

Privy Council Appeal No. 92 of 1936.

James Forbes - - - - - *Appellant*
v.
The Attorney-General of Manitoba - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 17TH DECEMBER, 1936

Present at the Hearing :

LORD ATKIN.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.
LORD MAUGHAM.

[*Delivered by* LORD MACMILLAN]

The Attorney-General of the Province of Manitoba, suing on behalf of His Majesty in right of the Province, seeks in these proceedings to obtain judgment against the appellant for a sum of \$20.80, being tax alleged to be due by him under the Special Income Tax Act, 1933, of the Province of Manitoba.

The appellant is a civil servant of the Dominion of Canada and holds the office of a meat inspector in the Health of Animals Branch of the Dominion Department of Agriculture. Throughout the material period he was resident within the Province of Manitoba and performed his official duties there. His remuneration was at the rate of \$115.25 per month plus 5 per cent. added and retained as a contribution to a superannuation fund. Payment was made to him monthly by an order on the Receiver General of Canada at Ottawa transmitted to him from Ottawa and cashed by him in Manitoba. The sum sued for is stated to represent a tax of 2 per cent. on the remuneration so received by the appellant during the period from 1st May to 31st December, 1933. The appellant received his salary without any deduction of tax.

The action was initiated in the County Court of Winnipeg where judgment was given against the appellant. The decision of the County Court Judge was unanimously affirmed by Court of Appeal of the Province of Manitoba, whose judgment in turn was upheld by a majority of the Supreme Court of Canada (Duff, C.J., Lamont and Davis, JJ.; Cannon and Crocket, JJ. dissenting).

The grounds of defence on which the appellant relied before their Lordships were, broadly stated, that the Special Income Tax Act of 1933, so far as purporting to tax wages, and in particular the wages or salaries of Dominion civil servants, was unconstitutional and *ultra vires* of the Provincial Legislature, and that the statute was in any event inapplicable to the appellant as a civil servant of the Dominion of Canada.

In order to deal with the arguments submitted on behalf of the appellant it is necessary to set out at length the material provisions of the enactment in question.

The statute is entitled "An Act to Impose a Special Tax on Incomes." It contains two main parts, the first of which is headed "Taxation of Wages" and the second "Taxation of Income other than Wages."

The following quotations are from Part I, on which the action is based:—

"3.—(1) In addition to all other taxes to which he is liable under this or any other Act, every employee shall pay to His Majesty for the raising of a revenue for provincial purposes a tax of two per centum upon the amount of all wages earned by or accruing due to him on or after the first day of May, 1933, which tax shall be levied and collected at the times and in the manner prescribed by this part . . .

[Here follow certain exemptions inapplicable to the present case.]

* * * *

"4.—(1) Every employer at the time of payment of wages to an employee shall levy and collect the tax imposed on the employee by this part in respect of the wages of the employee earned or accruing due during the period covered by the payment, and shall deduct and retain the amount of the tax from the wages payable to the employee, and shall, on or before the 15th day of the month next following that in which the payment of wages takes place, or at such other time as the regulations prescribe, pay to the administrator the full amount of the tax. No employee shall have any right of action against his employer in respect of any moneys deducted from his wages and paid over to the administrator by the employer in compliance or intended compliance with this section.

"(2) Every employer shall, with each payment made by him to the administrator under this section, furnish to the administrator a return showing all taxes imposed by this part on the employees of the employer in respect of wages during the period covered by the return, which shall be in the form and verified in the manner prescribed by the administrator.

"(3) Every employer who deducts or retains the amount of any tax under this part from the wages of his employee shall be deemed to hold the same in trust for His Majesty and for the payment over of the same in the manner and at the time provided under this part.

"5.—(1) Every employer shall keep at some place in the province, of the location of which he shall inform the administrator when requested to do so, a true and correct record of the names and residential addresses of all his employees, and of the dates upon which each of them worked, the wages paid to each, and such other matters as the administrator requires.

"(2) Every employer shall, on request of the administrator or any person authorised by him in writing, produce for inspection all records kept by the employer relating to his employees.

