BETWEEN:

GRACE GILHOOLY .... APPELLANT,

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

1945
June 21
—
Aug 24

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, sec. 5 (1) (a)—"Derive"—"Income derived from mining"—One who receives dividends from a mining company derives such dividends from mining and in the case of an estate such income is that of the beneficiary and not that of the trustee—Intervention of a trustee does not deprive ultimate beneficiary of the right to deduction for depletion—Court should hesitate to set aside a practice long followed by a government department when words of a statute clearly permit the interpretation placed on them by such government department.

Appellant has a life interest in a proportion of the income received by the executors of her father's will. Appellant claims a deduction from her income of twenty per cent of that part of her income paid to her by the executors and received by them as dividends on stock held in a Mining Company in accordance with the practice followed by the taxing authorities for 20 years and discontinued in 1937. Such deduction was disallowed by the Commissioner of Income Tax whose decision was affirmed by the Minister of National Revenue. Appellant appealed to this Court.

Held: That one who receives dividends from a mining company derives them from mining and is entitled to the deduction provided for by s 5 (1) (*a*) of the Income War Tax Act.

1945

GRACE GILHOOLY v. MINISTER OF NATIONAL REVENUE

Cameron J.

2. That the income is that of the beneficiary, the appellant herein, and not that of the trustees or executors of her father's will and the beneficiary derives it from minmg.
3. That the mere intervention of a trustee or executor does not deprive the ultimate beneficiary of the right of deduction for depletion.
4. That when the words of a statute clearly permit the interpretation placed on them by a government department and that practice has long continued a Court should hesitate to adopt a construction of the statute which would set aside a method long followed.

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before His Honour Judge J. C. A. Cameron, Deputy Judge of the Court, at Ottawa.

M. L. Gordon, K.C. and *Allan Lewis, K.C.* for appellant.

E. S. MacLatchy and *J. G. McEntyre* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON, Deputy Judge, now (August 24, 1945) delivered the following judgment:

This is an appeal from five assessments made by the Commissioner of Income Tax upon the Appellant in respect of income tax for the years 1937, 1938, 1939, 1940 and 1941, and affirmed by the Minister of National Revenue (hereinafter called "The Minister").

The assessment for the year 1937 was made on September 20, 1943, and for the other years on August 4, 1943. The taxpayer gave Notice of Appeal on or about September 2nd and 17th, 1943. On December 14, 1944, the Minister gave his decision affirming the assessments and stated, in part:

> The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notice of Appeal and matters thereto relating, hereby affirms the said Assessments on the ground that the taxpayer is not entitled to an allowance for depletion under paragraph (*a*) of Subsection 1 of Section 5 of the Act in respect of income received from the Estates of John McMartin; that the legal fees and the portion of the investment counsel fees which were disallowed, were not expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income within the meaning of paragraph (*a*) of Subsection 1 of Section 6 of the Act and therefore on these and related grounds and by reason of other provisions of the Income War Tax Act the said Assessments are affirmed.

On December 20, 1944, the Appellant filed Notice of Dissatisfaction and on January 2, 1945, the Minister gave his reply and pursuant to terms of Section 62 of the Income War Tax Act gave notice that he affirmed the assessments.

The appeals as set down for hearing include certain minor matters with which I am not now concerned, the parties having presented no evidence in regard thereto and having agreed that these matters should stand in abeyance pending a possible settlement, or, if necessary, a later hearing.

The Appellant for each of the years mentioned claimed to be entitled to deduct from her income 20 per cent of that part of her income paid to her by the executors of her father's will and received by them as dividends on stock held in a mining company—such claim being based on Section 5, 1. (*a*) of the Income War Tax Act. The Minister disallowed that claim in its entirety for reasons which will later be made clear.

The original War Tax Act was first enacted in 1917. On April 12, 1918, John McMartin, of Cornwall, Ontario, died and probate of his will was granted to the Trusts and Guarantee Company, Limited, of Toronto, and other individual executors. He devised all of his estate to his executors on trust and after providing for payment of certain legacies and annuities gave power to his executors to retain as investments of his estate all stocks, bonds, etc., owned by him at the time of his death; and with power to sell same at their discretion subject to the terms of an existing agreement; provided for payment to his wife of an annuity of $40,000 and the income from one-sixth of the residue of his estate; and for payment to each of his children, upon marriage or attaining twenty-five years of age, of the income from one-sixth of the estate for life, together with certain contingent supplements. In addition, certain limited powers of appointment were given to the children. He further directed that following the death of his wife and the last of his children, that all of the estate then remaining should be divided equally among all his grandchildren, per capita. I have not attempted to set out all the details of the will, but only such parts

1945
GRACE GILHOOLY v. MINISTER OF NATIONAL REVENUE
Cameron J.

thereof as are necessary to the consideration of this case. A large portion of his estate was in Hollinger Consolidated Gold Mines Limited, and very large sums are received annually by the executors as dividends from that Company and disbursed to the children of the deceased (the Appellant being one of the daughters) as provided in the said will.

