

# In the Privy Council.

No. 41 of 1939.

---

## ON APPEAL FROM THE SUPREME COURT OF CANADA.

---

IN THE MATTER of The Income War Tax Act; and  
IN THE MATTER of the Appeal of The Peter Birtwistle Trust of the City  
of Toronto in the Province of Ontario.

BETWEEN

THE MINISTER OF NATIONAL REVENUE ... *Appellant,*

AND

THE TRUSTS AND GUARANTEE COMPANY LIMITED  
as Trustees of the Peter Birtwistle Trust ... .. *Respondent.*

---

### RESPONDENT'S CASE.

---

1. This is an appeal by the Minister of National Revenue from the judgment of the Supreme Court of Canada delivered on the 19th day of December, 1938, reversing the judgment of the Honourable Mr. Justice McLean, President of the Exchequer Court of Canada, dated the 4th day of January, 1938, and setting aside the assessments under the Income War Tax Act of certain income received and accumulated by The Trusts and Guarantee Company Limited (hereinafter referred to as the Canadian Trustee) under and subject to the terms of an Indenture dated May 27, 1918, made between Peter Birtwistle (hereinafter referred to as the Settlor), then resident in the City of London, in the Province of Ontario, and the Canadian Trustee. Record. p. 44. p. 17. p. 57.

2. By the said Indenture it was provided that the income of the fund therein referred to should, save as to certain disbursements therein provided for, be received and accumulated by the Canadian Trustee, and that "The Trustee shall pay the whole of the Investment Account, together with accumulations thereon, to the Municipal Council of the Town of Colne in Lancashire, England, at the end of the period of twenty-one years after the death of the Settlor, to be used by the said Council for the benefit p. 57, et seq. p. 59, l. 42.

Record. "of the aged and deserving poor of the said Town of Colne in such manner  
 "and without restriction of any kind, as shall be deemed prudent to the  
 "said Council, save and except and the Settlor hereby declares it to be his  
 "wish that the said Council should insofar as possible or convenient, leave  
 "any of the said fund which is not required for immediate distribution to  
 "be held by the Trustee hereunder and invested by the Trustee under an  
 "arrangement similar to that comprised in this Indenture, the Settlor  
 "believing that it will be advantageous for the Council to retain this Colonial  
 "investment which the Settlor considers likely to return a better rate of  
 "interest than can be readily obtained in England." 10

p. 68, l. 19. 3. The Settlor died on the 19th day of April, 1927, and the fund there-  
 fore will, under the terms of the said Indenture, become payable to the  
 English Trustee on the 19th day of April, 1948, at which time, with ac-  
 cumulations, it will amount to approximately \$1,000,000.00.

p. 64, et seq. 4. The Canadian Trustee has, pursuant to the said Indenture, received  
 and accumulated the income of the said fund, and has duly made returns  
 thereof, Form T-3, under the Income War Tax Act for each of the years  
 1919 to 1934 inclusive. No assessment was made in respect of the income  
 p. 70. for any of these years until the 21st day of February, 1936, when the assess-  
 ments of taxes, additional taxes, surtax and interest in question in this 20  
 appeal were made, in the aggregate amount of \$36,053.25, of which \$8,794.45  
 was for interest.

p. 64, et seq. 5. The returns and assessments were in substance (except as to amount)  
 p. 70. identical in respect of each of the said years.  
 The return and the notice of assessment for the year 1934 are set out  
 in the Record.

p. 13, 6. The amounts claimed for taxes (including additional tax and surtax)  
 ll. 22-40. and for interest are summarised in the statement of claim.

7. The said assessments were made under the provisions of The Income  
 War Tax Act now embodied in sub-section (2) of section 11, of Chapter 97 30  
 of the Revised Statutes of Canada, 1927, as amended by sections 7 and 8  
 of Chapter 55 of the Statutes of Canada, 1934. The said section as so  
 amended is as follows :—

#### INCOME FROM ESTATES AND TRUSTS.

11. 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.

