

BETWEEN:

FREDERICK BURTON, MALCOLM SWARTZ and MARTIN GOLD-SMITH, Executors of the Estate of Harry M. Schiller

APPELLANTS;

Toronto 1968 Apr 16-17

AND

THE MINISTER OF NATIONAL REVENUE

RESPONDENT.

Estate tax—Situs of company shares—Deceased domiciled in Ontario—Shares in Saskatchewan company—No branch register in Ontario—Requirements of Saskatchewan Companies Act—Estate Tax Act, S. of C. 1968, c. 29, s. 9(8)(d).

S, the owner of all the shares in a company incorporated in Saskatchewan, died in 1965 domiciled in Ontario where he kept the register of members. The company's articles of association did not authorize it to keep a branch register, and under the Saskatchewan Companies Act it was required to have a registered office in Saskatchewan and to keep there its register of members for entry of particulars of share transfers.

Held, in calculating the deduction authorized by s. 9 of the Estate Tax Act the shares could not be deemed to be situate in Ontario under subsec. (8)(d)(i) but must be deemed to be situate in Saskatchewan under subsec. (8)(d)(ii)(A).

1. Neither the company's registered office (which was a "place of transfer" within the meaning of s. 9(8)(d)) nor its register of members (which was a "register of transfers" within the meaning of s. 9(8)(d)) were "maintained" for the "transfer of shares" in Ontario as required

15 [1964] Ex C R. 505.

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by such enactment The company's registered office was in Regina, and in the absence of legal authority to keep the register of members elsewhere, the company's shares could not be effectually dealt with anywhere else. *Erie Beach Co. v. A-G Ont.* [1930] A.C. 161, applied.

2. The shares must be deemed to be situate in Saskatchewan (1) because by virtue of the Saskatchewan *Companies Act* the company maintained there its registered office which was a place of transfer under s 9(8)(d) of the *Estate Tax Act*, and alternatively (2) because Saskatchewan was the only province in which the shares could be effectually dealt with. *M.N.R. v. Leckie* [1967] S.C.R. 291, applied.

ESTATE TAX APPEAL.

Gordon W. Ford, Q.C. for appellants.

M. J. Bonner for respondent.

JACKETT P. (orally):—This is an appeal from the assessment under the *Estate Tax Act* of the estate of Harry M. Schiller, who died on May 23, 1965, resident and domiciled in Ontario. The only question involved in the appeal is whether the Minister erred in refusing to allow a deduction under section 9(1) of the *Estate Tax Act* in respect of the shares owned by the deceased at the time of his death in Schiller's Limited, a company incorporated under the *Companies Act* of Saskatchewan.

Section 9(1) of the *Estate Tax Act* provides *inter alia* for a deduction from the tax otherwise payable under that Act upon the aggregate taxable value of the property passing on the death of a person who was domiciled in a prescribed province at the time of his death, of one-half of the part of the tax otherwise payable that is applicable to property passing on the death that was situate in the prescribed province. The parties agree that the deceased in this case was domiciled in Ontario when he died and that Ontario is a prescribed province. The only question in dispute is whether the shares owned by the deceased in Schiller's Limited when he died were situated at that time in Ontario, in accordance with the rules provided by subsection (8) of section 9¹ of the statute for determining such a question for the purpose of section 9.

¹ (8) A reference in this section to the situs of any property passing on the death of a person shall be construed as a reference to the situs of that property at the time of the death of that person, and, for the purposes of this section except subsection (3), the situs of any property so passing, including any right or interest therein of any kind whatever,

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The first rule to be considered as relevant to our problem is, in effect, that “shares...of a corporation...shall be deemed to be situated...in the province where the deceased was domiciled at the time of his death if any register of transfers or place of transfer is maintained by the corporation in that province for the transfer thereof”. (Section 9(8)(d)(i))

The second rule to be considered, as relevant to our problem, is that, in a case of shares in a corporation to which the first rule does not apply, they shall be deemed to be situated “in the nearest province, relative to the province where the deceased was domiciled at the time of his death, that is not a prescribed province and in which any register of transfers or place of transfer is maintained by the corporation for the transfer thereof”. (Section 9(8)(d)(ii)(A))

The third rule, to be considered in the event that the problem is not solved by the application of the first two rules, is that that is contained in section 9(8)(e) of the *Estate Tax Act*.