It is clear therefore that the Appellant has a life interest in a proportion of the income received by the executors and that the remaindermen are the grandchildren of the Appellant's father. The shares in the mines are registered, I assume, in the name of the executors or some of them.

The relevant section in the original Income War Tax Act of 1917 was as follows:

3. (1) For the purposes of this Act, "income" means. . . . .with the following exemptions and deductions:—

(*a*) such reasonable allowance as may be allowed by the Minister for depreciation, or for any expenditure of a capital nature for renewals, or for the development of a business, and the Minister, when determining the income *derived* from mining and from oil and gas wells, shall make an allowance for the exhaustion of the mines and wells;

By R.S.C. 1927, Chapter 97, it was provided:

5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following Exemptions and deductions:—

(*a*) Such reasonable amount as the Minister, in his discretion, may allow for depreciation, and the Minister in determining the income *derived* from mining and from oil and gas wells and timber limits *shall* make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair;

In 1928, paragraph (*a*) of subsection one of section five was amended by adding thereto the following:

And in the case of leases of mines, oil and gas wells and timber limits, the lessor and the lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and the lessee do not agree, the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive.

In 1940 paragraph (*a*) was repealed and the following substituted:

(*a*) The Minister in determining the income *derived* from mining and from oil and gas wells and timber limits *may* make such an allowance for the exhaustion of the mines, wells and timber limits as *he may deem just and fair,* and in the case of leases of mines, oil and gas wells and timber limits the lessor and lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and lessee do not agree the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive;

Paragraph one of section 11 of the Act is as follows:

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

In order to clarify the issue it will be convenient at this point to indicate the practice of the Department in dealing with the question of depletion, as shown by the evidence of the Deputy Minister taken on Examination for Discovery and read into the record.

From 1917 to 1928 those companies engaged in base metal operations were allowed to represent 25 per cent of their profits as depletion; from 1929 to the present 33⅓ per cent has been allowed. From 1917 to 1928 those persons who received dividends from companies operating base metal mines were allowed 25 per cent as depletion; from 1929 to 1937 33⅓ per cent and from 1934 to the present—20 per cent.

From 1917 to 1933 those companies operating precious metal mines were allowed to represent 50 per cent of the net profits as depletion and from 1934 to the present 33⅓ per cent. Those who received dividends from such mines from 1917 to 1933 were allowed 50 per cent as depletion and from 1934 to the present—20 per cent.

Prior to 1938 an estate receiving mining dividends reduced the dividends by the appropriate depletion allowance and the remainder was included with any other income of the estate and distributed to the life tenant for tax purposes. It followed that if the executor distributed the amount of the depletion it was not taxed at all to the beneficiary who thereby had the benefit of the exemption.

But in 1938 and thereafter the mining dividend income if passed by the executors to a life beneficiary has been taxed in the hands of the latter without considering depletion. The grounds given for such change in 1938 were that such beneficiary received his income from an estate and not by way of dividends from a mining company; that such beneficiary had no capital to deplete and that he could not trace the source of his dividends (the income from the estate) without being involved in the executors' allocation of expenses.

1945
GRACE GILHOOLY v. MINISTER OF NATIONAL REVENUE
Cameron J.

It is clear therefore that from 1917 to 1945—a period of 28 years—the Minister, in exercising the power under what is now Section 5, 1 (*a*), in determining what was just and fair to those *deriving* their income from mines, etc., by way of allowances for the *exhaustion of the mine*, has consistently made that allowance in two forms:

(1) to the mining company;

(2) to its registered shareholders.

And, further, that from 1917 to 1937—a period of 20 years—that that part of the allowance secondly mentioned was also allowed to those who derived their incomes from mines as beneficiaries receiving their income from an estate, the executors of which were the registered shareholders. It is clear, too, that the change in practice made in 1938 was made in the Department and not as the result of any change in the law; and that it was so made because the Department felt that the law was not being properly interpreted at that time and that such allowance for depletion to the beneficiaries of an estate had been made contrary to law.

