

1969
*Mar. 10, 11
June 6

FREDERICK BURTON, MALCOLM
SWARTZ and MARTIN GOLD-
SMITH, executors of the Estate of
HARRY M. SCHILLER } APPELLANTS;

AND

THE MINISTER OF NATIONAL
REVENUE } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Estate tax—Provincial tax credit—Situs of shares—Deceased domiciled in Ontario, a prescribed province—Company incorporated in Saskatchewan, a non-prescribed province—Shareholders register brought to prescribed province—Estate Tax Act, 1958 (Can.), c. 29, ss. 9(1), 9(8)(d), (e)—The Companies Act, R.S.S. 1955, c. 124, ss. 76(1), 77, 78a.

The deceased died in 1965, resident and domiciled in Ontario. At that time, he owned all the shares of a company incorporated in Saskatchewan. In 1958, he moved from Saskatchewan to Ontario and took the company's shareholders register with him. Neither the *Companies Act* of Saskatchewan nor the articles of association of the company authorized the keeping of a register anywhere except in the province of Saskatchewan. The executors of the estate contended that the shares were to be treated as having a situs in Ontario and that the estate was therefore entitled to a provincial tax deduction under s. 9(1) of the *Estate Tax Act*, 1958 (Can.), c. 29. Alternatively, the executors contended that if their situs could not be identified with reasonable certainty, that the shares were deemed to be situated in Ontario in accordance with the provisions of s. 9(8)(e) of the Act. The Exchequer Court upheld the Minister's contention that the shares were situated in Saskatchewan and that the estate was not entitled to the deduction. The executors appealed to this Court.

Held: The appeal should be dismissed.

The situs of a company's shares is at the place where its share register is required by law to be kept and the physical presence of the register in another jurisdiction has no effect upon the matter. (*Erie Beach Co., Ltd. v. A.G. for Ontario*, [1930] A.C. 161). The word "maintained" as used in s. 9(8)(d)(i) of the *Estate Tax Act* must be construed as meaning "maintained" in accordance with the requirements of the statute under which the company was incorporated, and in the present case this must mean in the province of Saskatchewan.

Revenu—Impôt successoral—Crédit pour taxes provinciales—Situs des actions d'une compagnie—Défunt domicilié en Ontario, une province prescrite—Compagnie constituée en Saskatchewan, une province non prescrite—Registre des actionnaires apporté dans la province prescrite—

*PRESENT: Cartwright C.J. and Ritchie, Hall, Spence and Pigeon JJ.

Loi de l'impôt sur les biens transmis par décès, 1958 (Can.), c. 29, art. 9(1), 9(8)(d), (e)—The Companies Act, S.R.S. 1955, c. 124, art. 76(1), 77, 78a.

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Lors de son décès en 1965, le *de cuius* résidait et était domicilié en Ontario. A ce moment, il détenait toutes les actions d'une compagnie qui avait été constituée en Saskatchewan. En 1958, il a déménagé de Saskatchewan à l'Ontario et il a apporté avec lui le registre des actionnaires de la compagnie. Ni le *Companies Act* de Saskatchewan ni les conventions d'association de la compagnie n'autorisaient la tenue d'un registre ailleurs que dans la province de Saskatchewan. La succession prétend que les actions de la compagnie doivent être considérées comme ayant leur situs en Ontario et qu'elle avait en conséquence droit à un crédit pour taxes provinciales en vertu de l'art. 9(1) de la *Loi de l'impôt sur les biens transmis par décès, 1958 (Can.), c. 29*. Alternativement, la succession prétend que si leur situs ne peut pas être déterminé avec une certitude raisonnable, que les actions sont censées être situées en Ontario en vertu des dispositions de l'art. 9(8)(e) de la Loi. La Cour de l'Échiquier a maintenu la prétention du Ministre que les actions étaient situées en Saskatchewan et que la succession n'avait pas droit au crédit. La succession en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

Le situs des actions d'une compagnie est à l'endroit où la loi exige que le registre soit tenu et la présence physique du registre dans une autre juridiction n'a aucun effet sur la question (*Erie Beach Co., Ltd. c. A.G. for Ontario*, [1930] A.C. 161). Le mot «tenu» tel qu'employé dans l'art. 9(8)(d)(i) de la Loi doit être interprété comme signifiant «tenu» selon les exigences du statut en vertu duquel la compagnie a été constituée, et dans le cas présent ceci signifie dans la province de Saskatchewan.

