BETWEEN:

FRANK L. BURNET, EXECUTOR OF THE WILL OF JEAN BROWN, DECEASED ..... APPELLANT;

1957
Mar. 25
1958
Apr. 23

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Revenue—Succession Duty—The Dominion Succession Duty Act, 4-5 Geo. VI, c. 14, s. 2(m), 5(1), 5(2)—"Succession"—"All such property shall be valued as of the date of death"—Refund of taxes as result of departmental policy established subsequent to death not part of estate—Appeal allowed.

The appellant is the executor of the will of Jean Brown, deceased, who was the sole beneficiary and executrix of the will of her sister Sarah Brown who died in 1947. Succession duties payable in respect of Sarah Brown's estate were levied by the Department of National Revenue and were fully paid by Jean Brown in 1948. In 1950 the respondent as the result of a directive issued in 1947, five months after the death of Sarah Brown, and a substitution therefore issued in 1949, at the request of Jean Brown paid to her a certain sum of money being the amount of a downward revision of income and excess profit taxes payable by Sarah Brown in respect to the years 1945 and 1946 as determined by the respondent after changing the result of certain sales of her cattle in those years from income to capital receipts. Respondent then reassessed Sarah Brown's estate for succession duties by adding that sum of money to the dutiable value of her property thereby increasing the amount of the succession duty which said amount was paid. After Jean Brown's death the present appellant as executrix of her will filed a Notice of Dissatisfaction which was disallowed by the Minister and an appeal was then taken to this Court.

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Held: That the payment to Jean Brown was a payment to her in her own right and not in that of Sarah Brown.

2. That since at the time of Sarah Brown's death no ruling existed as that under which the money was repaid to Jean Brown, no valid claim to some future departmental policy could at the time of Sarah Brown's death form part of her estate and pass on from her to Jean Brown.

3. That Jean Brown exercised a personal right when claiming repayment of the money which, therefore, cannot be integrated with the remainder of her dead sister's possessions.

APPEAL under the *Dominion Succession Duty Act.*

The appeal was heard before the Honourable Mr. Justice Dumoulin at Calgary.

T. J. Duckworth for appellant.

R. S. Dinkel for respondent.

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

DUMOULIN J. now (April 23, 1958) delivered the following judgment:

This is an appeal on behalf of the late Jean Brown, executrix of the will of Sarah Brown, deceased, now represented by her executor, Frank L. Burnet, against an assessment of succession duties made and subsequently confirmed in 1950, by the Minister of National Revenue, on the estate of the above-mentioned Sarah Brown.

It is necessary to set out at some length the particular and I would say, quite exceptional circumstances surrounding the matter.

The agreed statement of facts, filed in Court, relates that Sarah Brown and her sister, Jean, each owned an undivided one-half interest in a ranch at Pekisko, Province of Alberta, which, naturally, they operated in partnership.

Sarah Brown died on March 31, 1947, instituting Jean sole beneficiary and executrix of her will.

On July 16, 1948, the respondent issued a statement of succession duties payable in respect of Sarah Brown's estate, and, on August 12, same year, the amount therein demanded was completely acquitted by Jean Brown, the executrix.

Here, respondent, in paras. 3 and 4, introduced, as an explanatory factor, information which, upon first reading, might seem irrelevant, it goes thus: on July 7, 1945, the Minister of National Revenue, in the estate of one Anton

Esphetter, "had ruled that crop, produce and livestock on hand at the date of death was, for income tax accounting purposes, a capital asset in the hands of the beneficiary."

Jean Brown "asked respondent to extend the so-called 'Esphetter Rule' to the Sarah Brown estate".

Resuming the proper sequence of events, we then see that "on the 4th day of September, 1947 [five months after Sarah Brown's demise] the respondent *under the hand of his deputy* [the italic is mine] issued and published Directive No. 78 by the provisions in which a rancher could apply to the respondent to have his cattle . . . on hand as at a certain date constitute capital for income tax accounting purposes, and on the sale of such animals termed 'a Basic Herd', the proceeds would be Income Tax and Excess Profit Tax free in the hands of the recipient. This Directive was replaced by Directive No. 230 dated November 17th, 1948, which, in turn, was replaced by Directive No. 263 dated March 23rd, 1949, [or two years later than Miss Brown's death] *all of which are under the same hand* and of substantially the same effect."

Prior to the issuance of Directive No. 78, it is conceded, no departmental ruling in reference to "Basic Herd" had ever obtained. Since the latest departure of March 23, 1949, apparently contained more alluring terms, Jean Brown waived her previous request under the "Esphetter rule", and applied for the benefits of the "Basic Herd", on December 2, 1949, "as at the 1st of January, 1945". In 1950, respondent granted this demand; para. 8 of the joint statement explicitly admits that:

> 8. Following which acceptance and approval the Respondent paid to Jean Brown the sum of $8,234.08, *which was the amount of the downward revision of the Income and Excess Profits Taxes payable by Sarah Brown in respect to the years 1945 and 1946* as determined by the Respondent after changing the result of certain sales of her cattle in those years from income to capital receipts.

Having seen the inception of this litigation, let us next look at its sequel. Respondent, through its Succession Duty Branch, then proceeded to reassess Sarah Brown's estate, proportionately with the addition of $8,234.08 to the dutiable net value of the property, thereby increasing the succession dues by an amount of $3,459.91, "which sum was paid by the Appellant" according to the concluding words of para. 9. And there the matter stood at the time

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of Miss Jean Brown's death, on May 3, 1953. The present appellant, in virtue of s. 38 of the *Dominion Succession Duty Act* (S. of C. 1940-41, c. 14), in his capacity of Testamentary Executor, filed a Notice of Dissatisfaction which the Minister disallowed, persisting in his former assessment.