Quite apart from the words of the statute it would seem that an allowance for exhaustion should be made only to the owner of the capital so depleted—i.e. the owner of the mine itself, and in the case of a mining company, to the company itself and not to the shareholders. Counsel for the respondent argued before me that there was nothing in the Act that specifically required any allowance even to registered shareholders, and that is so, in the sense that shareholders are not mentioned—but the practice of the Department has been quite different. But the statute itself does not say that the allowance shall be made only to the owner of the mine—but to those *deriving* income from mines. If Parliament had intended to limit the application of the allowance to the mine owner it would have been very simple to use apt words to so indicate.

The history of the determination of the allowance is also shown in the evidence of the Deputy Minister. Apparently it was realized by all parties that it would be extremely difficult, and probably impossible, to ascertain with any degree of accuracy, just what would be a fair allowance for depletion of any individual mine. After consultation with the leaders of the industry, an arrangement was made to

meet the practical difficulty by establishing several classifications of mines—base metals and precious metals—and by the allowance of certain rates of depletion to both the operating company and those who received dividends therefrom.

The practice therefore has been that the Minister, from time to time, has found to be just and fair for the exhaustion of the mine an allowance which is the sum of its two parts—the one to the company and the other to those who receive income from it by way of its dividends.

The word "derive" is defined in Murray's New English Dictionary, Volume 3, p. 230, as "to flow, spring, issue, emanate, come, arise, originate, having its derivation from", and in the Shorter Oxford English Dictionary, Volume 1, as "to draw, fetch, obtain; to come from something as its source".

In my view the true meaning that would give effect to the words in the section is "income originating from mining or coming from mining as its source". Can there be any question that mining dividends are derived from mining? I think not—and while I have not been referred to any decisions in the Canadian Courts, where the matter has been directly considered, I find that it has been referred to in other courts.

In *Commissioners of Taxation* v. *Kirk* (1) Lord Davey said: "Their Lordships attach no special meaning to the word 'derived', which they treat as synonymous with arising or accruing".

In the case of *W. R. Wilson* v. *Minister of National Revenue* (2), the late President of this Court found that premiums on dividends paid in American funds were income derived from mining. It is true that he did not have to consider the question as to whether the dividends on mining shares were derived from mining, but it would scarcely be possible to find that the premiums were derived from mining unless the face value of the dividend cheques were also derived from mining.

I find therefore that in the absence of any provision in the section limiting the allowance for exhaustion to the mine owner, that one who receives dividends from a

(1) (1900) A.C. 588. (2) (1938) Ex. C.R. 246.

1945
GRACE GILHOOLY v. MINISTER OF NATIONAL REVENUE
Cameron J.

mining company does derive them from mining and is entitled to the allowance provided for. My opinion that this is the correct interpretation of the section is strengthened by the fact that the department has so construed it since 1917.

I turn now to consideration of the question as to whether this Appellant—not herself a shareholder, but receiving the income from an estate, the executors of which are the registered shareholders—is entitled to the deduction claimed.

Counsel for the Respondent put forward several reasons why the deduction should not be allowed.

His first contention was that an allowance for depletion is for the purpose of reimbursing the owner of capital for its loss through depletion and that the beneficiary in an estate (as in this case) has no interest in the capital. The first part of that proposition is probably quite correct in theory, but the words of the section provide that the allowance, while made for the exhaustion of a mine, is for the benefit of those *deriving income* from mining. The theory as to why depletion is allowed must give way to the words of the section. And it is quite apparent to me that the Appellant here has an interest—and a very important one—in the exhaustion of the mine. Her income will, of necessity, be affected by the depletion of the mine and, in fact, might terminate entirely.

Counsel for the Respondent also urged upon me the rule of construction of taxing statutes that exemption provisions should be strictly construed, referring to the case of *City of Montreal* v. *College Ste. Marie* (1), quoting from the judgment of former Chief Justice Duff: "That those who advance a claim to special treatment in such matters must show that the privilege involved has unquestionably been created". In my opinion, as will be noted from my previous findings, the section clearly uses such express words conferring the benefit of the deduction on all those deriving income from mines, that there is no need to presume any special privilege. It is contained in the very words of the section itself.

(1) (1921) A.C. 288.

