

1964
June 2
June 18

BETWEEN:

MARVIN E. GOLDBLATTAPPELLANT;

AND

THE MINISTER OF NATIONAL }
REVENUE } RESPONDENT.

Revenue—Income Tax—Income Tax Act, R.S.C. 1952, c. 148, ss 16(1) and 23—Transfer of rights to income by taxpayer to company.

In 1959 the appellant made an arrangement between Luria Bros, Inc, a large US scrap metal dealer, and International Iron & Metal Co, Limited, a company owned by the Goldblatt family and in which the appellant was a small shareholder, which resulted in substantially improved business operations for International Iron & Metal Co., Limited The arrangement also led to the payment by Luria Bros Inc of a finder's fee or middleman's commission to Cosmopolitan Import & Export Limited, a wholly owned subsidiary of Cosmopolitan Scrap Metal Brokers (Bahamas) Limited, the shares in the latter company being listed as owned by persons in the accounting firm of Peat, Marwick, Mitchell & Company. Cosmopolitan Import & Export Limited had been incorporated in 1946 but had remained inactive until 1958, shortly before payment of the said commissions to it commenced Cosmopolitan Scrap Metal Brokers (Bahamas) Limited had invested certain of its monies in oil paintings which were stored in the appellant's home Cosmopolitan Import & Export Limited had no regular employees, except the appellant, who, although employed full time as General Manager of International Iron & Metal Co, Limited, alleged that he did the work resulting in the payment of the commissions in his free or leisure time during which he was working for Cosmopolitan Import & Export Limited and not for himself. Cosmopolitan Import & Export Limited had no office of its own other than the address of the office of the lawyers of the appellant.

The appellant alleged that the part of the commissions received and kept by Cosmopolitan Import & Export Limited was income of that Company and not income of himself

Held: That Cosmopolitan Import & Export Limited was activated in 1958 for the express purpose of receiving the commissions from Luria Bros Inc and it was not actively engaged in a business, except incidentally, which had nothing to do with the earning of the commissions

- 2 That the commissions paid to Cosmopolitan Import & Export Limited were income in the hands of the appellant under either s 16(1) or s 23 of the *Income Tax Act*
- 3. That the appeal dismissed.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Gibson at Toronto.

P. N. Thorsteinsson for appellant.

D. A. Keith, Q.C. and *F. J. Dubrule* for respondent.

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

GIBSON J. now (June 18, 1964) delivered the following judgment:

This is an appeal from assessments made by the respondent dated September 6, 1962 for the taxation years 1959, 1960 and 1961, wherein taxes in the sums of \$32,280.03, \$20,226.19 and \$31,145.12 were levied in respect of the income of the appellant. The question involved in this appeal is whether the income assessed by the respondent is that of the appellant or whether, as is contended by the appellant, the income at the material times belonged to a company known as "Cosmopolitan Import & Export Limited".

Cosmopolitan Import & Export Limited was incorporated in 1946 but remained an inactive company until 1958. Beginning in September, 1959 certain commissions from a United States company, known as Luria Bros., Inc., were paid to it.

Commencing October 1, 1959, according to a copy of a Declaration of Partnership filed in evidence, there was a partnership formed consisting of Cosmopolitan Import & Export Limited and LaSalle Scrap Metal Brokers Limited.

All of the shares in the latter company were owned beneficially by one Mort Levy.

Exhibit A-8 is the Declaration of Partnership between LaSalle Scrap Metal Brokers Limited and Cosmopolitan Import & Export Limited. It bears the date September 30, 1959 and is signed by two of the solicitors in the law office whom the appellant employed as his regular solicitors at all material times. There is no date on the face of this Declaration.

Exhibit A-7 is a copy of a partnership agreement between the same two companies which is dated September 1, 1961.

As of September 30, 1959, LaSalle Scrap Metal Brokers Limited was not incorporated. The appellant gave in evidence that as of this date the partnership was between himself and Mort Levy.

Evidence was given that International Iron & Metal Co., Limited was a company owned by the Goldblatt family and it was a scrap metal dealer and broker and its head office

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was at Hamilton, Ontario; and that the appellant was a small shareholder in that company.

It was also given in evidence that the United States company known as Luria Bros., Inc. with head office at Cleveland, Ohio (which company the appellant described as the largest scrap metal dealer in America) began to sell directly to the steel mills of Hamilton, Ontario at lower prices than International Iron & Metal Co., Limited could sell to them. This resulted, apparently, in a substantial decrease in profits for the latter, and in some years losses during the material period which was, namely, 1959 to 1960.

In the year 1959, by reason of an arrangement that the appellant made with Luria Bros., Inc., that company began to buy from International Iron & Metal Co., Limited and not to deal directly with the Hamilton steel mills. The result was that International Iron & Metal Co., Limited according to the evidence given, commenced to earn profits, and during the period 1960 to 1963 these profits increased each year.

Because of what was done, Luria Bros., Inc. paid a finder's fee, or a middleman's commission, to Cosmopolitan Import & Export Limited. This commission was shared by the partnership Cosmopolitan Import & Export Limited and LaSalle Scrap Metal Brokers Limited, according to the evidence.

The relevant part of the commissions paid by Luria Bros., Inc. was shown on the tax return of Cosmopolitan Import & Export Limited, and it is the allegation of the appellant that the part of the commissions received and kept by Cosmopolitan Import & Export Limited was income of that company and not income of himself.