"6.—(1) If an employer, in violation of the provisions of this part fail to collect and pay over any tax imposed by this part, the administrator may demand and collect from him as a penalty ten per cent. of the tax payable, and he shall in addition be liable to a fine of 10 dollars for each day of default, but not to more than 200 dollars.

"(2) Every person, who contravenes any provision of this part in respect of which no penalty is otherwise provided, shall be liable to a fine not exceeding 500 dollars, and each day's continuance of the act or default out of which the offence arises shall constitute a separate offence; but nothing contained in this section nor the enforcement of any penalty thereunder shall suspend or affect any remedy for the recovery of any tax payable under this part or of any moneys in the hands of an employer belonging to His Majesty.

"7. In case the wages earned or accruing due to an employee are paid to him without the tax imposed thereon being deducted therefrom by his employer, it shall be the duty of the employee to forthwith pay the tax, and all the provisions of sections 23, 23A, 24 and 25 of 'The Income Tax Act' shall, *mutatis mutandis*, apply to the collection and recovery of the tax so imposed from the employer and employee, or either of them."

Section 2 (1) of the Act provides the following interpretations:—

"(b) 'Employee' means any person who is in receipt of or entitled to any wages.

"(c) 'Employer' includes every person, manager or representative having control or direction of or responsible, directly or indirectly, for the wages of any employee and in case the employer resides outside the province, the person in control within the province shall be deemed to be the employer.

"(d) 'Wages' includes all wages, salaries and emoluments from any source whatsoever, including—

"(i) any compensation for labour or services, measured by time, piece or otherwise;

"(ii) the salaries, indemnities or other remuneration of members of the Senate and House of Commons of the Dominion and officers thereof, members of the Provincial Legislative Councils and Assemblies, members of municipal councils, commissions or boards of management and of any Judge of any Dominion or provincial Court and of all persons whatsoever, whether such salaries, indemnities or other remuneration are paid out of the revenues of His Majesty in right of the Dominion or in right of any province thereof, or any person."

* * * *

Taking the contentions of the appellant in the order in which they were advanced their Lordships deal first with his submission that the tax on wages which the Act imposes is not "direct taxation within the province in order to the raising of a revenue for provincial purposes" within the meaning of section 92 (2) of the British North America Act, 1867, and is consequently invalid. This argument, it will be observed, would, if sustained, invalidate the tax as

regards all wage-earners in Manitoba and not merely in the case of Dominion civil servants. While in the heading of this Part of the Act the tax is described as a "Tax on Wages" it would be more accurate to describe it as a tax on employees in respect of, or measured by, their wages, and indeed it is described in section 4 as "the tax imposed on the employee by this part."

Now all are agreed that an income tax is the most typical form of direct taxation. "The imposition of taxes on property and income, of death duties and of municipal and local rates, is according to the common understanding of the term, direct taxation" (*per* Viscount Cave, L.C., in *City of Halifax v. Fairbanks' Estate* [1928] A.C. 117, at p. 125). If then the tax in question is an income tax there is an end of the matter. *Prima facie* the tax is an income tax. The statute imposing it is entitled "An Act to Impose a Special Tax on Incomes." It invokes the aid of provisions of the Manitoba Income Tax Act (1924 C.A. cap. 91 and amending Acts) and in section 16 the Lieutenant-Governor in Council is empowered to make regulations for the joint administration of the Act and the Manitoba Income Tax Act. The Act as a whole covers all taxable income, Part I dealing with one form of income, namely income from wages and Part II dealing with income other than wages. Wages are undeniably income and the tax is by section 2 imposed on employees in respect of the wages earned by them. A tax is not the less a tax on income because it is imposed on a particular component of the taxpayers' income. It may be convenient to tax one part of the taxpayers' income in one way, another part in another way. Moreover the tax is not in any way discriminatory for it is imposed on all wage-earners indiscriminately.

To all this the appellant answers that while the statute may profess to charge the tax on the wage-earner in respect of his wages it enacts that it is to "be levied and collected . . . in the manner prescribed by this part," and the manner prescribed is that the employer is to deduct the amount of the tax from the wages which he pays to his employees and account for it to the Crown. The tax, he says, is thus really imposed on the employer; it is not a tax on any income which the employee receives but a tax on the wage fund in the hands of the employer, and the tax is thus only indirectly imposed on the employee.

