

3.1950

No. 52 of 1947.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF CANADA.

UNIVERSITY OF LONDON
W.C.1.

-8 OCT 1956

INSTITUTE OF ADVANCED
LEGAL STUDIES

44351

BETWEEN

10 THE EXECUTORS of the Will of The Honourable
PATRICK BURNS, deceased; and THE ROYAL TRUST
COMPANY named in the Will of The Honourable
Patrick Burns as Trustee for Burns Memorial Trust;
THE FATHER LACOMBE HOME at Midnapore;
THE GOVERNING COUNCIL OF THE SALVA-
TION ARMY CANADA WEST; THE TRUSTEES
of the Fund to be administered by the City of Calgary
for the benefit of poor indigent and neglected children
under the Will of The Honourable Patrick Burns;
20 THE TRUSTEES of the Fund to be administered
for the benefit of Widows and Orphans of members
of the Police Force in the City of Calgary under the
Will of The Honourable Patrick Burns; THE
TRUSTEES of the Fund to be administered for the
benefit of Widows and Orphans of members of the Fire
Brigade of the City of Calgary under the Will of The
Honourable Patrick Burns

Appellants

AND

THE MINISTER OF NATIONAL REVENUE -

Respondent.

Case for the Respondent

RECORD.

30 1. This is an appeal by special leave from a judgment of the Supreme
Court of Canada, dated the 22nd of October, 1946, allowing in part the
Appellants' appeal from a judgment of the Exchequer Court of Canada,
dated the 9th day of January, 1946, which had dismissed an appeal from
the decision of the Minister of National Revenue affirming the assessments
for income tax against the Appellant Executors under the Income War
Tax Act for the taxation years 1938, 1939, 1940 and 1941.

2. The question for determination is whether or not, under the Income
War Tax Act (Chapter 97 of the Revised Statutes of Canada, 1927, as
amended) liability for income tax arises in respect of that part of the
income of the trust estate of The Honourable Patrick Burns deceased
during the taxation years 1938, 1939, 1940 and 1941, which, in the event

CASE FOR THE RESPONDENT

of its not being required to meet annuities or other charges will, upon the death of certain persons, be payable to the Royal Trust Company for the creation and establishment of a Trust, to be known as the Burns Memorial Trust, to be administered by the Royal Trust Company as trustee. The relevant provisions of the will of the deceased are set forth in paragraphs 8 and 9 of this Case. The relevant provisions of the Act are set out in paragraphs 3 to 6 of this Case.

3. The following provisions of the Act were in force and remained unchanged during each of the taxation years under consideration :—

“ 2. In this Act, and in any regulations made hereunder, 10 unless the context otherwise requires—

* * * * *

(h) ‘ person ’ includes any body corporate and politic and any association or other body, and the heirs, executors, administrators and curators or other legal representatives of such person, according to the law of that part of Canada to which the context extends ;

“ 3. For the purposes of this Act, ‘ income ’ means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from 20 a trade or commercial or financial or other business or calling directly or indirectly received by a person . . .

“ 4. The following incomes shall not be liable to taxation hereunder :—

* * * * *

(e) The income of any religious, charitable, agricultural and educational institution, board of trade and chamber of commerce, no part of the income of which inures to the personal profit of, or is paid or payable to any proprietor thereof or shareholder therein ;

* * * * *

“ 9. There shall be assessed, levied and paid upon the income 30 during the preceding year of every person—

(a) residing or ordinarily resident in Canada during such year ;

* * * * *

a tax at the rates applicable to persons other than corporations and joint stock companies set forth in the First Schedule of this Act upon the amount of income in excess of the exemptions provided in this Act: Provided that the said rates shall not apply to corporations and joint stock companies.

* * * * *

“ 11. The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature shall be deemed to include 40 all income accruing to the credit of the taxpayer whether received by him or not during such taxation period.

(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 an unmarried person."

