Taxation Decisions and Rulings

Part VIII of the Income Tax Regulations was made and established, under the authority of section 106 of The Income Tax Act, by Order in Council P.C. 1913, dated April 26th, 1949, and appearing in the Canada Gazette, Part II, of May 25th, 1949, at page 1064. It reads as follows:—

PART VIII

Certificate For The Foreign Exchange Control Board

800. Every person owning property having an aggregate value of $25,000 or more and who makes an application under The Foreign Exchange Control Act for a determination that he has ceased to be a resident shall obtain from the Minister a certificate that there are not outstanding any assessed taxes, interest or penalties payable by him in respect of his income, and that he is not in default of filing any prescribed return and shall file the certificate with the Foreign Exchange Control Board as a condition precedent to having his application considered.

Income Tax Cases

The first published decision of the Income Tax Appeal Board is that in the case of *In re the Income War Tax Act and Walter Crassweller*, [1949] Tax A.B.C. 1.

The appellant is the president and principal shareholder of a private Dominion company which had on hand capital surplus in excess of $1000 and undistributed income in excess of $1000. Pursuant to a by-law duly passed, entitled "A By-law for the purpose of distributing a portion of the capital surplus of the company among the shareholders of the company", $1000 was distributed to the shareholders in 1946. The Minister of National Revenue included in the appellant's income for 1946, $867.30, being his portion of the distribution. The appellant appealed on the ground that this sum was a distribution of capital and, as such, not taxable as income. The Board dismissed the appeal holding that an item which is capital in the hands of a transferor may be income in the hands of the transferee; that a

distribution of profits, whether out of capital or earned surplus, by a company pro rata among its shareholders can properly be described as a dividend; and that what the appellant received was a dividend subject to tax.

In *Cooper* v. *Minister of National Revenue* (not yet reported) the taxpayer was a motion-picture projectionist, employed as such for a salary in a theatre, and a member of a trade union. By agreement between the taxpayer's employer and his union, only union members in good standing would be employed as projectionists. To be a member in good standing, the payment of union dues was required by the constitution and by-laws of the union. In these circumstances Mr. Justice Angers, in the Exchequer Court, held that the taxpayer was entitled to deduct his union dues in computing his income subject to tax; the year in question was 1945. In so holding, the court drew a parallel between this case and the *Bond,* [1946] Ex. C.R. 577, [1946] C.T.C. 281; and *Rutherford,* [1946] C.T.C. 293, cases, in which it was held that salaried lawyers whose employment depended upon their being members of the Bar in good standing were entitled in computing their income subject to tax to deduct the annual Bar fees paid by them. The benefit of these decisions to the taxpayer is nullified for the taxation years 1949 and following by the terms of section 5 of the Income Tax Act, which states that salary and wage income is subject to certain limited deductions, "but without any other deductions whatsoever".

Succession Duty Case

At his death in 1944 W. Herbert Brookfield was domiciled in Nova Scotia. Before his death, upon his instructions, common shares in United States corporations, none of which had a share register or transfer office in Nova Scotia, were purchased and registered in the names of employee nominees of the Royal Trust Company, the share certificates being endorsed in blank. To each certificate was attached a declaration of trust signed by the person in whose name the certificate was made out, declaring that he held the shares as nominee of the trust company and giving the company authority to collect and receive dividends. The company held the shares in Halifax for the deceased "for management and safekeeping".

The trust company, as administrator of the estate, paid to the Collector of Succession Duties for the Province $65,258.97, including duties on the shares just mentioned. $17,897.92 was also paid to the Collector of Inland Revenue of the United States

as federal tax on the transfer of the shares. The trust company then claimed a refund from the province of Nova Scotia on the grounds *inter alia* that the shares in question were not "property situate in Nova Scotia" within the meaning of section 8(a) of the Succession Duty Act, 1945 (N.S.), c. 7, and that under the provisions of the Canada-United States of America Tax Convention Act, 1944-45 (Can.), c. 31, shares of a company organized in the United States are deemed to be property situated there.

The Nova Scotia Supreme Court en banc held that the share certificates as endorsed were property in Nova Scotia, having been found there at the death, and were subject to duty in that province and that the Canada-United States of America Tax Convention Act has no application to a question of situs arising under the Nova Scotia Succession Duty Act.

An appeal was made to the Supreme Court of Canada which upheld the court below with respect to the applicability of the Canada-United States of America Tax Convention Act, but overruled that court as to the situs of the shares, holding that, inasmuch as the shares could only be effectively dealt with outside Nova Scotia as between the company and the owner, they were not subject to succession duty in that province. The claim for the refund of moneys paid by the Royal Trust Company was accordingly sustained and the appeal allowed. *Re: Estate W. H. Brookfield* (*Royal Trust Company* v. *The King*), [1949] C.T.C. 59.