Their Lordships cannot accept this argument. In their view section 3 is what it professes to be, a section charging the tax on the employee. The following sections which provide for the deduction of the amount of the tax by the employer before he pays over his employee's wages are mere machinery and machinery of a very familiar type in income tax legislation. The expedient of requiring deduction of tax at the source, as it is called, is one which has long been in effective use in the United Kingdom. A

taxpayer is said either to pay or to bear income tax according as he pays it himself or suffers deduction of it from moneys due to him, but in either case he is the taxpayer and on him the burden of the tax is imposed. In their Lordships' opinion the present tax is a direct tax on employees in respect of that portion of their income which consists of wages.

The appellant's second contention was that it is incompetent for the Provincial Legislature to tax the income of a Dominion civil servant? Why so? "Any person found within the province may be legally taxed there if taxed directly" (*per* Lord Hobhouse in *Bank of Toronto v. Lambe*, 1887, 12 App. Cas. 575, at p. 584). The appellant's argument is that the tax offends against the exclusive legislative authority of the Dominion Parliament in "the fixing and providing for the salaries and allowances of civil and other officers of the Government of Canada" under section 91 (8) of the British North America Act. If, he says, the Provincial authorities can tax at the rate of 2 per cent. the salary which he receives from the Dominion to enable him to live in the Province and discharge his duties there, they can tax his salary to such an extent as to render it impossible for him to live and perform his duties. A similar argument *in terrorem* was advanced and rejected in the case of the *Bank of Toronto v. Lambe* (cit. sup. at p. 586). "It is suggested," says Lord Hobhouse, "that the legislature may lay on taxes so heavy as to crush a bank out of existence and so to nullify the power of parliament to erect banks. But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes."

The validity of imposing direct taxation by provincial legislation on a Dominion official has been expressly established by authority in the case of *Abbott v. City of St. John* (1908) 40 Can. S.C.R. 597, which was approved by this Board in *Caron v. The King* [1924] A.C. 999. Lord Phillimore, in delivering the judgment of the Board, quoted this passage from the judgment of Davies, J. in *Abbott's* case: "The Province does not attempt to interfere directly with the exercise of the Dominion power, but merely says that, when exercised, the recipients of the salaries shall be amenable to provincial legislation in like manner as all other residents." Dealing with the suggestion that provincial taxation might paralyse the Dominion civil service, Davies, J. adds that "if under the guise of exercising power of taxation confiscation of a substantial part of official or other salaries were attempted it would be then time enough

to consider the question and not to assume beforehand such a suggested misuse of the power." It should perhaps be explained that in *Caron's* case the validity of the Dominion Income War Tax Act, 1917, as affecting the salary of a minister of a Provincial Government was upheld. The present case is the converse. In their Lordships' opinion the appellant's second contention must share the fate of the first.

Next the appellant submits that he is not an "employee" at all within the meaning of the Act and further that the Dominion is not his employer. Cannon J., in the distressing picture which he draws of the civil servant's lot, seems to share this view. It is not, however, the view of the Dominion Legislature, which in the Civil Service Act, 1927, R.S.C. cap. 22 uses the word "employees" in speaking of civil servants and indeed in section 2 interprets "employees" to mean and include "officers, clerks and employees in the civil service." But the Act is quite explicit, and the appellant clearly falls within the definition of "employee" in section 2 (1) (b), for he "is in receipt of . . . wages" and "wages" by section 2 (1) (d) include "all wages, salaries, and emoluments from any source whatsoever" and in particular "(ii) the salaries of all persons whatsoever whether such salaries . . . are paid out of the revenues of His Majesty in right of the Dominion or in right of any province thereof or any person." To this there can really be no answer. The appellant, however, seeks to extricate himself by arguing that even if he is an employee, the Dominion Government is not his employer within the meaning of the Act. If the Dominion is his employer the combined effect of section 3 of the Act imposing the tax on him as an employee and section 7 requiring him "to forthwith pay the tax" if his wages are paid to him "without the tax imposed thereon being deducted by his employer"—which is the case with the appellant—leads inevitably to judgment against him. If the Dominion is not his employer then he maintains that the condition of the tax not having been deducted by his employer has not been fulfilled, and he escapes from the conditional obligation to pay imposed by section 7.

