TAXATION DECISIONS AND RULINGS

Since the June - July issue of the Review went to press Directives Nos. 203 and 205 have been issued "for public circulation" by the Taxation Division of the Department of National Revenue. Directive No. 203 dated July 8th, 1948, deals with tax deductions at source in the case of employees 65 years of age or more who are now, by virtue of section 5(1)(cc) of the Income War Tax Act as amended, entitled to a $500 deduction from income in addition to present deductions.

Directive No. 205 is reproduced in full hereunder:—

Assessment — Convention Expenses of Medical Profession

(Directive No. 205 of July 12th, 1948)

Effective 1st January, 1948, the reasonable expenses incurred by members of the medical profession in attending the following Medical Conventions will be admitted for Income Tax purposes against income from professional fees:

1. One Convention per year of the Canadian Medical Association.
2. One convention per year of either a Provincial Medical Association or a Provincial Division of the Canadian Medical Association.
3. One Convention per year of a Medical Society or Association of Specialists in Canada or the United States of America.

The expenses to be allowed must be reasonable and must be properly substantiated; e.g. the taxpayer should show (1) dates of the Convention, (2) the number of days present, with proof of claim supported by a certificate of attendance issued by the organizations sponsoring the meetings, (3) the expenses incurred, segregating between (a) transportation expenses, (b) meals and (c) hotel expenses, for which vouchers should be obtained and kept available for inspection.

None of the above expenses will be allowed against income received by way of salary since such deductions are expressly disallowed by statute.

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The following is a brief review of certain Tax Cases, decided since last December, which it is thought may be of interest to readers.

Income Tax

The Minister's power to raise an arbitrary assessment under section 47 of the Income War Tax Act was reviewed in the Exchequer Court by O'Connor J. in *Commercial Hotel Limited* v. *Minister of National Revenue*, [1948] Ex. C.R. 108, C.T.C. 7. This case is very similar to that of *Dezura* v. *Minister of National Revenue*, [1948] Ex. C.R. 10, [1947] C.T.C. 375, discussed at page 1169 of the December, 1947, issue of this Review. The appellant operated a beer parlor and the Minister was not satisfied that a correct return of its income from the sale of beer had been made. Accordingly, the Minister raised an arbitrary assessment, from which an appeal was taken. The court decided that the power given to the Minister to determine the amount of tax under section 47 is not a "ministerial discretion" similar to that provided in section 6(2), so that in making such determination of tax the Minister does not have to have material sufficient in law to support his determination or to give the taxpayer an opportunity of meeting the case against him; the Minister's decision under section 47 is not absolute because the taxpayer has the right of appeal under section 58 and, since the Minister's determination is solely one of fact, if the taxpayer can establish to the satisfaction of the court that the actual income was less than the amount determined by the Minister, then such amount will be reduced in accordance with the findings of the court. The appellant in this instance was not able to satisfy the court on this point and the appeal was dismissed.

Section 16, as it existed in 1938, and section 15 of the Income War Tax Act were considered in the case of *Carden S. Bagg* v. *Minister of National Revenue*, [1948] Ex. C.R. 244, C.T.C. 55. The appellant owned shares in a company whose capital assets had included an item of goodwill which had been written off against surplus in several stages between 1921 and 1937, resulting in a reduction of capital from $180,000 to $40,000. This write-off was not admitted by the taxing authorities and it was conceded by the appellant that, from an income tax point of view, on June 3rd, 1938, the company had undistributed income on hand of $38,091.61. On that date by supplementary letters patent the authorized capital of the company was decreased from $200,000 to $79,200 by cancelling 200 unissued shares, each of $100 par value, and by reducing the par value of the 1,800 issued shares from $100 per share to $44 per share; in addition the 1,800 shares of par value of $44 each were converted into 1,800 preferred shares of a par value of $40 each and 1,800 common shares of a par value

of $4 each. The appellant was assessed with respect to 1938 as being deemed to have received a dividend equal to the portion of the undistributed income represented by his holding of shares in the company. He appealed from the assessment. The court held that the appellant did not receive "an amount by virtue of the reduction", within the meaning of section 16(1) as it read in 1938, and that the undistributed income was capitalized as a result of the reduction and conversion in 1938, within the meaning of section 15. The court arrived at the latter conclusion by the following reasoning: the original capital of $180,000 had been written down to $40,000 by the write-off of goodwill; but by the supplementary letters the capital had been decreased to $79,200; the difference between $40,000 and $79,200 is represented by the undistributed income, so that the result was the same as if the capital stock had first been decreased to $40,000 and then increased to $79,200. The appeal was dismissed. Notice of Appeal to the Supreme Court of Canada has been filed.