4. The provisions of section 11 (4) of the Act were twice amended during the taxation years under consideration. For the taxation years 1938 and 1939 the sub-section was in this form :—

10 " (4) Dividends received by an estate or trust and capitalised shall be taxable income of the estate or trust."

5. For the taxation year 1940 the sub-section was in this form :—

" (4) (a) Income received by an estate or trust and capitalized shall be taxable in the hands of the executors and trustees, or other like persons acting in a fiduciary capacity.

(b) Income earned during the life of any person shall, when received after the death of such person by his executors, trustees or other like persons acting in a fiduciary capacity, be taxable in the hands of such fiduciary."

6. For the taxation year 1941 the sub-section was in this form :—

20 " (4) (a) Income received by an estate or trust and capitalized shall be taxable in the hands of the executors or trustees or other like persons acting in a fiduciary capacity.

(b) Income earned during the life of any person shall, when received after the death of such person by his executors, trustees or other like persons acting in a fiduciary capacity, be taxable in the hands of such fiduciary.

30 (c) Income taxable under the provisions of this sub-section shall be taxed as if such income were the income of a person other than a corporation, provided that no deduction shall be allowed in respect of the exemptions provided by paragraphs (c), (d), (e), (ee) and (i) of sub-section 1 of section 5 of this Act.

7. The Honourable Patrick Burns, late of the City of Calgary, in the Province of Alberta, died on the 24th February, 1937. His will with the codicil thereto was duly admitted to probate. The provisions of the will are set out at pages 53 to 74 of the Record, and in so far as they are directly relevant to this Appeal are summarised in paragraphs 8 and 9 of this Case. p. 18, l. 29.

8. After making certain specific bequests the testator gave the residue of his estate to the executors and trustees of his will upon trust to pay out of it funeral and testamentary expenses, debts, and estate and other duties. Clause 29 of the will described the balance of the residue of the estate as the testator's "trust estate". Clause 30 directed the trustees to stand possessed of the trust estate and of the income therefrom upon trust to pay certain annuities and to invest the surplus of the annual pp. 59-70.

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income as part of the capital of the trust estate at compound interest. Clause 35 directed the trustees in the event (which happened) of the testator's son predeceasing him and leaving a wife but no issue, to hold the trust estate with the accumulations and additions thereto upon trust out of the income thereof to pay an annuity to the son's widow. This Clause further directed the trustees to hold the trust estate and to appropriate sufficient of the same or of the investments thereof to insure an annual income therefrom sufficient to pay the annuities given by the will and to hold the trust estate including the accumulations thereof and the additions thereto by reason of the deaths of annuitants or otherwise until 10 the death of the last of the annuitants to whom he had bequeathed annuities by his will or the death of his son's widow whichever should last happen and subject to prior payment of the annuity to the son's widow upon trust to pay certain annuities (totalling 60 per cent. of the net annual income derived from the trust estate) to the testator's nephews and nieces. This Clause further directed the trustees until the death of the last annuitant or the death of his son's widow whichever should last happen to invest the surplus of the annual income of the trust estate as part of the capital of the trust estate at compound interest.

pp. 68-70.

9. Clause 36 of the will contained the trusts which are to take effect 20 on the death of the last of the annuitants or of the son's widow whichever last happens. The trustees are to stand possessed of the trust estate with all accumulations and additions to distribute 67 per cent. thereof to the testator's nephews and nieces and upon the further trust described as follows :—

“ And upon the further trust to pay and convey the rest, residue and remainder of ‘ my Trust Estate ’ unto the Royal Trust Company for the creation and establishment of a Trust to be known as the ‘ Burns Memorial Trust ’ to be administered by it as Trustee at its office in the City of Calgary, in the Province of Alberta, and the net 30 annual income therefrom to pay and distribute annually in equal shares thereof amongst the following :—

(1) The Father Lacombe Home at Midnapore in the Province of Alberta.

(2) The Branch of the Salvation Army having its Headquarters at the City of Calgary, in the Province of Alberta.