It was argued on behalf of the Respondent that all amounts received by a life beneficiary of an estate are received *as income* regardless of the source from which they are paid and the Judgment of Mr. Justice Finlay in *Brodie* v. *Commissioner of Inland Revenue* (1), was referred to. That was a case in which trustees in an estate were directed to pay the deceased's widow four thousand pounds per annum out of the income, and if in any year the income fell short of that amount they were directed to raise and pay the deficiency out of capital. The question there was whether the payments made out of capital were subject to income tax. It was held that the substance of the transaction was that the widow was to have an income of four thousand pounds and that the whole income was subject to tax. That case, I think, is readily distinguishable from the one before me. It had to do with the question of whether capital paid over to make up a fixed annuity was or was not taxable income in the hands of the recipient. It was held to be income and taxable as such. But no question arose therein as to special exemption for certain types of income such as existed in the case now before me or whether any special exemptions or allowances in favour of shareholders in certain companies would be available to a beneficiary in an estate which held shares in such companies. On page 438 Finlay J. said:

> Of course, if certain sums of capital were simply handed over by the trustees to the lady and received by the lady as capital, it is quite clear that Income Tax would not attach, but it is, to my mind, not less clear that, if the sums paid were paid to the lady and were received by the lady as income, *then it is immaterial what they may have been in the hands of the trustees who paid them.*

It was urged that the concluding words above quoted were of great importance. But a consideration of the whole judgment, and even of the sentence quoted, satisfied me that too wide an interpretation should not be given to these words and that in saying that "it is immaterial what they may have been in the hands of the trustees" means only that it is immaterial whether they were capital or income in the hands of the trustees under the circumstances of that case.

(1) (1933) 17 T.C. 432.

1945
GRACE GILHOOLY v. MINISTER OF NATIONAL REVENUE
Cameron J.

I shall now turn to consideration of the other main points raised by the Respondent—that the income of the beneficiary is received from the estate and not from a mining company and that to hold otherwise would involve consideration of the executors' accounts, their origin, allocation of expenses, etc. I have been unable to find any case in our own courts but there are several in other courts of the Empire where the matter has been given consideration, and which I have found of great assistance in reaching my conclusions.

In the tax case reported in 22 V.L.R. 539, a trustee receiving dividends for the true owner residing elsewhere, it was held that the trustee was exempt and that the owner abroad was the real person to whom the income belonged. In that case, however, no estate or life beneficiary was involved.

In another tax case in Australia, reported in 29 V.L.R. 525, it was held that income from certain companies was not taxable in the hands of either the trustee or the beneficiaries. In this case the widow was entitled to an annuity under her husband's will. She objected to her assessment on the ground that her taxable income should be reduced by the amount derived through the executors from certain companies. The companies in question came under the provisions of Section 9 (2) of the Act, as follows:

> In the assessment of the income of any taxpayer liable to tax there shall not be included any dividends from any company except. . . . . .

Counsel for the Tax Commissioner argued that once the money got into the hands of the trustee it lost its original character and the source from which it was derived could not be looked at; that it was simply a sum of money handed by the trustee to the beneficiary as income. The Court held that neither the trustee nor the beneficiary could be taxed in respect of such dividends.

A'Beckett J. said: "In the case before us the dividends are received in the first instance by the trustee, but he has no beneficial interest in them; he has merely to deal with them for the purpose of paying them over to other people".

Hood J. said: "The income is that of the beneficiaries —it is *derived from dividends*".

In that case it is to be noted that the section said: "There shall not be included any *dividends* from any company

except. . . .", and that in the case now before me the words are "derived from mining". If the principles involved are the same—and I think they are—then, the words of Section 5 1. (*a*) "derived from mining" would seem to strengthen the position of the Appellant herein.

Syme v. *Commissioner of Taxes* (1), is a decision of the Privy Council in a tax case arising in Australia. It was held that in respect of the income so received by the Appellant he was entitled to be assessed under the Income Acts 1895 and 1896 of Victoria, as upon income derived from personal exertion and that he was wrongly assessed as upon income the produce of property.

In that State the rate charged on income from produce of property was double that derived from personal exertion. By the will of the Appellant's father his trustees carried on certain businesses which the testator was carrying on at his death and paid one-fifth of the annual profits to the Appellant. Counsel for the Respondent urged that the income received by the Appellant from trustees was a different income from that derived by the trustees from the business, being paid out of a fund arrived at by the trustees after setting off profits and losses and deducting prior charges.

