view that a lump sum paid to commute a pension is in the nature of a capital payment, which is substituted for a series of recurrent and periodic sums which partake of the nature of income. He then continued:

> But can the same view be taken of an arrangement made between an employer and his servant under which, instead of the whole or part of a periodic salary, a single amount is paid and received in respect

[1] [1943] A.C. 386.
[2] (1932), 16 Tax Cas. 637.
[3] [1940] A.C. 549.

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of the employment? Generally speaking, I think not. An "office or employment of profit"—to use the actual phrase in sch. E—necessarily involves service over a period of time during which the office is held or the employment continues. The ordinary way of remunerating the holder or the person employed is to make payments to him periodically, but I cannot think that such payments can escape the quality of income which is necessary to attract income tax because an arrangement is made to reduce for the future the annual payments while paying a lump sum down to represent the difference. My view seems to me to be supported by the decision of this House in *Cameron v. Prendergast.*

In the present case the substance of the matter was the engagement by the appellant to work for Mr. Brown or one of the companies in which the latter was interested and the agreement by the appellant with Federated Petroleums. It is true that in order to fulfil his obligations under the contracts the appellant was obliged to resign his position with Imperial Oil Limited and thereby gave up not only the annual salary, a like amount which he was to receive, but also his pension rights and further prospects. However, the payment of $250,000 was made for personal service only and that conclusion really disposes of the matter as it is impossible to divide the consideration. The mere fact that the first agreement of August 15, 1951, states that Brown agreed to pay the appellant $250,000 in consideration of the loss of pension rights, chances for advancement and opportunities for re-employment in the oil industry cannot change the true character of the payment. Its true nature must be found in the terms of the two agreements and the surrounding circumstances including the fact that the $250,000 did not come from Imperial Oil Limited. I have been unable to secure any assistance from the other cases referred to by Mr. Stikeman including *Van Den Berghs Ltd. v. Clark*[1], a decision of the House of Lords, and the judgment of Williams J. in the High Court of Australia in *Bennett v. Federal Commissioner of Taxation*[2]. I should add that while, from the point of view of the respondent, I obtain no assistance from a consideration of s. 24A of the Act, I cannot agree with the submission on behalf of the appellant that it establishes non-taxability of the appellant.

The appeal should be dismissed with costs.

[1] [1935] A.C. 431.

[2] (1947), 8 A.T.D. 265.

TASCHEREAU J. (*dissenting*):—All the material facts of this case have been fully recited by the Chief Justice and my brother Martland, and it is therefore unnecessary to deal with them once more.

The learned trial judge has reached the conclusion that the sum of $250,000 paid to the appellant in 1951, constituted income within the meaning of the Act and was properly assessed as such.

I cannot escape the conclusion that a substantial part of this amount paid to the appellant by Robert A. Brown Jr., was a capital receipt in the circumstances of this case, and not taxable as such.

The appellant had been with the Imperial Oil Company since 1933, with one short interval, and in August, 1951, was manager of the Producing Department. He enjoyed a very high reputation as a geologist, and was a man of extensive knowledge. He earned a salary of $25,000 a year, and on two occasions had been invited to become a director of the company. If the appellant had remained in the employment of Imperial Oil Co. or an affiliated company, he would have been entitled, when reaching the retirement age of 65, to an annual pension of approximately $12,500, and as an employee of the company, many other privileges were available to him, such as group insurance, sick benefits, and a stock purchase privilege. There were also great possibilities of salary increases.

It would indeed have been a very poor bargain for the appellant to enter into, without insisting upon a fair compensation, as he did in his written agreement with Brown, for foregoing such substantial actual and eventual benefits. I do not think however that the total of this amount of $250,000, which is in my view divisible, was paid to the appellant as consideration of the loss of those benefits. I believe that a proportion was for personal services to the new employer. As this division has not been made by the trial judge, I would allow the appeal with costs, and refer the case back to the Exchequer Court so that it may apportion the part of this sum of $250,000 which is income, and therefore taxable, and the other part which is of a capital nature.