As I have already indicated, Ontario is, so the parties agree, a “prescribed province” within the meaning of that

shall, where that property comes within any of the classes of property mentioned in paragraphs (a) to (e) of this subsection, be determined in accordance with the following rules:

* * *

(d) shares, stocks and debenture stocks of a corporation and rights to subscribe for or purchase shares or stocks of a corporation (including any such property held by a nominee, whether the beneficial ownership is evidenced by scrip certificates or otherwise) shall be deemed to be situated

(i) in the province where the deceased was domiciled at the time of his death, if any register of transfers or place of transfer is maintained by the corporation in that province for the transfer thereof, and

(ii) otherwise,

(A) in the nearest province, relative to the province where the deceased was domiciled at the time of his death, that is not a prescribed province and in which any register of transfers or place of transfer is maintained by the corporation for the transfer thereof,

(B) if no register of transfers or place of transfer is maintained by the corporation for the transfer thereof in any province that is not a prescribed province, in the nearest place outside Canada, relative to the place where the deceased was

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expression in section 9(8)(d). Similarly, the parties are in agreement that Saskatchewan, the other province that has to be considered as a possible situs of the shares of Schiller's Limited, is not such a "prescribed province".

The only question that has to be decided as between the parties in this case in connection with the application of the first two rules is whether, at the time of the death of the deceased, Schiller's Limited maintained, in Ontario or in Saskatchewan, "any register of transfers or place of transfer" for the transfer of its shares within the meaning of those words as used in section 9(8)(d) of the *Estate Tax Act*.

Schiller's Limited was at the time of the death of the deceased governed by the *Companies Act*, R.S.S. 1953, chapter 124, as amended by chapter 18 of the Statutes of 1956. Schiller's Limited was incorporated as a memorandum of association company (R.S.S. 1953, chapter 124, sections 5, 19 and 20). A company incorporated under the Saskatchewan Act must have a registered office in Saskatchewan (section 97), and must keep in that registered

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- ordinarily resident at the time of his death, in which any such register of transfers or place of transfer is so maintained,
- (C) if no register of transfers or place of transfer is maintained by the corporation for the transfer thereof in any province that is not a prescribed province or in any place outside Canada, then in the nearest province, relative to the province where the deceased was domiciled at the time of his death, that is a prescribed province but is not a designated province and in which any such register of transfers or place of transfer is so maintained, or
- (D) if no register of transfers or place of transfer is maintained by the corporation for the transfer thereof in any province that is not a prescribed province, in any place outside Canada, or in any province that is a prescribed province but is not a designated province, then in the nearest province, relative to the province where the deceased was domiciled at the time of his death, that is a designated province and in which any such register of transfers or place of transfer is so maintained;
- (e) property for which no specific provision is made in any other paragraph of this subsection, or the situs of which, determined as provided therein, cannot with reasonable certainty be identified, shall be deemed to be situated in the place where the deceased was domiciled at the time of his death;

and, for the purposes of subsection (3), the situs of any property so passing, including any right or interest therein of any kind whatever, shall, where that property comes within any of the classes of property mentioned in section 38, be determined as provided in that section.

office (section 76 as enacted by chapter 18 of 1956 read with section 78a as enacted by section 6 of chapter 18, and section 76 as it existed prior to 1956) a “register of its members” in which it must enter *inter alia* “particulars of the transfer of any member of his shares” (section 76). That register is evidence of the matters directed or authorized to be inserted therein (section 76). Either the transferee or transferor can require the company to enter in its register of members the name of a transferee (section 77) and may enforce its demand by applying to the Court of Queen’s Bench of Saskatchewan for rectification (section 78). Such a company may have a branch register of members outside Saskatchewan if so authorized by the regulations in its Articles of Association (section 83). A share in such a company is personal estate, transferable in manner provided by the articles of the company (section 11). A reference to the articles in this case shows that a transfer is effected by registering it on the register of members.

The registered office of Schiller’s Limited has been in Regina, Saskatchewan since it was incorporated in 1927. From the time of its incorporation, it had a “Shareholders’ Register” which, I am satisfied, is the register of members required by the statute. It has never had authority in its regulations for a branch register. The Shareholders’ Register was kept at the registered office at Regina until May 1953, when the deceased (who until his death in 1965 owned all the company’s shares, was president of the company, and exercised “full...control and management...” of the company) changed his own place of residence and domicile from Regina to Toronto and took the Shareholders’ Register with him. After the move, the deceased dealt with the Shareholders’ Register in Toronto as though it were in Regina where the law required that it be.