APPEL d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada¹, en matière d'impôt successoral. Appel rejeté.

APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada¹, in an estate tax matter. Appeal dismissed.

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

F. J. Dubrule and M. J. Bonner, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought by the Executors of the Estate of Harry M. Schiller, from a judgment rendered by President Jackett of the Exchequer Court of

¹ [1968] 2 Ex. C.R. 347, [1968] C.T.C. 233, 68 D.T.C. 5164.

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Canada¹, whereby he confirmed the assessment made by the Minister of National Revenue under the *Estate Tax Act* in relation to the shares held by the late Mr. Schiller in Schiller's Limited, a company incorporated under *The Companies Act*, of Saskatchewan.

The following portions of *The Companies Act*, R.S.S. 1955, c. 124 as amended by c. 18 of the Statutes of Saskatchewan 1956, appear to me to be particularly relevant:

76. (1) Every company shall keep in one or more books a register of its members, and shall enter therein the names of the subscribers to the memorandum and the name of every other person who agrees to become a member of the company, together with the following particulars:

- (a) the full name, address and occupation of every such subscriber and person, and of every person to whom section 91 or 92 applies, and who requests the company to enter his name in a representative capacity;
- (b) the date at which each person was entered in the register as a member;
- (c) the date at which any person ceased to be a member;
- (d) the kind and class of the shares held by each member, their nominal amount or par value, if any, and the amount paid or agreed to be considered as paid on each share;
- (e) particulars of the transfer by any member of his shares;
- (f) in the case of a person to whom section 91 or 92 applies, a description of the capacity in which such person represents any share in the company so held by him, and the name of the estate or person so represented.

77. On the application of the transferor of any share in a company, the company shall enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee.

Section 78a

78a The register of members shall be kept at the registered office of the company; provided that the register may be kept at an office in the province of a trust company licensed under *The Companies Inspection and Licensing Act*, and so long as the register is so kept the trust company shall be subject to the provisions of this Act respecting the register in the same manner and to the same extent as if the register were kept at the registered office of the company, but the trust company shall under no circumstances be entitled to a lien on the register.

The Company in question was incorporated on May 26, 1927. By its Memorandum of Association it was provided that the registered office was to be situate at the City of Regina in the Province of Saskatchewan and no provision was ever made, either in the Company's Articles of Association or otherwise for any other registered office or branch registry.

¹ [1968] 2 Ex. C.R. 347, [1968] C.T.C. 233, 68 D.T.C. 5164.

From the time of its incorporation until the date of his death, the late Mr. Schiller owned or controlled all the issued common shares of the Company; he was its president and exercised the full degree of control and management consequent upon his ownership of the shares and his office as president. Until March, 1953, Mr. Schiller resided in the City of Regina where he was domiciled and where the business of the Company was conducted, but from that date until his death he became resident and domiciled in the City of Toronto to which City he removed the Minute Book, Share Register Book and Shareholders' Register of the Company, and where he conducted all its affairs, although the Company continued to file annual returns as required by *The Companies Act* of Saskatchewan wherein it reported the address of its "Registered Office" as being 1702 Hamilton Street in the City of Regina, which was a building owned by it.

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It is agreed between the parties that the Province of Ontario is a "prescribed Province" within the meaning of s. 9 of the *Estate Tax Act*, whereas Saskatchewan is not such a Province.

Under the provisions of s. 9(1) of the *Estate Tax Act* provision is made for the deduction from the tax otherwise payable upon the aggregate taxable value of property passing on the death of a person:

9.(1)(a) in the case of a person who was domiciled in a prescribed province at the time of his death,

(i) the part of the tax otherwise payable that is applicable to

(A) such of the property passing on the death of that person
as was situated in that or any other prescribed province,
and...

multiplied by

(ii) one-half;...

The italics are my own.

The fact that this deduction would be properly applicable to the late Mr. Schiller's shares in the company if they had a situs in the Province of Ontario and would have no application if they were to be treated as having a situs in Saskatchewan, gives rise to the objection here taken by the Schiller estate.