At p. 1020 the Court said:

Lastly, it is said that the income is not the same income, and the fund which produces it is not the same fund, when the trustees are assessed as when the cestui que trust is assessed. They carry on several businesses, one great and the rest relatively small, some at a profit and some at a loss. They set off losses against profits, and bring down a balance on profit and loss account; they discharge sundry prior charges, and then divide an ultimate balance. All this is true, but all this is mere bookkeeping. *It does not follow when the appellant receives the cheque for his share that he is getting a part of a new mixed fund or that the connection between his income and the newspaper business is lost.* There is no difficulty, either in fact or in theory, in keeping the "Age business" apart from the other businesses, and all the businesses apart from those concerns the income of which is the produce of property. The Commissioner's argument conceived the fund out of which the appellant is paid as a reservoir, fed by various streams descending from sundry sources, and blending their waters in one basin, out of which they flow indistinguishably and indissolubly. With all respect to the learned judges, the majority in the High Court of Australia in Webb v. Syme, who adopted this figurative way of putting a very plain set of facts, their Lordships are only able to regard this argument as fallacious. There is no question here of shewing whence the sovereigns came in the first instance which

(1) (1914) A.C. 1013.

1945

GRACE GILHOOLY v. MINISTER OF NATIONAL REVENUE

Cameron J.

were ultimately paid to the appellant. In the ordinary course of business the trustees may mix all the sums that come to their hands from all sources, and with them discharge indiscriminately all or any of the obligations which fall upon them whether at law or in equity, but they keep accounts all the time, and there is no doubt whatever that the appellant's £17,025.17s.3d. comes from the "Age business" and that of the Melbourne Mansions Company was made in them, and is his solely because under his father's will they are carried on for him and the other members of the family. What was the produce of personal exertion in the trustees' hands till they part with it *does not in the instant of transfer, suffer a change, and become the produce of property and not of personal exertion, as it passes to the hands of the cestui que trust.*

A tax case in Queensland reported in 1929 Q.S.R., p. 276, is, in many respects, similar to the instant case and the judgment is of great interest. The headnote is as follows:

It is provided by s. 8 of The Income Tax Acts, 1924-1928:

The following incomes, revenues and funds shall be exempt from income tax:—

(8) Income *derived as dividends* from any company which has paid in Queensland income tax on the profits of the company from which such dividends are paid;......................................

(9) Income *arising or accruing* from......bonds......issued by the Government of Queensland or of the Commonwealth of Australia.

A testator, by his will, directed trustees to invest £25,000 of his estate, or set apart investments of the value of £25,000, to provide an income of £1,200 for his wife during her life, and subject thereto devised his real estate and bequeathed his personal estate to trustees on trust for his children. The trustees set aside 25,000 shares in a company, some of which were sold and the proceeds invested in Commonwealth Government bonds, not chargeable with income tax. The company had paid income tax on its profits. The trustees paid the income from the shares and the bonds to the widow.

Held, that although the widow's title to such income sprang from the dispositions of the will, the income was not liable to taxation, being (i) income "derived as dividends" from the company and (ii) income "arising or accruing" from bonds issued by the Government of the Commonwealth of Australia.

Held, further: (i) The words "*derived*" as dividends" are *directed to the nature of the original source of the income rather than to whether the ultimate recipient is the shareholder himself, or a person otherwise entitled to the benefit of the dividend.*

(ii) The *exemptions* allowed by s. 52B of The Commonwealth Inscribed Stock Act 1911-1918, and s. 8, subsecs. 8 and 9, of The Income Tax Acts, 1924-1928, *are not,* in the case of a trustee-investor, *confined to the trustee, but may be claimed also by the beneficiary.*

(iii) The widow has a right to be paid the annuity out of the income from investments set aside or made for the purpose of providing for that annuity, and is not in the position of a mere annuitant.

1945

GRACE GILHOOLY v. MINISTER OF NATIONAL REVENUE

Cameron J.

For the Commissioner the following contentions were raised (p. 281):

The income that is being taxed is an annuity paid to appellant out of the estate of the deceased. The income is, therefore, taxable under the definition of "income from the produce of property" and s. 11, subsec. 3. The will merely directs the payment of an annuity and the appropriation of investments to secure it; it gives the appellant no specific right to the income, or to any part of the income of such investments, or to the investments themselves. Under these circumstances, the exemption clauses, s. 8, subsecs. 8 and 9, do not apply. Section 8, subsec. 8, only exempts "income derived as dividends." The trustees, the holders of the shares, derive the income as dividends, but the appellant derives it as income of the estate; the words "derived as dividends" connote that the recipient is the registered shareholder: "derived" means directly received by the taxpayer.

On similar reasoning, it was contended that the language of s. 8, subsec. 9, "income arising or accruing from. . . .bonds," connotes that the person entitled to the exemption is the legal owner, the holder of the bonds. In the hands of the appellant, the income does not arise or accrue from the bonds, but from the gift to her of the annuity made by the will.