All of the shares in Cosmopolitan Import & Export Limited, the appellant admitted on cross-examination, were owned not by himself, as he said in chief, but instead were owned by a company known as Cosmopolitan Scrap Metal Brokers (Bahamas) Limited.

The shares of this latter company were listed as being owned by persons in the accounting firm of Peat, Marwick, Mitchell & Company.

In effect, therefore, it was admitted that Cosmopolitan Import & Export Limited at the material times was a wholly-owned subsidiary of the Nassau company.

The appellant also admitted on cross-examination that this Nassau company had invested certain of its monies in

oil paintings which were stored in the appellant's house in Hamilton, Ontario.

The minute book of Cosmopolitan Import & Export Limited, commencing in 1958, does not disclose any reference to any transactions for the earning of commissions from Luria Bros., Inc., and the appellant on discovery, which was held just a short time before the trial, had stated that he did not know the purpose of activating this company; but, at trial, he stated that the sole purpose for doing so was for entering into the commission transactions with Luria Bros., Inc.

In the minute book of International Iron & Metal Co., Limited, which was the Goldblatt family company, there is a reference to a meeting on October 25, 1960, a copy of which minute is Exhibit A-5 in this trial, by which it was recorded that it was desirable to confirm the arrangement made in 1958 on behalf of International Iron & Metal Co., Limited with Luria Bros., Inc. concerning the payment or allocation of commissions.

At that time, namely, October 25, 1960, it should be noted, it was not possible to confirm an arrangement to pay any commissions to the partnership, Cosmopolitan Import & Export Limited and LaSalle Scrap Metal Brokers Limited, because at that time, according to the evidence, LaSalle Scrap Metal Brokers Limited was not incorporated.

The appellant stated that this minute was prepared at the suggestion of the auditors.

Cosmopolitan Import & Export Limited, during the material time, had no regular employees except, as alleged, the appellant. Part-time clerical assistance was obtained from the law office of the lawyers of the appellant and from the office of International Iron & Metal Co., Limited.

During the material time, also, it had no office of its own other than the address of the law office of the lawyers of the appellant.

The appellant was the general manager of the family company, International Iron & Metal Co., Limited, at all material times and worked full time for that company; he alleged, however, that in his free or leisure time he did the work which resulted in the commissions being received from Luria Bros., Inc., and that during these times he was not working for himself, but instead he was working for the company—Cosmopolitan Import & Export Limited.

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The appellant says that Mort Levy, beneficial owner of all the shares of LaSalle Scrap Metal Brokers Limited, had only a small part in completing the arrangements with Luria Bros., Inc.

The appellant admits that his lawyers had advised him concerning this matter which, in their view, was the best way to handle the commissions received from Luria Bros., Inc. It was on their advice that Cosmopolitan Import & Export Limited was activated (the language used in evidence in describing what took place with this company in the year 1958) after it had remained inactive, or dormant, since its incorporation in 1946.

On September 27, 1961, the Department of National Revenue wrote to the appellant a letter, a copy of which is Exhibit R-2, and on October 10, 1961, the appellant replied to this letter and a copy of this reply is filed as Exhibit R-3.

The relevant extracts from this latter letter are as follows:

I have your letter of September 27th and acknowledge it.

* * *

As to paragraph 2 of your letter I did have a discussion with you in my own office and I understand that you subsequently discussed our conversation with Mr. Paikin who is himself no party to any arrangements and whose firm is acting as Solicitors only and providing office facilities for Cosmopolitan Scrap Metal Brokers Limited and LaSalle Scrap Metal Brokers Limited. Of course Mr Paikin could only affirm the fact of your conversation with me. The facts are that Luria Bros. & Company Inc and International Iron & Metal Co Limited were enabled to enter into certain brokerage and commercial relationships which had not hitherto existed. These companies are very much in competition but do purchase and sell materials from and to each other mutually on certain transactions. These arrangements were primarily referable to the activities of myself and Morton Levy and when the opportunity arose, as a result of these arrangements, Cosmopolitan Scrap Metal Brokers Limited and LaSalle Scrap Metal Brokers Limited were expressly formed to receive the commissions which, both parties agreed, were to be payable as we might designate. The Corporations were formed further to carry on allied trading and Cosmopolitan Scrap Metal Brokers Limited has engaged in other commercial activities.

I am the beneficial owner of all of the issued shares of Cosmopolitan Scrap Metal Brokers (Bahamas) Limited.

I trust this reply gives you all the information you require.

On these facts, I am of opinion that Cosmopolitan Import & Export Limited was "activated" for the express purpose of receiving the commissions from Luria Bros., Inc. and that, during the material times, it was not actively engaged in a business, except incidentally, which had nothing to do with

the earning of the commissions, the subject matter of this appeal.

In my view, the case is indistinguishable from the principles enunciated in *Adams v. Minister of National Revenue*¹.

I am therefore of the opinion that the part of the commissions paid to Cosmopolitan Import & Export Limited, during the material times, by Luria Bros., Inc., was income in the hands of the appellant within the meaning of either section 16(1) or section 23 of the *Income Tax Act*.

I should also record that there was a conflict of evidence between what the appellant said in chief and what he said on cross-examination, and also in respect of certain questions he was asked on discovery and the answers given in response to the same questions at trial.

The appeal is dismissed with costs.

Judgment accordingly.

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