(3) The Children's Shelter carried on under the auspices of the said City of Calgary, towards which I have bequeathed Fifty (50) 4 per cent. non-voting, non-cumulative redeemable Preference Shares in the Capital Stock of Burns Foundation 40 (Limited) by this my Will.

(4) To the Fund established for the benefit of Widows and Orphans of Members of the Police Force of the City of Calgary, towards which I have bequeathed Fifty (50) 4 per cent. non-voting, non-cumulative, redeemable Preference Shares in the Capital Stock of Burns Foundation (Limited) by this my Will, the first moneys distributed in pursuance of this bequest to be made after the expiration of one year from the date of the payment, conveyance and transfer by my Trustees of the said rest, residue

and remainder of 'my Trust Estate' unto the said, The Royal Trust Company, and while it is my desire that the said annual income shall be expended annually and I Direct the said The Royal Trust Company, to so expend the said income derived from the said Burns Memorial Trust, I hereby provide that in the event of there being at any time a surplus of the said income in any one year that such surplus may be invested in the name of the said The Royal Trust Company, as part of the capital of the said Trust to be known as the 'Burns Memorial Trust'."

10 10. The rights of the son's widow under the will were varied by agreements approved by the Supreme Court of Alberta. To provide for the amounts payable under these agreements the executors appropriated out of the estate a certain sum to be administered by them separately from the general estate and, in addition, made provision therefor out of the general revenue of the estate as was done in the case of annuities payable under the will. p. 18, l. 29—p. 19, l. 49.

20 11. By an Order of the Supreme Court of Alberta, dated the 11th December, 1939, the gifts of income to the Lacombe Home, the Salvation Army, the Children's Shelter, the Fund established for the benefit of Widows and Orphans of members of the Police Force of the City of Calgary, and the Fund established for the benefit of the Widows and Orphans of members of the Fire Brigade of the City of Calgary, were declared to be good and valid charitable bequests. By the same order schemes were approved for the setting up and administration of funds for "The Trustees for Poor, Indigent and Neglected Children of the City of Calgary", "The Trustees for Widows and Orphans of the Police Force of the City of Calgary" and "The Trustees for Widows and Orphans of the Fire Brigade of the City of Calgary", and provision was made in each scheme for the appointment of trustees for the several purposes. p. 20, ll. 28-51.

30 12. During the taxation years 1938, 1939, 1940 and 1941, the annuitants and the widow of the testator's son were still living. In each of these years the annuities and the sums due to the widow were paid, and 60 per cent. of the total net income of the trust estate was paid to the nephews and nieces entitled thereto under Clause 36 of the will, and the remaining 40 per cent. of the net income was transferred by book entry by the trustees from Estate Income Account to the Estate Capital Account. The trustees made no segregation or allocation of the net income as between the nephews and nieces entitled ultimately to 67 per cent. of the trust estate and the Royal Trust Company entitled ultimately to 33 per cent. of the trust estate. p. 21, ll. 42-48.

40 13. The executors filed income tax returns for each of the years 1938, 1939, 1940 and 1941, claiming as a deduction in each year amounts totalling 33 per cent. of 40 per cent. of the net income of the trust estate. These deductions were not allowed in the assessments made upon the executors for the years in question. The executors appealed to the Respondent. The reasons given for the appeal were that 33 per cent. of 40 per cent. of the net income was accumulating for the benefit of the Burns Memorial Trust, that the charitable institutions entitled beneficially p. 21, ll. 25-41.
p. 2, l. 30—p. 3, l. 51

to the Burns Memorial Trust were named in the will and were ascertained as beneficiaries at the date of the testator's death, that the shares of income and capital vested in these beneficiaries immediately upon the testator's death, that the Burns Memorial Trust was a charitable institution and as such free from liability to pay income tax, and that the 33 per cent. being accumulated for that institution was exempt from taxation under section 4 (e) of the Act.