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The judgment of Locke, Martland and Judson JJ. was delivered by

MARTLAND J.:—The facts of this case are contained in the judgment of the Chief Justice, including the contents of the agreement dated August 15, 1951, made between the appellant and Mr. R. A. Brown Jr. I agree with counsel for the respondent that this agreement must be considered in conjunction with the agreement of the same date, between the appellant and Federated Petroleums Limited (hereinafter referred to as "Federated"), which was executed immediately following the execution of the first-mentioned agreement. The agreement with Mr. Brown specifically recites that Brown, the holder of a substantial interest in Federated, is very desirous of persuading the appellant to resign from his position with Imperial Oil Limited in order to be free to accept an offer of employment from Federated. The employment contract with Federated enabled it to require the appellant to serve as manager of any other company or companies in which Federated had a financial interest.

Mr. Brown's evidence made it quite clear that his purpose in approaching the appellant and paying him the consideration of $250,000 was in order that the appellant would be available to become associated with Federated and that it was his wish, for the reasons which he gave, that, if possible, the appellant should become President and Managing Director of Home Oil Company Limited (hereinafter referred to as "Home"). At that time, though both Brown and Federated held substantial interests in Home, they did not have control of it and Brown was not then a director of Home. In due course, subsequently, the appellant did become president and managing director of Home and Brown became a director of that company.

These circumstances make it clear that the $250,000 payment was made by Brown to the appellant and received by the appellant to induce him to serve as manager of Federated or of Home and preferably, if possible, the latter. This being so, it seems to me that it constituted a payment for services to be rendered by the appellant.

For the appellant it is contended that the payment represented a capital receipt and not income. The argument is based upon the proposition that the agreement made by him with Brown was to provide compensation for loss or relinquishment of a source of income, which source was of itself a capital asset of the appellant.

In support of this submission several English decisions and an Australian case were cited. All of these were, however, cases in which an employer purchased from its employee a surrender by the latter of rights which he had previously held as against the employer. Thus, for example, in *Hunter v. Dewhurst*[1] (a case which has been regarded in later decisions as arising in very special circumstances) the employee, for a consideration, released the employing company from a contingent liability. The payment was distinguished by the majority of the House of Lords from being remuneration under the contract of employment.

Hose v. Warwick[2] was a case in which the employee, for a consideration, turned over to the employing company his extensive personal connection in the insurance business, which he had previously been entitled to retain for himself.

In *Tilley v. Wales*[3], the taxpayer had been employed by a limited company as Managing Director at a fixed salary of 6,000 pounds per annum and had a right to receive a pension of 4,000 pounds per annum for a period of ten years after cessation of his employment. He entered into an agreement with the company to release it from its obligation to pay the pension and to reduce the salary to 2,000 pounds per annum in consideration of 40,000 pounds paid to him by the company in two consecutive, annual instalments of 20,000 pounds each.

The House of Lords held that so much of the payment as represented consideration for a reduction in salary was income and subject to tax, but that the consideration received by the taxpayer for commutation of his pension rights was not income.

Duff v. Barlow[4] is a case in which the employee surrendered his right to remuneration for services being rendered by him to a subsidiary of the employing company

[1] (1932) 16 Tax Cas. 637.
[2] (1946), 27 Tax Cas. 459.
[3] [1943] A.C. 386.
[4] (1941), 23 Tax Cas. 633.

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in consideration of a lump-sum payment. The parent company had decided that it was in its interest to terminate the agreement under which these services were being rendered and it was determined. It was held that, as there was thereafter no obligation to perform services for the subsidiary, such services could not be any part of the consideration for which the lump sum was paid.

In *Beak v. Robson*[1], the money consideration received by the employee was for his covenant not to compete for five years within a certain radius if and when he terminated or caused to be terminated his contract of employment.