(2) Income accumulating in trust for the benefit of unascertained  
 persons, or of persons with contingent interests shall be taxable in the 40  
 hands of the trustee or other like person acting in a fiduciary capacity,  
 as if such income were the income of a person other than a corporation,  
 provided that he shall not be entitled to the exemptions provided by

paragraphs (c), (d), (e) and (i) of subsection one of section five of this Act.

Record.

(3) In determining the taxable income of deceased persons, interest, rents, royalties, annuities and other income payable periodically shall be deemed to have accrued by equal daily increment during and within the period for or in respect of which such income arose and shall be apportionable in respect of the period of time accordingly and that portion accrued to the date of death shall be taxed as income of the deceased.

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

(5) Any amount paid by an estate or trust for the upkeep, maintenance and taxes of any property which, under the terms of the will or trust is required to be maintained for the use of any tenant for life, and which in any case is in excess of such an amount as the Minister may prescribe, shall be deemed to be taxable income received by such tenant for life.

8. Notice of appeal was served, and the other proceedings prescribed by the Act were taken in due time to complete the appeal for hearing by 20 the Exchequer Court of Canada. pp. 2 to 17.

9. The Respondent pleaded that the said income was accumulated for the trust as such, and was payable only to the English Trustee and was in any event not accumulated for the benefit of unascertained persons or persons having contingent interests within the meaning of sub-section (2) of section 11 of the Act; that the income in question was the income of a charitable institution and as such exempted from taxation. The Respondent further alternatively pleaded that if it were held that any part of the said income were held to be taxable, it was right and proper that interest should be allowed in respect of any such tax only from the date of the assessments, 30 namely, the 21st day of February, 1936. p. 14,  
ll. 14-20.  
p. 14,  
ll. 24-26.

10. The Appellant pleaded that the said income was not the income of a charitable institution, and was income accumulated for the benefit of unascertained persons or of persons having contingent interests within the meaning of the Act, and that there was no provision in the Act for the waiving of any interest. p. 15,  
l. 10, et seq.

11. The learned President of the Exchequer Court held that the said income was not income of a charitable institution, but was income of a charitable trust, was not exempted from taxation, and was income accumulated for the benefit of unascertained persons or persons having contingent interests within the meaning of the Act. He further held that he was not warranted in holding that the Respondent should escape payment of any of the interest charges in question. The appeal, therefore, was 40 dismissed without costs. p. 21, l. 17,  
et seq.  
p. 23, l. 13,  
et seq.  
p. 23, l. 20.

Record.  
p. 44, l. 10,  
et seq.

12. The Supreme Court of Canada (Sir Lyman Duff, C.J., and Davis, Crocket and Hudson, JJ., Kerwin, J. dissenting) reversed the decision of the Exchequer Court and set aside the assessments.

p. 45, l. 13.  
p. 48, l. 5,  
et seq.

13. Davis, J. (with whom the Chief Justice and Crocket, J., concurred) found that section 11 (2), which is a charging section, contemplated income that would vest and ultimately pass to persons for the time being unascertainable, such, for instance, as unborn issue, or to persons whose rights are for the time being merely contingent interests; that the trust fund with which they were dealing was not intended to pass, either capital or income, to any particular person or persons; that the fund was created for a purpose, not 10 for any particular person or persons; that the purpose was that the fund should be used "for the benefit of the aged and deserving poor of the Town of Colne"; that it was an arrangement or undertaking established by the Settlor for promoting a defined public or social object without reference to the property appropriated for the purpose becoming vested at any time in any particular person or persons; that aged and deserving poor could not be regarded otherwise than as a class in the community; that to regard them otherwise would be to destroy the character of what was obviously a charitable trust; that no particular persons would ever acquire a right to demand and receive the beneficial interest in the income from the fund, or in any 20 part thereof.

p. 48, l. 31,  
et seq.

He distinguished the case of *Holden v. Minister of National Revenue* [1933] A.C. 526, and found that under the trust in question here the income was not being accumulated for persons presently unascertainable, or for persons with merely contingent interests within the meaning of section 11 (2); that it was being accumulated for a purpose, and the purpose was to make provision for the benefit of the aged and deserving poor of the Town of Colne; that it was not suggested that the accumulating income was taxable except under section 11 (2), and as that section did not apply, the income of the fund in the hands of the Canadian Trustee was never taxable under 30 the Statute.