14. On the 5th June, 1944, the Respondent gave his decision rejecting the appeal. The Respondent's reasons given in his decision were as follows :—

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p. 5, ll. 21-30.

“ The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notices of Appeal, and matters thereto relating, hereby affirms the said Assessments on the ground that all the income accumulating in the hands of the executors is taxable in their hands under the provisions of sub-section (2) and paragraph (a) of sub-section (4) of section 11 of the Act ; that no part of the said income is the income of any religious, charitable, agricultural or educational institution within the meaning of paragraph (e) of section 4. of the Act. Therefore on these and related grounds and by reason of other provisions of the 20 Income War Tax Act the said Assessments are affirmed.”

p. 6, l. 14—p. 9, l. 47.

15. The executors filed a Notice of Dissatisfaction dated the 30th June, 1944, requesting that their appeal be set down for trial in the Exchequer Court. On the 28th July, 1944, the Respondent issued his reply.

16. After pleadings filed, the appeal came on for hearing in the Exchequer Court before Mr. Justice Cameron who gave judgment on the 9th January, 1946, dismissing the appeal and holding that the whole of the 33 per cent. of the 40 per cent. of the net income was liable to tax. The Appellants appealed to the Supreme Court of Canada who by a majority 30 allowed the appeal in part and dismissed it as to the remainder. The views of the Supreme Court in respect of each of the four years may be summarised thus :—

1938

The Majority held that tax was payable on three-fifths of the 33 per cent. of the 40 per cent. of the net income but not upon two-fifths thereof the two-fifths being that proportion in which the Lacombe Home and the Salvation Army would ultimately be interested. The Minority held that the whole of the 33 per cent. was free of tax.

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1939

The views of the Majority and the Minority were the same as those held by them respectively in relation to 1938.

1940

The Majority held that the whole of the 33 per cent. was liable to tax. The Minority held that none of it was liable to tax.

1941

Both the Majority and the Minority held that the whole of the 33 per cent. was liable to tax in this year.

17. Mr. Justice Cameron held that the testator's estate was a "person" within the definition contained in section 2 (*h*) of the Act and that the income of the estate was charged to tax under the provisions of section 9 of the Act. To succeed in the appeal the Appellants, he said, must show that the 33 per cent. was the income of a "charitable institution" within the meaning of section 4 (*e*) of the Act. He was of
 10 opinion that no part of the 33 per cent. was the income of the Burns Memorial Trust or of any of the five organisations which would eventually benefit from the income of the Burns Memorial Trust Fund when that fund was established. The Burns Memorial Trust would never receive the 33 per cent. as income. It would receive it only as corpus. The five named beneficiaries would never receive the 33 per cent. in any form. They would merely receive shares in the income earned on the corpus at some time in the future. In his opinion it was unnecessary to deal with any of the other points raised in the appeal but he expressed his views upon some of them. He held that the Royal Trust Company, to which the accumu-
 20 lated corpus would eventually be handed over, was not a "charitable institution" within the meaning of section 4 (*e*). Neither was the Burns Memorial Trust a charitable institution: it was nothing more than a name attached to a fund. In respect of the years 1938 and 1939 he was of opinion that if the 33 per cent. should be regarded otherwise than as the income of the estate it was liable to tax under the provisions of section 11 (2) of the Act as "income accumulating in trust for the benefit of unascertained persons". In respect of the years 1940 and 1941, upon the same assumption, he was of opinion that the 33 per cent. was liable to tax under the provisions of section 11 (4) (*a*) as "income received by an estate or trust and
 30 capitalised".