In so far as Schiller’s Limited is concerned, I am of the view that its Shareholders’ Register, which, as I have already indicated, is in my view the “register of members” that it was required by the *Companies Act* to keep, was a “register of transfers” within section 9(8)(d) of the *Estate Tax Act*, that its “registered office” was a “place of transfer” within that section, and that both the Shareholders’ Register and the registered office were “maintained” by the

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company *inter alia* "for the transfer" of shares in the company as required by the Saskatchewan law under which the company operates. I come to that conclusion by reason of the view that the "transfer" contemplated by section 9(8)(d) is one that is effective as between the holder of the shares and the company, and not one that is merely effective between transferor and transferee.²

Having reached that conclusion, I have to decide whether either the Shareholders' Register or the registered office was maintained by the company in the Province of Ontario for the transfer of its shares. Clearly, the registered office was not maintained in Ontario. With reference to the Shareholders' Register, there was no legal authority to keep it anywhere other than at the registered office in Regina. It seems clear from the decision in *Erie Beach Co. Ltd. v. Attorney-General for Ontario*³ that, whatever the deceased thought he was accomplishing by what he did with the register in Toronto, it did not operate, because it could not in law operate, to "effectually deal" with the company's shares. That being so, it cannot be said that the register was being "maintained" in Ontario as a register of transfers. I conclude, therefore, that the company was not maintaining a "register of transfers" in Ontario for the transfer of its shares. It follows that the appellant fails in its contention that the shares are deemed, by virtue of section 9(8)(d)(i), to have been situated in Ontario when the deceased died.

Turning to section 9(8)(d)(ii)(A), I have concluded that the company was, at the relevant time, maintaining its "registered office" in Regina and that it was a statutory function of that office to serve as a "place of transfer" for the transfer of the company's shares. The registered office is the place where a transferee or transferor was entitled to go under sections 77 and 97 and demand that a transfer be registered, and, if the company failed to comply, application could be made to the Court under section 78 to compel it to do so. The fact that the physical register of transfers

² See *Rex v. Williams*, [1942] A.C. 541 and *Royal Trust Company v. The King*, [1949] S.C.R. 329, as applied by Mr. Davis in *Leckie Estate v. Minister of National Revenue*, 65 DTC 744, whose judgment was approved by the Supreme Court of Canada in the same case [1967] S.C.R. 291 at page 294.

³ [1930] A.C. 161.

had wrongfully been removed from the registered office did not make that office any the less a "place of transfer". The company in fact maintained a registered office in Saskatchewan. As a matter of law, that office had the character of being a "place of transfer". It follows that my conclusion is that the shares in question were, by virtue of section 9(8)(d)(ii)(A), deemed to have been situated at the material time in Saskatchewan. I do not, therefore, have to consider the respondent's alternative argument that the Shareholders' Register was maintained by the company in Saskatchewan notwithstanding its physical situs in Toronto for over twelve years, or the question as to whether section 9(8)(e) of the *Estate Tax Act* can have any application to shares in a company notwithstanding that section 9(8)(d) seems to have been intended as a comprehensive set of rules re situs for shares.⁴

There is another somewhat simpler line of reasoning which leads me to the same conclusion as that that I have reached by considering the matter step by step. In *Leckie Estate v. Minister of National Revenue*⁵, the Tax Appeal Board had to consider a problem under section 9(8)(d) at a time when it was somewhat differently worded but when it was, as far as my use of the decision is concerned, in substance the same as the present section 9(8)(d). The facts that the Board had to consider were similar to those in the present appeal except that the controlling shareholder did not take the register of transfers away from the home province of the company. In that case Mr. Davis, who gave the decision of the Board, after examining the *Erie Beach* case *supra*, and other cases of that line of cases, concluded that Winnipeg, Manitoba was the only place where shares of the corporation in that case could be effectively dealt with and concluded from that that "the situs of the shares... must be found to have been in the Province of Manitoba... within the meaning of section 9 of the *Estate Tax Act*". Mr. Davis's reasons on this point were expressly adopted by the Supreme Court of Canada. See *Minister of National Revenue v. Leckie*⁶ per Cartwright J., as he then was, delivering the judgment of the Court, at

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⁴ This intention appears clearer when section 9(8)(d)(ii) is considered as it was prior to the 1962-3 amendment.

⁵ 65 DTC 744.

⁶ [1967] S.C.R. 291.

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page 294. It seems obvious to me that the basis of Mr. Davis's reasoning is that a company cannot be regarded as maintaining a register of transfers or a place of transfer any place where the shares cannot be effectively dealt with and must be regarded as maintaining such a register or place any place where the shares can be effectually dealt with.

Applying that reasoning to this case, reading the Saskatchewan *Companies Act* in the light of the *Erie Beach* case, it is clear that the only place where Schiller's Limited's shares could, at the relevant time, have been effectively dealt with, is some place in Saskatchewan. It therefore follows that the situs of its shares must be found to have been in that province within the meaning of section 9 of the *Excise Tax Act*.

The appeal is dismissed with costs.