THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

1966
*Mar. 2
Apr. 26

AND

HELEN RYRIE BICKLE, JUDITH RYRIE WILDER, WILLIAM PRICE WILDER and CHARTERED TRUST COMPANY, Executors of the Estate of EDWARD WILLIAM BICKLE RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Estate tax—Will—Charitable gift—Direction to pay duty out of charitable gift—Computation of deduction allowed by Act for gift—Estate Tax Act, 1958(Can.), c. 29, s. 7(1)(d).

By his will, the testator left the balance of his estate, after payment of debts, all estate taxes and succession duties and after setting aside fifty per cent of the remaining balance for the benefit of his family, to a charitable foundation within the meaning of s. 7(1)(*d*) of the *Estate Tax Act,* 1958 (Can.), c. 29. In computing the "aggregate taxable value" within the meaning of the Act, the Minister used a method known as "successive approximations" to compute the amount of deduction under s. 7(1)(*d*). The amount of the charitable gift could not be ascertained without first knowing the estate tax payable, and, in turn, the amount of the estate tax payable depended upon the amount of the charitable gift. The Exchequer Court ruled that the method used by the Minister was the wrong one. The Minister appealed to this Court. At the hearing, the executors made the submission for the first time that the charitable deduction was the full value of the charitable residue, on the basis that the last paragraph of s. 7(1)(*d*) did not apply to this particular will because under the will "no part of any estate, legacy, succession or inheritance duty...is... payable out of the property comprised in such gift," or payable by the charity "as a condition of the making of such gift".

Held (Spence J. dissenting in part): The appeal of the Minister should be allowed.

Per Abbott, Judson, Ritchie and Hall JJ.: The Minister's method of calculation was the correct one. The successive calculations of estate duty were required in this case because of the provisions of s. 7(1)(*d*), which allow as a deduction from aggregate net value of the estate only the actual value of the gift that ultimately finds its way to the charity. The will gave to the charity the residue of the estate charged with the burden of the payment of the duty. Under the Act, the Minister must value this interest, and the value of this interest for purposes of deduction from aggregate net value is to be reduced by the amount of the duties. The duties were payable out of the property comprised in the gift and were payable by the donee as a condition of the making of the gift.

Per Spence J., *dissenting in part*: If s. 7(1)(*d*) of the *Estate Tax Act* applies, the course adopted by the Minister was the correct one.

*PRESENT: Abbott, Judson, Ritchie, Hall and Spence JJ.

1966

MINISTER OF NATIONAL REVENUE v. BICKLE et al.

Under the will, the estate tax and succession duties were not directed to be payable out of the property comprised in the gift to the foundation, nor were they payable by the foundation as a condition of the making of the gift to it. What the charity was entitled to receive was the residue of the residue after performance of all trusts including the payment of taxes; it was only in the residue of the residue that the charity had any property interest. The executors were, therefore, entitled to the benefit of the exemption and were not caught by the "minus" provision at the end of s. 7(1)(*d*).

Revenu—Impôt successoral—Testament—Don de charité—Paiement des droits à même le don—Calcul de la déduction permise par la Loi lorsqu'il s'agit d'un tel don—Loi de l'Impôt sur les biens transmis par décès, 1958 (Can.), c. 29, s. 7(1)(d).

Par son testament, le testateur a légué à une organisation de charité, dans le sens de l'art. 7(1)(*d*) de la *Loi de l'Impôt sur les biens transmis par décès*, 1958 (Can.), c. 29, le reliquat de sa succession, après paiement des dettes, de tous les impôts successoraux et des droits de succession et après avoir mis de côté pour le bénéfice de sa famille 50 pour-cent de la balance. En calculant la «valeur globale imposable» dans le sens de la Loi, le Ministre s'est servi de la méthode par approximations successives pour calculer le montant de la déduction en vertu de l'art. 7(1)(*d*). Le montant du don de charité ne pouvait pas être établi sans savoir au préalable le montant de l'impôt successoral payable, et, alternativement, le montant de l'impôt successoral payable dépendait du montant du don de charité. La Cour de l'Échiquier a jugé que la méthode dont s'était servi le Ministre était la mauvaise. Le Ministre en a appelé devant cette Cour. Advenant l'audition, les exécuteurs de la succession ont soumis pour la première fois que la déduction de charité était la pleine valeur du reliquat de charité, pour le motif que le dernier paragraphe de l'art. 7(1)(*d*) ne s'appliquait pas au testament en question parce qu'en vertu du testament «aucune fraction des droits visant une masse des biens, un legs, une succession ou un héritage . . . est . . . payable sur les biens compris dans cette donation» ou payable par l'organisation charitable «comme condition de l'octroi d'une telle donation».