The Australian case cited was that of *Bennett v. Federal Commissioner of Taxation*[2]. The payments in question there were made to an employee for the cancellation of an employment agreement, which was replaced by another contract under which the term of employment had been reduced and the employee had been shorn of his previous absolute control of the company.

All of these are cases in which the money payments to an employee have been held not to constitute taxable income because they were not made in respect of the performance of services by the employee, but rather in order to acquire from him rights which he had previously held against the employer.

On the other side of the line are cases such as *Cameron v. Prendergast*[3], where the House of Lords decided that a lump-sum payment made to a Director to induce him not to resign his Directorship of a limited company was a profit from his Directorship and, as such, was liable to tax. In that case it was held that the payment was made so that the taxpayer would continue to perform services as a Director of the company. The contention that the payment was made merely to persuade the taxpayer not to exercise the right which he had to resign from office was rejected.

In the present case it is clear that Mr. Brown was not seeking to acquire any rights which the appellant had under his existing employment contract with Imperial Oil Limited. The agreement made by Brown with the appellant and Brown's evidence make it clear that he was seeking to

[1] (1942), 25 Tax Cas. 33. [2] (1947), 8 A.T.D. 265.
[3] [1940] A.C. 549.

acquire the skilled services of the appellant as a manager. In order that those services might be available it was necessary that the appellant should resign from his position with Imperial Oil Limited and such resignation resulted in the forgoing by him of various advantages which his employment with Imperial Oil Limited carried and which are referred to in the agreement. However, the essence of the matter was the acquisition of services and the consideration was paid so that those services would be made available.

I, therefore, think that the payment made to the appellant by Brown, under the agreement of August 15, 1951, was income to the appellant within the meaning of s. 3 of the *Income Tax Act*, which provides:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

Reference was made in argument to s. 24A of the *Act*, as it applied in the year in question, which section refers to s. 5. The relevant portions of s. 5 and s. 24A provide as follows:

5. Income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year plus . . .

* * *

24A. An amount received by one person from another,

(*a*) during a period while the payee was an officer of, or in the employment of, the payer, or

(*b*) on account or in lieu of payment of, or in satisfaction of, an obligation arising out of an agreement made by the payer with the payee immediately prior to, during or immediately after a period that the payee was an officer of, or in the employment of, the payer,

shall be deemed, for the purpose of section 5, to be remuneration for the payee's services rendered as an officer or during the period of employment, unless it is established that, irrespective of when the agreement, if any, under which the amount was received was made or the form or legal effect thereof, it cannot reasonably be regarded as having been received

(i) as consideration or partial consideration for accepting the office or entering into the contract of employment,

(ii) as remuneration or partial remuneration for services as an officer or under the contract of employment, or

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(iii) in consideration or partial consideration for covenant with reference to what the officer or employee is, or is not, to do before or after the termination of the employment.

Counsel for the respondent conceded that s. 24A was not applicable to the circumstances of this case. Counsel for the appellant, however, urged that s. 24A was enacted in order to broaden the scope of s. 5 so as to tax certain kinds of income not otherwise taxable under s. 5. He pointed out that s. 24A might have applied to the payment in question here if it had been made to the appellant by Federated or by Home. Since it did not apply, because the payment was not made by the appellant's employer, he contended that the payment could not be regarded as income within s. 3, because so to hold would make s. 24A meaningless in its application.

It seems to me, however, that s. 24A was essentially a provision dealing with onus of proof and deemed certain payments as therein defined to be payments within s. 5, unless the recipient could establish affirmatively that a payment did not reasonably fall within the provisions of paras. (i), (ii) or (iii) of s. 24A. I do not think that it follows that payments which would fall within s. 24A, except for the fact that they were made by someone other than the employer, of necessity cannot be income within the provisions of s. 3.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs, TASCHEREAU J. *dissenting.*

Solicitors for the appellant: Chambers, Might, Saucier, Milvain, Peacock, Jones & Black, Calgary.

Solicitor for the respondent: A. A. McGrory, Ottawa.