Privy Council Appeal No. 119 *of* 1925.

The Minister of Finance - - - - - - *Appellant*

v.

Cecil R. Smith - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 27TH JULY, 1926.

Present at the Hearing:

VISCOUNT HALDANE.
LORD ATKINSON.
LORD DARLING.
LORD JUSTICE WARRINGTON.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from a judgment of the Supreme Court of Canada which had reversed the judgment of the Exchequer Court. The decision of the Exchequer Court, which was that of Audette J., was in answer to a question arising on a special case stated by direction of the Court itself, on an appeal by the respondent under the provisions of the Income War Tax Act, 1917, of the Dominion, as amended by subsequent legislation. This question was raised upon the narrative that the respondent Smith had, during the year 1920, gained certain profits within the Province of Ontario by operations in illicit traffic in liquor contrary to the existing Provincial legislation in that respect. Upon these profits Smith had been assessed for Income Tax, pursuant to the Income War Tax Act, 1917, and the amendments thereto. The validity of the assessment, in so far as it included the said profits as a basis for computing the tax as assessed, was in dispute. The question for the opinion of the Court was "Are the profits arising within Ontario from the illicit traffic in liquor therein, contrary to the provisions of the said existing Provincial legislation in that respect

'income' as defined by s. 3, ss. 1, of the Income War Tax Act, 1917, and amendments thereto, and liable to have assessed, levied and paid thereon and in respect thereof the taxes provided for in the said Act." On this question the Exchequer Court decided that the profit arising from the illicit traffic within Ontario was income taxable under the Dominion statutes referred to, and dismissed an appeal brought to it by the respondent Smith.

The power of the Dominion Parliament to tax income is exercised under sub-head 3 of Section 91 of the British North America Act, 1867. This extends to the raising of money by any mode or system of taxation. The Dominion Parliament is in such a matter of taxation *quasi* sovereign, and it is not open to serious doubt that under Section 91, the Dominion Parliament could tax the profits in question if it thought fit to do so, or that the fact that they arose from operations of traffic in liquor made illicit by the Provincial legislation of a Province constitute no hindrance to such taxation, if the Dominion Parliament had clearly directed it to be imposed. The only real question is one of construction, whether words have been used which impose a tax in such a case.

Section 3 of the Income War Tax Act, 1917 defines income as including the annual net profit or gain or gratuity being profit from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any trade, manufacture or business as the case may be, whether derived from sources within Canada or elsewhere, and as including the indirect profits or dividends directly or indirectly received from money at interest upon any security or from stocks, or from any other investment, and whether such gains or profits are divided or distributed or not, and also the profit or gain from any other source. Section 4 imposes income tax upon the income so defined of any person carrying on business in Canada. The respondent was engaged during the year 1920 in illicit traffic in liquors in Ontario, contrary to the provisions of the Ontario Temperance Act and the 'amendments thereto, and the question is whether the Parliament of Canada has enacted that he is to be taxed on the profits from this.

In the Exchequer Court, Audette J. said that trading in liquor is not illicit or illegal at common law, and not *malum in se* but only *malum prohibitum*, and is not a criminal offence. It was, however, illicit and illegal by the laws of Ontario, and the present respondent could not invoke his own turpitude to claim immunity from paying taxes, and ask for discrimination in his favour, increasing the amount which might have to be levied on honest traders. It was not necessary to enquire, he added, into the source from which his revenue was derived, for the tax was by Section 4 of the Taxing Act imposed on the person. The illicit traffic in question was not a criminal offence in itself, and while illegal in Ontario, might not be so in other parts of Canada. The Provincial legislation could not derogate from the right of the

Dominion under its Taxing Act, and the profits in question came within the ambit of the definition of income in that Act.

The Supreme Court took a different view. The learned Judges of that Court thought that such a business as that of the present respondent ought to be strictly suppressed, and that it would be strange if under the general terms of the Dominion statute the Crown could levy a tax on the proceeds of a business which a Provincial legislature, in the exercise of its constitutional powers, had prohibited within the Province. They held that the power, given to the Dominion Minister, by Section 7, to call for a return of the taxpayer's income vouched by documents and in detail, and for records which he was to keep, could be construed only as relating to what was legal, and could not extend to gains from crimes. They therefore allowed the appeal. Idington J. added that the "Bootleggers," as the profiteers under the Ontario Temperance Act had been called, were well known before the Taxing Act became operative, and that it was to be expected that if it had been intended to apply that Act to them express or very clear language would have been used. The judgment of the Exchequer Court was accordingly reversed, and this appeal is the result.

Construing the Dominion Act literally, the profits in question, although by the law of the particular Province they are illicit, come within the words employed. Their Lordships can find no valid reason for holding that the words used by the Dominion Parliament were intended to exclude these people, particularly as to do so would be to increase the burden on those throughout Canada whose businesses were lawful. Moreover, it is natural that the intention was to tax on the same principle throughout the whole of Canada, rather than to make the incidence of taxation depend on the varying and divergent laws of the particular Provinces. Nor does it seem to their Lordships a natural construction of the Act to read it as permitting persons who come within its terms to defeat taxation by setting up their own wrong. There is nothing in the Act which points to any intention to curtail the statutory definition of income, and it does not appear appropriate under the circumstances to impart any assumed moral or ethical standard as controlling in a case such as this the literal interpretation of the language employed. There being power in the Dominion Parliament to levy the tax if they thought fit, their Lordships are therefore of opinion that it has levied income tax without reference to the question of Provincial wrongdoing.

There are certain expressions at the end of the judgment of Scrutton L.J., in *Inland Revenue Commissioners* v. *Von Glehn* (1920, 2 K.B. 553) as to the scope of the British Income Tax Acts. Their Lordships have no reason to differ from the conclusion reached in that case, but they must not be taken to assent to any suggestion sought to be based on the words used by the learned Lord Justice, that Income Tax Acts are necessarily

restricted in their application to lawful businesses only. So far as Parliaments with sovereign powers are concerned, they need not be so. The question is never more than one of the words used.

They will humbly advise His Majesty that this appeal should be allowed, the judgment of the Supreme Court set aside with costs and the judgment of the Exchequer Court restored.

The respondent will pay the costs of the appeal.

In the Privy Council.

THE MINISTER OF FINANCE

v.

CECIL R. SMITH.

DELIVERED BY VISCOUNT HALDANE.

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