Arrêt: L'appel du Ministre doit être maintenu, le Juge Spence étant dissident en partie.

Les Juges Abbott, Judson, Ritchie et Hall: La méthode de calcul dont s'est servi le Ministre était la bonne. Les calculs successifs de l'impôt successoral étaient requis dans ce cas à cause des dispositions de l'art. 7(1)(*d*) qui permettent comme déduction de la valeur globale nette des biens transmis seulement la valeur actuelle du don qui en fin de compte tombe entre les mains de l'organisation charitable. Le testament a légué à l'organisation charitable le résidu de la masse lequel était chargé de payer les droits. En vertu de la Loi, le Ministre doit évaluer cet intérêt, et la valeur de cet intérêt pour les fins de déduction de la valeur globale nette doit être réduite par le montant des droits. Les droits étaient payables sur les biens compris dans le don et étaient payables par le donataire comme condition de l'octroi du don.

Le Juge Spence, *dissident en partie*: Si l'art. 7(1)(*d*) de la *Loi de l'Impôt sur les biens transmis par décès* s'applique, la conduite adoptée par le Ministre était la bonne.

En vertu du testament, l'impôt successoral et les droits de succession n'étaient ni payables sur les biens compris dans le don à l'organisation charitable, ni payables par l'organisation comme condition de l'octroi du don. Ce que l'organisation charitable avait droit de recevoir était le reliquat du reliquat après l'exécution de toutes les fiducies y compris le paiement des droits; l'organisation charitable n'avait d'intérêt que sur le reliquat du reliquat. En conséquence, les exécuteurs avaient droit au bénéfice de l'exemption et ne tombaient pas sous la disposition commençant par le mot «moins» à la fin de l'art. 7(1)(*d*).

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], rejetant la cotisation faite par le Ministre. Appel maintenu, le Juge Spence étant dissident en partie.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], setting aside an assessment made by the Minister. Appeal allowed, Spence J. dissenting in part.

Hon. R. L. Kellock, Q.C., and *G. W. Ainslie*, for the appellant.

John J. Robinette, Q.C., for the respondents.

The judgment of Abbott, Judson, Ritchie and Hall JJ. was delivered by

JUDSON J.:—The question in issue in this appeal is how the Minister must compute the deduction allowed by s. 7(1)(*d*) of the *Estate Tax Act* for charitable gifts when there is a direction to pay duty out of the charitable gift.

The *Estate Tax Act* imposes a tax upon the aggregate taxable value of all property passing on the death of every person domiciled in Canada at the time of his death. Section 7(1)(*d*) of the Act, which provides for the deduction of charitable gifts in computing aggregate taxable value, is in the following terms:

7. (1) For the purpose of computing the aggregate taxable value of the property passing on the death of a person, there may be deducted from the aggregate net value of that property computed in accordance with Division B such of the following amounts as are applicable:

* * *

(*d*) the value of any gift made by the deceased whether during his lifetime or by his will, where such gift can be established to have been absolute and indefeasible, to

(i) any organization in Canada that, at the time of the making of the gift and of the death of the deceased, was an organization constituted exclusively for charitable purposes, all or substantially all of the resources of which, if any, were

[1] [1965] 1 Ex. C.R. 664, [1964] C.T.C. 208, 64 D.T.C. 5134.

1966

MINISTER OF NATIONAL REVENUE v. BICKLE et al.

Judson J.

devoted to charitable activities carried on or to be carried on by it or to the making of gifts to other such organizations in Canada all or substantially all of the resources of which were so devoted, and no part of the resources of which was payable to or otherwise available for the benefit of any proprietor, member or shareholder thereof, or

(ii) Her Majesty in the right of Canada or a province, a Canadian municipality or a municipal or other public body in Canada performing a function of government,

minus such part of any estate, legacy, succession or inheritance duties or any combination of such duties (including any tax payable under this Part) as is, either by direction of or arrangement made or entered into by the deceased whether by his will or by contract or otherwise, or by any statute or law imposing such duties or relating to the administration of the estate of the deceased, payable out of the property comprised in such gift or payable by the donee as a condition of the making of such gift;

The difficulty of the problem is that the value of the charitable gift is, by definition, the value of the gift minus duty where there is a direction to pay duty out of the charitable gift. One cannot ascertain the amount of the charitable gift without first knowing the estate tax payable, and, in turn, the amount of the estate tax payable depends upon the amount of the charitable gift.