18. The judgment of the Majority of the Supreme Court was delivered by Kerwin, J., and may be summarised as follows: it was held that the 33 per cent. was taxable only if it could be brought within the provisions of section 11 of the Act. The income received after the testator's death and accumulated in trust by executors or trustees was not taxable under the provisions of section 9 read with section 2 (*h*). In respect of the years 1938 and 1939 the majority was of opinion that three-fifths of the 33 per cent. representing the eventual interest of "The Trustees for Poor, Indigent and Neglected Children of the City of Calgary," "The Trustees for Widows and Orphans of the Police Force of the City of Calgary", and "The Trustees for Widows and Orphans of the Fire Brigade of the City of Calgary", was
 40 taxable under the provisions of section 11 (2) as "income accumulating in trust for the benefit of unascertained persons", but that two-fifths of the 33 per cent. representing the eventual interest of the Father Lacombe Home and of the Salvation Army, was not taxable as these two bodies were ascertained persons. In respect of the years 1940 and 1941 the Majority was of opinion that the whole of the 33 per cent. was taxable under the provisions of section 11 (4) (*a*) as "income received by an estate or trust and capitalised". The Majority further held that the

p. 22, l. 35—p. 33,
l. 36.

p. 35, l. 1—p. 40,
l. 17.

provisions of section 4 (e) exempting from taxation "the income of any charitable institution" did not apply in any of the four years. Even if it were assumed that the five organisations which would ultimately benefit were "charitable institutions", no part of the 33 per cent. was the income of any of these organisations. Nor could it properly be regarded as the income of the Burns Memorial Trust, which in any event was merely a name for a fund to be administered by the Royal Trust Company. As to the Royal Trust Company, this was not a charitable organisation and the income in question did not belong to it beneficially.

p. 40, l. 18—p. 41,
l. 44.

19. Mr. Justice Rand agreed with the Majority that the 33 per cent. could not be regarded as the income of any of the five charities on the ground that it would never belong to them or come into their possession. Therefore the income was not exempt from taxation under section 4 (c). In respect of the years 1938 and 1939 and 1940 he held that the charging language of the Act was inadequate to impose any charge upon this income. As to the years 1938 and 1939, it could not be regarded as "income accumulating for the benefit of unascertained persons" within the meaning of section 11 (2). In his view section 11 (2) applied only to cases in which "the accumulation, when completed, passes in its entirety to the persons entitled". In the present case the accumulation would not at any time pass to the five named beneficiaries: the only benefit which they would derive would be from the income of the capital increased by the accumulations. As to 1940, he held that section 11 (4) (a) was not adequate to impose the charge on the ground that the sub-section did not specify the basis of taxation, i.e., whether the income was to be taxed as that of a person or corporation and in either case whether any exemptions were to be allowed. As to 1941 he held that the whole of the 33 per cent. was taxable under section 11 (4) (a) and (c). 10 20

p. 44, l. 45—p. 50,
l. 15.

20. Mr. Justice Estey reached the same conclusions as Mr. Justice Rand and for substantially the same reasons. 30

21. The Respondent respectfully submits that this appeal should be dismissed with costs for the following among other

REASONS

- (1) BECAUSE in respect of each of the four taxation years three-fifths of the income in question was income accumulating in trust for the benefit of unascertained persons or of persons with contingent interests and was taxable under section 11 (2) of the Act.
- (2) BECAUSE in respect of the years 1940 and 1941 the whole of the income in question was income received by an estate or trust and capitalised and was taxable under section 11 (4) (a) of the Act. 40
- (3) BECAUSE in respect of the year 1941 the whole of the income in question was income received by an estate or trust and capitalised and was taxable under section 11 (4) (a) and (c) of the Act.

- (4) BECAUSE no part of the income in question for any of the four taxation years was exempted from taxation by section 4 (e) of the Act.
- (5) FOR the reasons given by Mr. Justice Cameron in the Exchequer Court.
- (6) FOR the reasons given in the judgment of the Chief Justice and of Kerwin and Hudson, JJ., in the Supreme Court of Canada.

R. P. MORISON.

B. MACKENNA.

In the Privy Council.

ON APPEAL

from the Supreme Court of Canada.

BETWEEN

**THE EXECUTORS of the
Will of the Honourable
Patrick Burns, deceased,
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AND

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Case for the Respondent

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