Henchman J. after referring with approval to (1903) 29 V.L.R. 525, which I have mentioned above, said at page 284:

It follows from the above reasoning that the Victorian Court treated s 9, subsec. 2, as including the case where the taxpayer was not himself the shareholder, but the trustee received the dividends and handed on to the taxpayer, as beneficiary, his share of them. *Looking at the real substance of the facts, it treated the beneficiary's income as derived, in his hands, from the dividends, and not from the trust estate. The words "dividends from any company" were thus not limited to dividends paid to and still in the hands of the taxpayer.*

In my opinion, the above reasoning is sound, having regard particularly to the fact that in the interpretation of an Income Tax Act the Court looks to the true substance of a transaction, and not to its form, and *treats the ascertainment of the actual source of a given income as a hard practical matter of fact.*

Is there, then, anything in the words in s. 8, subsec. 8, of our Act, "income derived as dividends from any company," to compel me to set aside this reasoning and its result? Do the words "derived as dividends from any company" necessarily connote the meaning "received by the taxpayer from the company as dividends"?

I do not think so. If that were the meaning, and if it had been intended to bring about a result different from that reached by the Victorian Court, it would have been easy to say "income received (or received by the taxpayer) as dividends from any company. . . . ." But the words are "derived as dividends," and *these words appear to me to be directed to the nature of the original source of the income, rather than to whether the ultimate recipient is the shareholder himself or a person otherwise entitled to the benefit of the dividend.* Here, it seems to me, the income received by Mrs. A. from the trustees was income "derived as dividends from the company," none the less because the

1945
GRACE GILHOOLY v. MINISTER OF NATIONAL REVENUE
Cameron J.

trustees directly received it and could alone discharge the company. I am not called upon now to decide what would be the position in the case of a mere annuitant, or other person merely entitled to receive part of the income of any estate—although the Victorian Court's reasoning would seem to cover every such case. But here Mrs. A. is entitled to receive her £1,200 out of these very dividends, so long as the shares are, in fact, appropriated to answer her annuity. *Her income is thus, in fact, derived as dividends from the company, though her title to them springs from the dispositions of the will.*

The principles involved in the instant case were considered by the Appellate Division of the Supreme Court of South Africa in 1938, in the case of *Armstrong* v. *Commissioner of Inland Revenue,* reported in South African Tax Cases (1), Volume 10, p. 1. The Court, after referring with approval to *Syme* v. *Commissioner of Taxes,* above mentioned, unanimously allowed the appeal from the Natal Provincial Division, which had held that the exemption applied only in the case of a taxpayer who actually received the dividends from the company and as the appellant received them from the trustee who received them from the administrator, who in turn received them from the company, and was the only person who could enforce payment from the company, the exemption provided by the statute did not apply to her.

The Appellate Court—

Held, allowing the appeal, that the *intervention of a representative taxpayer* to receive the dividends from the company for the benefit of the ultimate beneficiary *did not deprive the latter of the exemption provided* by section 10 (1) (*k*) of the Income Tax Act, No. 40 of 1925, the intention of which was to relieve from twofold taxation income derived from a certain source, *irrespective of the personal capacity of the ultimate recipient.*

Held, further, that the *difficulties in applying the exemption* in such a case as that of the Appellant, where only a portion of the exempted amount was allocable to a certain taxpayer, *were of administration only and not of* law and could be overcome by bookkeeping and arithmetical calculation.

The entire judgment is important and deals with most of the arguments presented to me, but I shall quote only portions of it: Page 5—

It cannot matter whether the original owner of that revenue, the testator, created that trust or whether it was created by the appellant or by her daughters or by a cessionary from any of them. The simple and essential position is the same as if the owner of shares puts them into the name of a trustee to pay a portion of the dividends to the appellant. *The crux of the question lies in the simple fact of the intervention of*

(1) (1938) 10 South African Tax Cases 1.

a trustee between the companies and the appellant. It was this intervention which the Provincial Division considered fatal to the claim for exemption under sec. 10 (1) (*k*). Shortly stated, the reasoning of both learned Judges was that the exempting subsection required for the invocation of its benefit by the appellant a vinculum juris between her and the companies producing the revenue, ...that unless the appellant could sue the companies for payment of the dividends she could not be said to receive such dividends from the companies. . . .