It is necessary to set out in outline the structure of the will. Everything is given to trustees and the only trusts with which we are concerned in the decision of this appeal are these:

1. "To pay out of the capital of the residue of my estate my just debts, funeral and testamentary expenses and all estate, legacy, succession and inheritance taxes or duties, whether imposed by or pursuant to the law of any domestic or foreign jurisdiction whatsoever, that may be payable by any beneficiary of this my Will or any Codicil hereto in connection with the property passing (or deemed to pass by any governing law) on my death . . ."
2. To set aside a sum equal to 50 per cent of the estate, such sum to be ascertained after the deduction of debts only, and debts are not to include succession duty and estate duty.

   (This trust was for the benefit of members of the family.)
3. To pay or transfer the residue of the estate to the E. W. Bickle Foundation.

The E. W. Bickle Foundation is admitted to be a charitable organization which qualifies under s. 7(1)(*d*). The parties agree:

(1) that the aggregate net value of the property passing on death was $5,242,455.21;

(2) that the value of the residue out of which the estate and succession duties were by the will directed to be paid was $2,261,847.64;

(3) that the amount payable for Ontario succession duty was $600,212.95.

The Minister contends that the estate tax payable is $1,132,922.35. The figure computed by the learned trial judge[1] was $1,004,994.75. The Minister arrived at his figure as a result of ten successive calculations. Under the scheme of this Act you cannot determine the value of the charitable gift until you have determined the amount of duty. It should be possible to state the Minister's proposition in such a way that an actuarial training is not needed to understand it. First of all, you have a charitable fund of determined amount which is not taxable but from which must be deducted the amount of estate duty. You first calculate the amount of the estate duty on the balance of the estate ignoring the charitable fund. This gives you the first figure that must be deducted from the charitable fund but it is not the final figure. This first calculation of duty must be transferred from the charitable fund to the taxable portion of the estate. This calculation was repeated ten times until the tenth calculation showed little or no difference from the ninth. This then was the amount of estate duty which had to be deducted from the value of the charitable gift. This is the figure that the Minister contended for and, in my opinion, the mode of calculation is correct and the one required by the Act. The evidence also indicates that the same result may be obtained by the application of an elaborate algebraic formula.

The learned trial judge held that the assessment was wrong because it applied succession duty principles in the computation. With respect, I do not think that this criticism is well-founded. Where a will makes a gift to a beneficiary together with the succession duty on this gift,

[1] [1965] 1 Ex. C.R. 664, [1964] C.T.C. 208, 64 D.T.C. 5134.

1966

MINISTER OF NATIONAL REVENUE v. BICKLE et al.

Judson J.

the beneficiary must pay succession duty not only on the gift but on the gift of duty. There is no analogy between this tax and estate tax, which is a single levy not on any succession but upon the value of the whole estate. The successive calculations of estate duty are required in this case because of the provisions of s. 7(1)(*d*), which allows as a deduction from aggregate net value of the estate only the actual value of the gift that ultimately finds its way to the charity.

The learned trial judge also found that only two calculations were required by s. 7(1)(*d*). First you calculate the tentative estate tax without reducing the exempt gift either by estate duty or succession duty. Then you calculate the estate tax once again after reducing the exempt gift by a combination of the estate tax first found and the admitted figure for succession duty. I think that there is no justification for stopping at the first stage, having regard to the provisions of s. 7(1)(*d*).

In this Court the submission was made for the first time that the charitable deduction was the full value of the charitable residue, namely, $2,261,847.64. The basis for this submission was that the clause in s. 7(1)(*d*) commencing with the word "minùs" does not apply to this particular will because "no part of any estate, legacy, succession or inheritance duty or any combination of such duties is . . . payable out of the property comprised in such gift", or payable by the charity "as a condition of the making of such gift".

I have already set out a summary of the trusts contained in the will and it is argued that what the charity is entitled to receive is the residue of the residue after performance of the trusts, including the payment of taxes, and that it is only in this residue of residue that the charity has any property interest. Therefore, these duties are not payable out of "the property comprised in such gift" or "payable by the donee as a condition of the making of such a gift".