The point at issue, quite a subtle one, is: did this repayment to Jean Brown, by the Department of National Revenue, Taxation Division, in 1950, automatically merge itself into a successional increment to which she became entitled as Sarah's legatee, or, inversely, did Directive No. 263 (Basic Herd ruling), of March 23, 1949, endow Jean Brown with a personal, individualized right, completely sundered from all hereditary transmission? More concisely: was Jean Brown refunded those eight thousand two hundred odd dollars in her own or in her sister's right? The alternative result pointing at either a personal and succession duty free asset or to some devolved and therefore taxable benefit.

I carefully noted the arguments respectively submitted by counsel. Of these, two are of special significance, presenting a clear-cut statement of the contending interpretations.

The appellant stresses that "at the time of Sarah Brown's demise, March 31, 1947, no ruling existed such as the Basic Herd Directive No. 263, dated March 23, 1949". Consequently, no vested claim to some future departmental policy could, at the time of Sarah Brown's demise, form part of her estate and pass on from her to Jean.

On behalf of respondent, it is urged that Sarah Brown's estate, or more exactly, its devolution on Jean, carried with it a latent ability to all benefits eventually resulting from the Basic Herd provisions of September 4, 1947, and March 23, 1949, since Miss J. Brown became the legal successor *of a testatrix who, had she lived, could have availed herself of this fiscal abatement.* Should this assumption prove admissible, adds respondent, then the surviving sister obtained, in 1950, a refund of $8,234.08 as sole beneficiary of her late relative, such repayment evidencing an altered basis of taxation from income and excess profits, of a revenue and operational character, *to a decidedly capital asset, liable to consequential succession duties, as of the date of Sarah's death, though paid back only in 1950.*

To begin let us dispose of the "Anton Esphetter ruling", issued in 1945. The testatrix never resorted to it; therefore, I can detect no connecting link between this and the subsequent "Basic Herd" directive. True, the universal legatee filed under the former rule but was completely released therefrom and extended the privileges of a new provision, concerning which it is agreed that: (Statement of Facts)

6. Prior to the issuance and publication of said Directive No. 78 no similar statutory provision, Directive or Departmental ruling in reference to a "basic herd" had been issued or published or acted upon by the Respondent.

Effective continuity between these consecutive measures, in view of known facts, seems hardly tenable.

The bare statement that Sarah Brown, surviving until the issuance of Directive No. 263, would have ready access to its benefits, is of little assistance in the case, since the dire truth paints another picture. Admittedly, Miss Jean Brown obtained, in 1950, a proportionate refund of income taxes paid by the testatrix some years past. However, the guiding criterion is concerned with the cause more than with its result. In other words, what was the nature of the enabling disposition and in whom did it originate? Obviously none other than Directive No. 263 of March 23, 1949, that authorized Jean Brown to file, in her own right and name, a request dated December 2, 1949.

The *Dominion Succession Duty Act* (4-5 Geo. VI, 1940-41, c. 14 and amendments), in my comprehension, contemplates transmissibility of possessions and rights at the time of a testator's death. How could it be otherwise; since acquisition by a deceased person is a material impossibility, so are *post mortem* transmissions. Where nothing is gained, nothing passes on.

Supposing Sarah Brown who, we know, died March 31, 1947, had bequeathed so many bank shares to her universal legatee and that, two or three months later, subscription rights had been allotted to shareholders of record at closing time, May 1, 1947, what would the outcome be? Similar accretions possess a pecuniary value, yet would they be considered increments of the estate, or in the light of a personal benefit accruing to the heir in her own name and not through testamentary devolution?

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In the Act "Succession" is described thus:

> 2(*m*) "succession" means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof *upon the death of any deceased person* . . .

Section 5(1) specifies that:

> . . . for the purposes of this Act, *all such property shall be valued as of the date of death*, . . .

Rights of any description, being in the nature of intangible property, must, at the same period, assume some degree of identity to constitute a transmissible asset.

Lastly, and as an instance of merely remote analogy, I might quote a few lines of s-s. (2) of s. 5:

> . . . the duty payable by each successor shall not be subject to any increase or decrease by reason of appreciation or depreciation in the value of the property included in a succession *after the date of death* or by reason of maladministration or any other cause whatsoever.

Not without hesitation, I reached the conclusion that Jean Brown exercised a personal right when claiming the amount of $8,234.08, which, therefore, cannot be integrated with the remainder of her late sister's possessions.

The view I take excuses me from expressing an opinion concerning the legality of the several departmental policies that appellant forcibly attacked as transcending the powers and authority of a deputy minister, and derogatory to s. 6(1)(*b*) of the *Income War Tax Act* (1927, R.S.C., c. 97 and amendments).

In 1946, the learned President of this Court decided a point of law of some similarity in re: *Trapp v. Minister of National Revenue*[1]. Both parties in the instant case may find Mr. Justice Thorson's remarks, on p. 256 of the report, profitable reading.

For the reasons above, this appeal is allowed; the reassessment by respondent of Sarah Brown's estate, under Form S.D. 7 No. 89612, dated July 14, 1950, is vacated and annulled; the amount of $3,459.91, purporting to be succession duties paid by appellant, is to be reimbursed to the latter, and the case will be referred to the Minister for necessary action. Appellant is entitled to his taxable costs.

Judgment accordingly.

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[1] [1946] Ex. C.R. 245.