A Canadian company, being in arrears as to its cumulative preference stock in 1944, declared a dividend but postponed payment thereof for twenty years, issuing to its shareholders, as evidence of the right to receive the dividend, dividend notes payable in 1964. The appellant appealed from an assessment adding to his 1944 income the face value of one of these dividend notes which he received as a shareholder. The appeal was allowed by the Exchequer Court on the ground that the dividend note was not "interest dividends or profits" received from "stocks" during the year 1944 but that it merely constituted an acknowledgment of debt which might never be satisfied: *Flinn* v. *Minister of National Revenue*, [1948] Ex. C.R. 272, C.T.C. 90. It is to be noted that this judgment has been rendered ineffective with respect to 1947 and subsequent years by the enactment of subsection (11) of section 3 of the Income War Tax Act.

In *The King* v. *Sansoucy*, [1948] Ex. C.R. 399, C.T.C. 121, a Writ of Immediate Extent, alleging that the defendant owed the Crown taxes, interest and penalties under the Income War Tax Act and that there was danger of the debt being lost, and issued to the Crown from the Exchequer Court on a judge's fiat, was challenged on two grounds:

(*a*) that Rule 2 of the General Rules and Orders of the Exchequer Court, 1931, combined with the Crown Proceedings Act, 1947 (U.K.), which abolished Writs of Extent in the United Kingdom, means that the Exche-

quer Court has no jursidiction to issue any Writ of Extent; and

(*b*) that the affidavit of the Deputy Minister upon which the fiat issued was insufficient and defective in that there was no proper evidence of a debt to the Crown and no proof of danger.

The court rejected the first contention and agreed with the second, setting aside the fiat and writ because no valid Notice of Assessment had been sent to the defendant, so that there was no debt owing to the Crown when the writ was obtained, and because no facts were set out in the affidavit to support the allegation of danger.

Two cases dealt with provisions of the Income War Tax Act which were in effect during the war period but which have since been repealed. In the first the appellant sought exemption from tax with respect to his pay received in 1943 as an officer in the Reserve Army (under section 4(1)(t)(iii) as it then read). The appeal was dismissed on the ground that the provision applied only to members of the forces on active service (*Acorn* v. *Minister of National Revenue*, [1948] Ex. C.R. 390, C.T.C. 135). The second case involves the meaning of the word "employed" as it appeared in Rule 6 of section 2 and Rule 2 of section 1 of paragraph A of the First Schedule to the Income War Tax Act during the period 1942-1946. The Rule was that, if husband and wife each had a separate income in excess of $660, each should be taxed as single, but that the husband should not lose his married exemption "by reason of his wife being employed and receiving any earned income". The appellant was a practising barrister and his wife was a practising physician. In 1942 the wife earned more than $660 from the practice of her profession. The appellant was assessed as a single person and the Crown contended that "being employed" requires the relationship of master and servant. The court allowed the appeal (*Might* v. *Minister of National Revenue*, [1948] Ex. C.R. 382, C.T.C. 144).