Page 6—

Take the case of minors on whose behalf a trustee is put on the register of shareholders; since companies do not recognize the representative character of a registered shareholder, the company could not be sued and on the line of reasoning adopted minors would be taxed. . . . . It will be noticed that the words of the subsection allowing the exemption are: "*dividends . . . . . .received or accrued from any company* chargeable with the normal tax" and that Hathorn, J., in his reasons has read them as implying the words "by the taxpayer" after the words "received". . . . . .*The emphasis is not upon the receipt but upon the derivation of the income. And the clear intention of the Act can only be effectively and generally carried out by exempting the person ultimately receiving such monies.* In the simple case I am now examining, namely, that of a trio comprising a company, the intervening trustee, and the beneficiary, it is manifest that in the truest sense the beneficiary derives his income from the company, for that income fluctuates with the fortunes of the company and the *trustee can neither increase nor diminish it, he is a mere 'conduit pipe.'*" This leads on to the firm conclusion that the *true test of exemption* of the person beneficially entitled to the income *is not the right to sue the company but the derivation of that income. . . . . .I am supposing the beneficiary would be entitled to the exemption on all moneys coming to him through a trustee but obtained by the latter from companies.*

Page 7—

We have next to deal with the actual facts of the case and with the points raised by respondent's counsel (1) that the trustees had to deal with a fund composed partly of income from companies and partly from other sources, (2) that the trustees did not receive dividends but merely a balance, (3) that the trustees divide the fund among a plurality of beneficiaries and have not to pass any particular item to any particular beneficiary and (4) that the appellant receives a fixed amount, not a proportionate amount. These objections to the exemption were used "cumulatively" by counsel, but as I have already said the problem cannot be resolved in that way, either these objections are separately sound or they have no bearing on the question. . . . . .

The total income received by the trustee is composed partly of what, for convenience, I will call "free" money and partly of income liable to tax, *the one amount does not contaminate the other, and the beneficiaries are entitled to receive their calculated proportions of the two.* This, as the learned Lord pointed out, is *merely a matter of bookkeeping and arithmetical calculation. . . .*

The difficulty suggested is that it is impossible to say from which of the several types of incomes these deductions should be made. . . . .There is, in my judgment, no difficulty in apportioning these expenses, etc.;

1945
GRACE GILHOOLY v. MINISTER OF NATIONAL REVENUE
Cameron J.

. . . . . .It would indeed be an absurd result if in the case of a fund composed of £5,000 dividends and £50 from other sources the deduction of the trustee's remuneration were to render the whole £5,000 liable to tax.

Page 9—

It will be seen that all the *difficulties suggested by the respondent's counsel, with the exception of that created by the intervention of a trustee, are practical and not legal and can, as I have pointed out be overcome by proper bookkeeping and artithmetical calculations.*

The cases which I have referred to above, almost without exception, are from other jurisdictions and arose in the interpretation of different taxing statutes. But in my view they have to do with the fundamental issues of this case and throw a good deal of light on the problems and principles involved. The emphasis in Section 5 (1) (*a*) of the Income War Tax Act is on the derivation of the income—not on the recipient—and I have no difficulty in reaching the conclusion that a shareholder in a mining company does derive his income from mining and is clearly entitled to the deduction established from time to time by the Minister. There is nothing in the Act to indicate otherwise and the words of the section permit that interpretation and the Department has long followed it.

Nor do I think that the mere intervention of a trustee or executor (whose duty is merely to collect mining dividends and turn over that income in the proportions and to the persons mentioned in the testator's will, as in this case) results in the ultimate beneficiary being deprived of the right of deduction for depletion.

I adopt the reasoning in the cases above referred to. In the last two cases which I have mentioned, practically the same arguments were presented on behalf of the taxing authority as were made in this case, and they were held to be invalid. The income is clearly that of the beneficiary and not that of the trustee and the beneficiary derives it from mining. This Appellant has the right to receive from the trustees her proportion of the income from the mining shares set apart to produce income for her and the other life tenants.

(I refrain from making any finding as to whether the result would be the same were the appellant entitled to

receive a fixed sum by way of an annuity, although some of the cases cited seem to be to that effect; but that matter was not before me and I shall not deal with it.)

The indentity and origin of the mining dividends received by the trustees are not lost or merged in the general income; books are kept and the amounts so received accurately recorded. Nor do I think that the mere fact that the work of the Department would be increased by such an interpretation (due to the necessity of going into the trustees' accounts) is a sufficient reason for denying the statutory deduction. The work would probably be more difficult but that is not a valid reason for denying the statutory right. It is a matter of mathematical calculation.