In the present case the Minister has determined that the shares in question are situate in Saskatchewan and that the estate of the deceased is therefore not entitled to the deduc-

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tion provided under s. 9(1); whereas the appellants contend that as all the Company's documents, including its Register of Shares, were physically situate in Ontario where the deceased was domiciled at the time of his death, they are to be treated as having a situs in that Province and that the estate is accordingly entitled to a deduction under s. 9(1)(a)(i)(A) or in the alternative that if their situs cannot be identified with reasonable certainty, that the shares are deemed to be situate in Ontario in accordance with the provisions of s. 9(8)(e) of the *Estate Tax Act*.

Section 9(8) of the *Estate Tax Act* provides statutory rules for determining the situs of shares passing on the death of a person, and the relevant portions of s. 9(8)(d) and (e) read as follows:

- (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,...
- (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;...

It is agreed between the parties that at the time of Mr. Schiller's death the Share Register of the Company was physically situate in Toronto where entries were made in it from time to time as appears therein, but neither *The Companies Act* of Saskatchewan nor the Articles of Association of the Company authorized it to keep a Register of Members or a branch Register of Members anywhere except in the Province of Saskatchewan, and the whole question raised by this appeal is whether, notwithstanding the provisions of the Saskatchewan *Companies Act* requiring the Register of Members of a company to be kept in that Province, the fact that such Register was kept in the

Province of Ontario at the time of Mr. Schiller's death, had the effect of giving the Company's shares a situs in the Province of Ontario within the meaning of s. 9(8)(d) of the *Estate Tax Act*. In my view this case is governed by the direct authority of the decision of the Privy Council in *Erie Beach Company, Limited v. The Attorney-General for Ontario*². In that case the question for determination was whether the shares of a company incorporated under the Ontario *Companies Act* were situate in the Province of Ontario or the State of New York for succession duty purposes. Under the Ontario *Companies Act* (R.S.O. 1914, c. 178) companies incorporated under that statute were required to keep a Register of Shares and Shareholders at the head office "within Ontario", but Mr. Bardol, who owned or controlled all the shares in the company, managed his business from his office in Buffalo, New York, where the books, records and documents of the company were kept, and such transfers as took place were made and recorded. In delivering the judgment on behalf of the Privy Council, Lord Merrivale said:

In *Attorney-General v. Higgins* 1914 A.C. 176, as in *Brassard v. Smith*, 1925 A.C. 371, duty upon shares was in question. In *Attorney-General v. Higgins, supra*, Baron Martin held that when transfer of shares in a company must be effected by a change in the register, the place where the register is required by law to be kept determines the locality of the shares. Lord Dunedin, in delivering the judgment of this Board in *Brassard v. Smith*, epitomized the crucial inquiry in a sentence—"Where could the shares be effectually dealt with?" The circumstances relied upon by the appellants which show the predilection of the members of the plaintiff company for transacting its business in Buffalo—so far as they might—have, in their Lordships' opinion, no material weight. The shares in question can be effectually dealt with in Ontario only. They are therefore property situate in Ontario and subject to succession duty there.

I take this to be authority for the proposition that the situs of a company's shares is at the place where its share register is required to be kept by law and that the physical presence of the share register in another jurisdiction has no effect upon the matter. I am accordingly of opinion that the words "...if any register of transfers or place of transfer is maintained by the corporation in that province..." as they are used in s. 9(8)(d)(i) of the *Estate Tax Act* must be construed as meaning "maintained" in accordance

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² [1930] A.C. 161, [1930] 1 W.W.R. 31, [1930] 1 D.L.R. 859.

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with the requirements of the statute under which the company in question was incorporated and that in the present case this must mean in the Province of Saskatchewan.

The learned President of the Exchequer Court has written careful reasons for judgment in which he has concluded that for the purpose of the *Estate Tax Act* the shares of Schiller's Limited are deemed to be situate in Saskatchewan at the date of Mr. Harry Schiller's death in accordance with the provisions of s. 9(8)(d). I am in agreement with this conclusion and would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: B. M. Singer, Toronto.

Solicitor for the respondent: D. S. Maxwell, Ottawa.