Excess Profits Tax

A dairy company, in existence for many years before the war, purchased in 1937 all the outstanding shares of three smaller dairies. In 1941 and 1942 it purchased the assets and business of the three companies and merged them with its own concern. It was claimed that the standard profits of the three acquired companies should be added to those of the purchaser in view of section 4(2) of the Excess Profits Tax Act, 1940. It was held in

the Exchequer Court that the words in section 4(2), "who acquired his business as a going concern", when read with the subsection as a whole, refer to the commencement of business by a new taxpayer who has acquired his business after January 1st, 1938, and not to a taxpayer in business before that date but who acquired an addition to his business thereafter. (*The Borden Company Limited* v. *Minister of National Revenue*, [1948] Ex. C.R. 20, [1947] C.T.C. 384)

The words "carrying on business" as they are used in the Excess Profits Tax Act have been interpreted in two cases. In *Martin* v. *Minister of National Revenue* (not yet reported) the appellant leased apartments, duplexes and houses, belonging to her, together with furniture and services in certain cases. The Exchequer Court held that in view of the facts she was not a mere owner leasing her own property, but was engaged in a commercial enterprise and so subject to Excess Profits Tax.

In *Argue* v. *Minister of National Revenue* (not yet reported) the Supreme Court reversed the Exchequer Court. Argue was the manager of a loan company. While so employed, he wrote some insurance on his own account and invested in mortgages, agreements and notes which he turned over from time to time. It was held that in view of the facts he was not subject to Excess Profits Tax as carrying on business.

Succession Duty — Ontario

Shares in a company were registered in the names of two persons domiciled in Manitoba as joint tenants with the right of survivorship. On the death of one party the other applied to the Toronto transfer agent of the company to have the shares registered in his name as surviving joint tenant. The transfer agent refused until a release from the Ontario Succession Duty officials was supplied. An action was then taken for a mandatory order compelling the company to register the shares in the name of the plaintiff. The action was dismissed in the High Court. The Ontario Court of Appeal held that section 8 of the Ontario Succession Duty Act was not ultra vires and did not conflict with the Dominion Companies Act. The question of the situs of the shares was not before the court. (*Christie* v. *British-American Oil Company Ltd.*, [1947] O.R. 842, [1948] C.T.C. 1)

The deceased took out an insurance policy upon his life and subsequently designated his wife, children and grand-children as beneficiaries, subject to a trust agreement under which the proceeds of the policy would be payable to his trustees, who were

to divide the income in equal shares among his wife, children and grandchildren during the life of the wife, with the capital to be divided upon her death. The executors and beneficiaries of the deceased appealed from the confirmation by the Treasurer of the Province of Ontario of the statement of succession duty levied on the deceased's estate, on the ground that the income from the insurance proceeds was exempt under section 4(1)(j) of the Ontario Succession Duty Act, 1939, as being a non-commutable annuity, income or periodic payment effected other than by will or testamentary instrument and paid for by the deceased during his lifetime. Barlow J. of the Ontario High Court held that the exemption of section 4(1)(j) should be strictly construed, that the onus was on the appellants to show that they came within the exemption and that they had failed to discharge the onus because the income in question was not paid for by the deceased within his lifetime but arose from capital controlled by the trustees. He therefore dismissed the appeal: *Re Carr*, [1948] O.W.N. 95, [1948] C.T.C. 15. His judgment was confirmed by the Ontario Court of Appeal: [1948] O.R. 284, [1948] C.T.C. 68.

Succession Duty — Quebec

A testator who left considerable property in Quebec made provision for three trusts. Two were set up with a capital of $30,000 each, with provision that the individual beneficiary was to receive the income therefrom to the extent of a minimum of $1,200 per annum for life with power to encroach upon capital if necessary. The third consisted of his residuary estate, the income of which was to be paid to one individual during his life. The income from the first two trust funds was likewise to be paid to the third beneficiary upon the death of the first two. On the death of the third beneficiary the capital of all three trusts was to be added to a trust fund for charitable purposes. The Province of Quebec claimed that the three named beneficiaries were usufructuaries within the meaning of section 13 of the Quebec Succession Duties Act and levied duty as though they had received as absolute owners. It was held by the Supreme Court of Canada, by a majority of three to two, that the three beneficiaries received only a personal right, that they could not be regarded as usufructuaries and that the corpus of the funds was exempt from tax since it was left for charitable purposes. Therefore the appeal was allowed. (*Guaranty Trust Company of New York* v. *The King*, [1948] S.C.R. 183, C.T.C. 153)

Montreal WILLIAM J. HULBIG