I do not agree with these submissions. This will gives the charity the residue of the estate charged with the burden of the payment of the duty. It is not disputed that until the trusts under a will have been performed, a residuary beneficiary cannot put his hands on a specific piece of

property and claim ownership with all the consequences of ownership. This is all that the cases of *Sudelay v. Attorney-General*[1], and *Barnardo v. Commissioners for Special Purposes of the Income Tax Acts*[2] decide. In the first case foreign mortgages were comprised in a husband's estate. This estate was not fully administered when the wife, a residuary beneficiary, died. Her executors unsuccessfully contended that because she would have been ultimately entitled to an interest in these foreign mortgages, that interest was not an English asset of her estate and subject to probate duty. In *Barnardo,* income, on which tax had been deducted at the source, was received by executors before the estate had been administered and the residue ascertained. The charity as the residuary beneficiary claimed a refund of the tax. It was held that until the residue had been ascertained, the charity had no property in this specific investment from which this income had been derived and that the claim for a refund failed.

These cases, in my opinion, afford no help to anyone in the application of s. 7(1)(*d*). The value of the charitable gift is established at $2,261,847.64. Admittedly, this is a residuary interest and the charity cannot claim ownership *in specie* of any particular piece of property comprised in the estate, before the estate has been administered. What was given to the charity was the residuary interest. The Act says that the Minister must value this interest and that the value of this interest for purposes of deduction from aggregate net value will be reduced by the amount of the duties. I think that the duties are payable out of the property comprised in the gift and are payable by the donee as a condition of the making of the gift.

I would allow the appeal with costs both here and in the Exchequer Court and direct that the assessment made by the Minister be restored.

SPENCE J. (*dissenting in part*):—I have had the privilege of reading the reasons of my brother Judson and agree with his view that if s. 7(1)(*d*) of the *Estate Tax Act,* Statutes of Canada 1958, c. 29, as amended by Statutes of Canada 1960, c. 29, s. 4(1) applies then the course adopted by the Minister is correct and, with respect, that adopted by Gibson J. in the Exchequer Court[3] is in error.

[1] [1897] A.C. 11, 75 L.T. 398. [2] [1921] 2 A.C. 1, 125 L.T. 250.
[3] [1965] 1 Ex. C.R. 664, [1964] C.T.C. 208, 64 D.T.C. 5134

1966

MINISTER OF NATIONAL REVENUE v. BICKLE et al.

Spence J.

The *Estate Tax Act* provides:

7. (1) For the purpose of computing the aggregate taxable value of the property passing on the death of a person, there may be deducted from the aggregate net value of that property computed in accordance with Division B such of the following amounts as are applicable:

* * *

(*d*) the value of any gift made by the deceased whether during his lifetime or by his will, where such gift can be established to have been absolute and indefeasible, to

(i) any organization in Canada that, at the time of the making of the gift and of the death of the deceased, was an organization constituted exclusively for charitable purposes, all or substantially all of the resources of which, if any, were devoted to charitable activities carried on or to be carried on by it or to the making of gifts to other such organizations in Canada all or substantially all of the resources of which were so devoted, and no part of the resources of which was payable to or otherwise available for the benefit of any proprietor, member or shareholder thereof, or

(ii) Her Majesty in right of Canada or a province, a Canadian municipality or a municipal or other public body in Canada performing a function of government,

minus such part of any estate, legacy, succession or inheritance duties or any combination of such duties (including any tax payable under this Part) as is, either by direction of or arrangement made or entered into by the deceased whether by his will or by contract or otherwise, or by any statute or law imposing such duties or relating to the administration of the estate of the deceased, payable out of the property comprise in such gift or payable by the donee as a condition of the making of such gift;

Therefore, the section permits, for the purpose of computing the aggregate taxable value of the property passing, deduction of the value of any gift made by the deceased to any organization constituted exclusively for charitable purposes. By the final paragraph of the subsection, such deduction is to be reduced by such part of any estate, legacy, succession or inheritance duties as is, whether by will or contract or otherwise, payable out of the property comprised in the gift, or payable by the donee as a condition of making such gift. It is agreed that the E. W. Bickle Foundation is a charitable organization under the provisions of s. 7(1)(*d*) of the statute and, therefore, the executors are entitled to the deduction permitted by s. 7(1)(*d*) thereof.