In support of the submission that the Dominion is not an "employer" within the meaning of the Act, the appellant refers to sections 4, 5 and 6 of the Act, where the duties of deduction, of accounting, of making returns and of keeping records are imposed upon "every employer" under penalties. This cannot, he says, apply to the Dominion, for it would be *ultra vires* of the Provincial Legislature to impose duties and corresponding penalties on the Dominion Government; if the Provincial Legislature has done so, the legislation is invalid. Their Lordships agree that in these sections the term "employer" does not on a sound construction apply to the Dominion Government.

But equally it does not apply to all other employers outside the Province. And this for the very good reason that the revenue laws of a country are addressed to the inhabitants of that country and are ineffectual to reach or affect persons beyond its borders. Indeed "it may be accepted as a general principle that States can legislate effectively only for their own territories" (*Croft v. Dunphy*, [1933] A.C. 156 at p. 162). Therefore when a revenue statute of Manitoba addresses "every employer" and requires him under penalties to discharge certain duties in relation to the collection of the revenue of the Province, the order must be construed as addressed to "every employer" who is subject to the Legislature and is inapplicable to employers beyond its jurisdiction, notwithstanding that the language in which the term "employer" is defined in the Act is sufficiently wide to include persons beyond its jurisdiction. On the other hand their Lordships are equally clear that there is no such obstacle in the way of construing the word "employer" where it occurs in section 7 in the phrase "without the tax imposed thereon being deducted therefrom by his employer" as including the Dominion Government or any other employer outside Manitoba. The comprehensive meaning of the term "employer" is here free to operate, for the provision in question does not seek to impose any duty on persons outside the Province; it merely refers to a question of fact, the fact of the employer, wherever or whoever he may be, not having deducted the tax in paying wages to a person within the Province. It is not *ultra vires* of the Provincial Legislature to provide that if a wage-earner within the Province receives his wages from an employer outside the Province without deduction of tax, the wage-earner shall himself pay the tax, whether the outside employer be the Dominion Government or anyone else. Such legislation is not legislation affecting persons outside the Province with any duty or liability.

The last ground on which the appellant took his stand is even less tenable. He submitted that the Dominion Parliament by enacting a general Dominion Income Tax in 1917 had already so occupied the field of this form of taxation as to preclude the Manitoba Legislature from enacting any income tax legislation. In their Lordships' opinion this submission, which, if well-founded, would invalidate the whole Act and not merely Part I, is based on a misconception of the doctrine of the "occupied field" evolved in the interpretation of the British North America Act. The Dominion Parliament has exclusive authority under section 91 (3) to make laws for "the raising of money by any mode or system of taxation" and each Province under section 92 (2) has the exclusive right to make laws for "direct taxation within the Province in order to the raising of a revenue for provincial purposes." It was pointed out in *Citizens Insurance Company of Canada v. Parsons*, 1881,

7. App. Cas. 96 at p. 108, that though the description "the raising of money by any mode or system of taxation" is "sufficiently large and general to include 'direct taxation within the province in order to the raising of a revenue for provincial purposes' assigned to the provincial legislatures by section 92, it obviously could not have been intended that . . . the general power should override the particular one." This statement is quoted and approved in *Bank of Toronto v. Lambe* (*cit. sup.* at p. 585). The doctrine of the "occupied field" applies only where there is a clash between Dominion legislation and provincial legislation within an area common to both. Here there is no conflict. Both income taxes may co-exist and be enforced without clashing. The Dominion reaps part of the field of the Manitoba citizen's income. The Province reaps another part of it. This argument therefore also fails.

Their Lordships have now disposed adversely to the appellant of all the grounds on which the validity of the tax in question was challenged before them and they will accordingly humbly advise His Majesty that the appeal be dismissed. As their Lordships were informed that it had been agreed between the parties that they should each bear their own costs throughout these proceedings there will be no order as to costs.

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