To decide otherwise than I have done would, in my view, create discrimination. It is clear that the amount to be allowed as depletion for exhaustion of a mine should depend on the rate of exhaustion. The percentage of depletion allowed, as pointed out above, is given in two ways—to the mining company and to those receiving dividends. It is the sum of these two that makes up the allowance and that allowance, in fairness, should not vary with the quality of the one receiving the dividends—i.e. whether he is a registered shareholder or whether he receives it through an intermediary trustee. My point will be made clear by considering the simple case of a testator who is the owner of large holdings in a mining company. To his wife he may by his will give one-half of his shares outright; and to a daughter the trustee is directed to pay the income only from the remaining one-half, with a gift over of the corpus to her children on her death. In this case, under the present practice, the widow would be entitled to the deduction for depletion and the daughter would not be so entitled. Under these circumstances the full fair and reasonable allowance, as determined by the Minister for the exhaustion of that mine, would not be made so long as the life interest was outstanding. Other illustrations where discrimination would result may readily be found, such as the case of two very similar mines operating at the same rate, where the shares in one were owned outright and in the

1945
GRACE GILHOOLY v. MINISTER OF NATIONAL REVENUE
Cameron J.

other were held by trustees and income paid to life tenants. It is clear that in such a case the allowance for exhaustion should be the same.

Counsel for the Appellant called no witnesses at the trial but read the evidence of the Deputy Minister taken on Examination for Discovery. He also filed, as Exhibit 1, a document entitled "brief" composed of a copy of a probate of the will of John McMartin, instructions and rulings from the Income Tax Department to its Inspectors, extracts from a budget speech in Parliament and from Hansard and copies of T-3 Income Tax forms. Objection to the admissibility of these documents (except as to the copy of the probate of the will of John McMartin) was made by Counsel for the Respondent on the ground that they had not been proven and that they were irrelevant. Some correspondence had taken place prior to the trial suggesting that these documents be admitted without formal proof. In the absence of any clear proof that the parties had agreed that they be accepted at the hearing without proof, I must find that they cannot be considered as evidence. In my consideration of the evidence therefore I have confined myself to the documents accompanying the certificate dated January 18, 1945, the Examination for Discovery of the Deputy Minister and the will of the deceased.

Some reference should be made to the practice in the Department as to the allowance still made to shareholders in a mining company and until 1938 made also to life tenants, as previously pointed out. It was contended for the Respondent that such allowances were extralegal and that, in any event, no weight should be attached to the practice. Reference was made to the case of *Gleaner Company Limited* v. *Assessment Committee* (1). This was an appeal from the Supreme Court of Jamaica and the judgment merely determined that no weight should be attached to the practice of the taxation authorities in England. In any event that case seems to have always been regarded with some doubt in England. See *Absalom* v. *Talbot* (2), House of Lords, particularly in the judgments of Lord Simon, L.J. at 645, and Lord Porter at 652, the latter referring to Halsbury, Hailsham edition, volume 17, p. 162, note (t). In this case it was found that the practice had statutory

(1) (1922) A.C. 169. (2) (1944) 1 All E.R. 642.

authority and was not conceded only by the benevolent practice of the department.

Reference was also made to an older case—*Trustees of the Clyde Navigation* v. *Laird and Sons* (1). In that case referring to a departmental practice extending over eighteen years, Lord Blackburn said: "I think that raises a strong prima facie ground for thinking there must exist some legal ground on which they could rest", and later he pointed out that enjoyment for any period short of what would give rise to prescription, if founded on a mistaken construction of a statute, could not bind the Court so as to prevent it from giving the true construction.

After giving careful consideration to all the cases referred to by counsel, I have reached the conclusion that when the words of an act clearly permit the interpretation placed on them by a government department and that practice has long continued (in this case it continued from the time the act first came into effect in 1917 until 1938) a Court should hesitate to adopt a construction of the statute which would lead to the destruction of a method long followed. See *Steamship Glensloy Company, Limited* v. *Lethem*—Surveyor of Taxes (2).

In the case now before me the words of the section clearly permit of the practice followed from 1917 to 1938. The Minister in charge of the Department must be assumed to have known of the interpretation placed thereon by his officials. In fact, as shown by the evidence of the Deputy Minister, public notice of changes in rates was given by the Minister in 1935 by introducing a resolution in the House of Commons and these changes affected both the mining company and those receiving dividends therefrom.

For the reasons which I have set forth above, I am of the opinion that the Appellant must succeed. There will, therefore, be judgment allowing the appeal and declaring that the Appellant is entitled for the years 1937 to 1941 to deduct from her income the allowances in force for the respective years as provided for in Section 5 (1) (*a*) of the Income War Tax Act and as allowed by the Minister to registered shareholders of the mine mentioned. The Appellant is also entitled to be paid her costs after taxation.

Judgment accordingly.

(1) (1883) 8 A.C. 658.

(2) (1914 6 T.C. 453 at 462.