The problem is whether such deduction is to be reduced by the estate taxes because of the final words of the said s. 7(1). The gift in question is set out in para. III of the Last Will and Testament of the testator as follows:

III. I GIVE, DEVISE AND BEQUEATH the whole of my property of every nature and kind and wheresoever situate including any property over which I may have any general power of appointment to my said Trustees upon the following trusts, namely:—

* * *

(*d*) To pay out of the capital of the residue of my estate my just debts, funeral and testamentary expenses and all estate, legacy, succession and inheritance taxes or duties, whether imposed by or pursuant to the law of any domestic or foreign jurisdiction whatsoever, that may be payable by an beneficiary of this my Will or any Codicil hereto in connection with the property passing (or deemed to pass by any governing law) on my death or in connection with any insurance and/or annuities on my life or in connection with any gift or benefit given or provided by me either in my lifetime to or for any such beneficiary, or by survivorship, or by this my Will or any Codicil thereto, or to or for the benefit of any beneficiary of any trust or settlement created by me during my lifetime, and whether such taxes and duties be payable in respect of estates or interests which fall into possession at my death or at any subsequent time; and I hereby authorize my Trustees to commute or prepay any such taxes or duties.

(*e*) To set aside a sum equal to fifty per centum (50%) of my estate. For the purpose of determining the sum to be so set aside, my estate shall be deemed to comprise all property which by paragraph III of this my Will I give, devise and bequeath to my Trustees less any debts (but such debts shall not include any succession duties or estate taxes) owing by me at my death and the value to be placed on such property shall be the value thereof as fixed for the purposes of the Ontario Succession Duty Act or, if no such Act is in force at the time of my death, the value thereof as fixed for the purposes of The Canada Estate Tax Act. The sum so set aside shall be disposed of as follows:

* * *

(*f*) To pay or transfer the residue of my estate to E. W. Bickle Foundation.

In my view, the testator has directed first that there be paid out of his estate the debts and succession duties. Secondly, the testator has directed his executors to divide equally the whole estate less debts but not succession or other estate duties into two halves, and has dealt with the first half as set out in para. (*e*) and directed the payment of the second half to the E. W. Bickle Foundation. The only gift, therefore, to the respondents is a gift after the payment of the debts and the payment of all succession, legacy, and estate duties. It is true that the duties are to be paid from "the second half" of the residue as so decided but they are to be paid, by the provisions of para. III (*d*) of the Will before any amount is to be payable to either the beneficiary under para. III (*e*) or the E. W. Bickle Foun-

1966

MINISTER OF NATIONAL REVENUE v. BICKLE et al.

Spence J.

dation under para. III (*f*). Therefore, in my view, such "estate, legacy, succession or inheritance duties" were not directed by the will to be payable out of the property comprised in the gift to the foundation, nor were they payable by the foundation as a condition of the making of the gift to it.

I agree with the statement made by counsel for the respondents in his factum—"What the charity is entitled to receive is the residue of the residue after performance of all trusts including the payment of taxes; it is only in the residue of the residue that the charity has any property interest". In reaching this conclusion, I have not considered as particularly applicable either *Sudeley v. Attorney General*[1] or *Bernardo v. Commissioners for Special Purposes of the Income Tax Acts*[2]. I have simply interpreted the words of s. 7(1) of the *Estate Tax Act* and of the testator's last Will in their ordinary grammatical sense. It might well have been the purpose of the legislator in the drafting of that section to have it apply to such a situation as exists under the will in question. If so, in my view, the legislator has not succeeded and it is not the duty of this Court to legislate. The executors are entitled to the benefit of the exemption and are not caught by the "minus" provision at the end of the subsection. I am, therefore, of the opinion that the order asked for by the respondents is the order which should be made by this Court.

I would dismiss the appellant's appeal with costs but would set aside the assessment made by the Minister with a direction that the Minister should re-assess on the basis that the aggregate taxable value of the estate is $2,920,-607.57, *i.e.*, at an amount obtained by deducting from the aggregate net value of the estate $5,242,455.21, only the aggregate net value of the gift to the charity of $2,261,-847.64 and the basic survivor's exemption allowed by s. 7(1)(*a*) of the *Estate Tax Act*.

Appeal allowed with costs, SPENCE J. *dissenting in part.*

Solicitor for the appellant: E. S. MacLatchy, Ottawa.

Solicitors for the respondents: McCarthy & McCarthy, Toronto.

[1] [1897] A.C. 11, 75 L.T. 398. [2] [1921] 2 A.C. 1, 125 L.T. 250.