Excess Profits Tax Case

In *The Borden Company Limited* v. *Minister of National Revenue* (not yet reported) the appellant carried on a large business during the Standard Period. In 1941 and 1942 it acquired the assets and business of three subsidiaries which throughout the standard period and until such acquisition had themselves operated. The appellant sought to add to its standard profits the standard profits of the three businesses so acquired and contended that section 4(2) of The Excess Profits Tax Act applied. The Supreme Court upheld the decision of the Exchequer Court that section 4(2) was not applicable in the circumstances and dismissed the appeal.

Sales Tax Case

Defendant, a retail jeweller, saw in the United States toy electric irons and conceived the idea of selling them in Canada. To this end he entered into a contract with a Canadian firm

under which that firm first, at his cost, made dies with which to produce the irons and then manufactured the irons exclusively for defendant who in turn sold them to departmental stores and jobbers. Action was taken against defendant in the Exchequer Court for the payment of sales tax of 8% on the sale price of the irons sold by him on the ground that he was a "producer or manufacturer" as defined by section 2(c)(ii) of the Excise Tax Act, R.S.C., 1927, c. 179, and as such was subject to the tax as provided in section 86(1)(a)(i) of the Act. Defendant denied that he was the "producer or manufacturer" of the toys, claimed that the firm which had supplied him was liable to tax, stated that he had paid the tax to the supplier and produced invoices marked with the words "sales tax included" to support his statement. The court held that defendant held a sales or other right to the goods manufactured on his behalf and sold by him and was therefore the "manufacturer or producer" of the goods within the meaning of section 2(c)(ii) of the Act; that with no contract clause requiring the supplier to pay the sales tax the fact that invoices were marked "sales tax included" does not indicate that defendant paid any sales tax; that in any event payment of the sales tax to the supplier would not exonerate defendant from his liability to pay to the Crown; and that the Crown was entitled to payment of the tax with interest and penalties. *His Majesty the King* v. *Reuben Shore* (not yet reported).

Representation Before the Income Tax Appeal Board

A copy of the following resolution of the Council of the Bar of Montreal, passed on April 27th, 1949, has been sent to the Prime Minister and the Ministers of Justice, Finance and National Revenue. The resolution is reproduced here, at the request of the Council of the Bar of Montreal, as a matter of interest to our readers:—

WHEREAS by Section 83(3) of the Income Tax Act the Income Tax Appeal Board is constituted a court of record; and

WHEREAS by the provisions of the said Act appeals from the said Court may be lodged in the Exchequer Court of Canada; and

WHEREAS it is essential to the conduct of proceedings before the Income Tax Appeal Board and to the orderly settlement of disputes before that Board that proceedings be carried on according to well established rules of evidence; and

WHEREAS Section 82(1) of the Income Tax Act provides that the Minister and the Appellant may appear in person, or may be represented at the hearing by counsel or an agent; and

WHEREAS the provision in said Section, that the parties may appear by an agent, contravenes the immemorial rule of law that parties appearing before a court of record may only appear in person or by counsel; and

WHEREAS advocates, barristers, attorneys and solicitors are officers of the Courts and as such have duties and responsibilities to which other persons who might appeal as agents for parties before the said Appeal Board are not subject; and

WHEREAS the provision in the Income Tax Act that parties may appear before the Income Tax Appeal Board by an agent, is contrary to the public interest and to the proper administration of justice;

THAT request be made to the appropriate authorities that the Income Tax Act be amended by deleting from Section 82(1) of the said Act the words "or an agent" and that the introduction of legislation for the amendment of said Act be proceeded with at the earliest possible date; and

THAT for such purpose a copy of this resolution be forwarded immediately to the Prime Minister of Canada, the Minister of Justice, the Minister of Finance and the Minister of National Revenue.

WILLIAM J. HULBIG

Montreal

Shakespeare or Lord Chancellor Bacon?

1 *Clown.* Is she to be buried in Christian burial, that wilfully seeks her own salvation?

2 *Clown.* I tell thee, she is; and therefore make her grave straight: the crowner hath sat on her and finds it Christian burial.

1 *Clown.* How can that be, unless she drowned herself in her own defence?

2 *Clown.* Why, 'tis found so.

1 *Clown.* It must be *se offendendo;* it cannot be else. For here lies the point: if I drown myself wittingly, it argues an act: and an act hath three branches; it is, to act, to do, and to perform: argal, she drowned herself wittingly.

2 *Clown.* Nay, but hear you, goodman delver, —

1 *Clown.* Give me leave. Here lies the water; good: here stands the man; good: if the man go to this water, and drown himself, it is, will he, nill he, he goes, — mark you that; but if the water come to him, and drown him, he drowns not himself: argal, he that is not guilty of his own death, shortens not his own life.

2 *Clown.* But is this law?

1 *Clown.* Ay, marry, is it; crowner's-quest law.

(Hamlet, Prince of Denmark, Act V, Scene 1)