He further found that it was not necessary in the view he took of the appeal to put a construction upon section 4 of the Income War Tax Act and the exemptions therein given to the income of any religious, charitable, agricultural and educational institution, board of trade and chamber of commerce, as to which it had been contended by the Appellant that the exemptions must be confined territorially to institutions within Canada.

p. 49, l. 5,  
et seq.

14. Hudson, J., found, after much hesitation, that income accumulated in the trust here was not for the benefit of unascertained persons within the meaning of section 11 (2); that the persons intended were persons who 40 might become entitled to specific portions of the fund, and not a general class who would ultimately get the benefit of the fund in the way of charitable assistance.

p. 49, l. 16.  
p. 50, l. 1.

15. Kerwin, J. (dissenting) found that there was but one trust with two successive trustees, and that the real beneficiaries of the trust were the

aged and deserving poor of Colne, and, as it had been determined in *Holden v. Minister of National Revenue* [1933] A.C. 526, that section 11 (2) was a true charging section, then the question whether such members are unascertained persons within the ambit of that provision should be answered in the affirmative; that until the period of distribution arrives the recipients of the Settlor's bounty were unascertainable. He also found that the Court had no power to disregard the plain provisions of the Act imposing upon the taxpayer a liability for interest.

Record.  
p. 50, l. 13.

p. 51, l. 35.

16. The Respondent submits that the appeal should be dismissed and the judgment of the Supreme Court of Canada affirmed for the following among other

### REASONS.

1. Because what the Settlor has created is a charitable trust.
2. Because a charitable trust is a public trust and the gift thereof is to "charity."
3. Because in a public trust the mode in which a gift to "charity" is to take effect is not of the substance of the gift and therefore the words in the settlement "for the benefit of the aged and deserving poor of the Town of Colne in such manner and without restriction of any kind as shall be deemed prudent to the said Council," simply define the mode in which the Settlor desired the "charity" to be administered.
4. Because in that the trust here is a charitable trust the gift does not at any time vest beneficially in any particular person or persons.
5. Because in that the trust here is a charitable trust regard cannot be had "to the aged and deserving poor" otherwise than as a class of the community; that to do so necessitates regarding them as a fluctuating body of individuals; that so to regard them destroys the legality of the trust as a charitable trust.
6. Because if regard may be had to the "aged and deserving poor of the Town of Colne," then since the application of the fund by the English Trustee is to be in such manner and without restriction of any kind as shall be deemed prudent to the English Trustee, neither the aged nor deserving poor of the Town of Colne in 1948 or any subsequent year, nor any individual who might be so described, can have any right, legal or equitable, to demand or receive the income here in question or any part thereof, or to give a valid receipt therefor; none of the said poor could receive as his or her "income" any of the income here in question, any such receipt would be merely

20

30

40

as a gratuitous payment, and therefore not income ; none of the said poor would be subject to taxation under the Act because the objects of the Settlor's charity must by the terms of the Indenture be resident in the Town of Colne in England.

7. Because the Settlor by the execution of the Indenture brought into being, instituted and constituted an undertaking or institution fully organised for carrying out the charitable intention, and the income of that charitable institution is, by the terms of the Act, exempt from taxation.
8. For the reasons given in the judgments of the majority in the 10 Supreme Court of Canada.

S. CASEY WOOD.

G. M. JARVIS.

---

---

# In the Privy Council.

No. 41 of 1939.

---

*On Appeal from the Supreme Court of Canada.*

---

IN THE MATTER of The Income War Tax Act ; and  
IN THE MATTER of the Appeal of The Peter Birtwistle Trust  
of the City of Toronto in the Province of Ontario.

BETWEEN

THE MINISTER OF NATIONAL  
REVENUE ... .. *Appellant,*

AND

THE TRUSTS AND GUARANTEE  
COMPANY LIMITED as Trustees of  
the Peter Birtwistle Trust ... .. *Respondent.*

---

RESPONDENT'S CASE.

---

BLAKE & REDDEN,  
17, Victoria Street,  
S.W.1.