1950
*May 1, 2
*Oct. 3

IN THE MATTER OF THE DOMINION SUCCESSION DUTY ACT

CHARLES McCARROLL SMITH and PHYLLIS G. RUDD..... } APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Succession duty—Valuation of estate—Interest in estate not falling under the Act—How to determine fair market value—Succession Duty Act, 4-5 Geo. VI (Can.) c. 14, ss. 2(a) (e), 5(1), 34, 58(2).

Held: The provisions of the *Succession Duty Act* (Can.) are not retroactive and accordingly in assessing duty thereunder, s. 34 is not applicable in valuing an interest in the estate of a person whose death occurred prior to its enactment.

APPEAL from the judgment of the Exchequer Court of Canada, Cameron J. (1), affirming the assessment made for succession duties by the Minister of National Revenue in respect of the valuation of the interest of the deceased in the estate of her father.

R. Robinson K.C. for the appellants.

F. A. Sheppard K.C. and *A. J. MacLeod* for the respondent.

The judgment of the Court was delivered by

KELLOCK J.:—This is an appeal from the judgment of the Exchequer Court, Cameron J. (1), affirming the decision of the Minister on an appeal against an assessment for succession duties. The appellants are each entitled to life interests in the residuary estate of the late Mary Catherine Fisher, deceased, and the only matter in dispute between the parties is the value of one item of that residue, namely, the interest of the said estate in the estate of the late Charles Woodward, deceased, the father of the said Mary Catherine Fisher.

By his will and codicil, the late Charles Woodward bequeathed to a sister and a brother, out of the income to be

*PRESENT: Rinfret C.J. and Taschereau, Kellock, Estey and Cartwright JJ.

(1) [1950] Ex. C.R. 104.

received by his trustees from his Vancouver real estate, an annuity of $200 per month each, during their respective lives and, subject thereto, he directed that such income should be distributed annually between three persons, of whom the deceased daughter was one, during a period ending with the death of the last survivor of four named persons. It has been held by a judgment of the Supreme Court of British Columbia that the interest of the deceased Mary Catherine Fisher did not determine with her death but continued for the benefit of her estate. It is to be noted that the late Mary Catherine Fisher died on 23rd October, 1943, after the *Succession Duty Act* came into force, but her father, the late Charles Woodward, died prior thereto, his estate, therefore, not being subject to the provisions of the statute.

In valuing the interest of the daughter in her father's estate, the Minister applied the provisions of section 34 of the *Act,* as he did also in valuing the respective interests of the appellants in the estate of their testatrix. The appellants do not object to the application of the section in this last-mentioned respect, but they contend that the Minister erred in applying the provisions of the section in ascertaining the value of the asset here in question as part of the residuary estate of Mary Catherine Fisher. The appellants say that s. 34 is not, but that the provisions of s. 2(*a*) and (*e*) and s. 5(1) are applicable.

S. 34 is as follows:

> The value of every annuity, term of years, life estate, income, or other estate, and of every interest in expectancy in respect of the succession to which duty is payable under this Act shall for the purposes of this Act be determined by such rule, method and standard of mortality and of value, and at such rate of interest as from time to time the Minister may decide. (1940-41, c. 14, s. 34).

The important words for present purposes are the words, "in respect of the succession to which duty is payable under this Act." The only successions in respect of which duty is payable under the *Act* are the successions of the appellants to the estate of Mary Catherine Fisher. The section in its clear terms, therefore, has no application to anything but the valuation for duty purposes of the interests of the appellants in that estate. Paragraphs (*a*) and (*e*) of s. 2 and s. 5(1) are as follows:

> 2. (*a*) "aggregate net value" means the fair market value as at the date of death, of all the property of the deceased, wherever

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situated, together with the fair market value, as at the said date, of all such other property wherever situated, mentioned and described in section three of this Act, as deemed to be included in a succession or successions, as the case may be, from the deceased as predecessor, after the debts, incumbrances, and other allowances are deducted therefrom as authorized by subsection six of section seven and by section eight of this Act.

(*e*) "dutiable value" means, in the case of the death of a person domiciled in Canada, the fair market value, as at the date of death, of all property included in a succession to a successor less the allowances as authorized by subsection six of section seven and by section eight of this Act and less the value of real property situated outside of Canada, and means, in the case of the death of a person domiciled outside of Canada, the fair market value of property situated in Canada of the deceased included in a succession to a successor less the allowances as authorized by subsection six of section seven and by sections eight and nine of this Act.

5. (1) Notwithstanding that the value of the property included in a succession to which each heir, legatee, substitute, institute, residuary beneficiary, or other successor is entitled, cannot in any case be determined until the time of distribution, nevertheless, for the purposes of this Act, all such property shall be valued as of the date of death, and each successor shall be deemed to benefit as if such property less the allowances as authorized by section eight of this Act were immediately distributed, and as if each successor benefited accordingly.

In my opinion, the appellants are right in their contention that the value of the asset of the Fisher estate here in question falls to be determined under the provisions of s. 2(*a*) and (*e*) and s. 5(1), in other words, at the fair market value at the date of the death of Mary Catherine Fisher on 23 October, 1943.

Although it is not raised by the pleadings, Mr. Sheppard for the respondent contends that s. 58(2) is applicable independently of s. 34, and that under the relevant regulation the same result is arrived at as if the provisions of s. 34 applied. S. 58(2), so far as material, is as follows:

The Minister may make any regulations deemed necessary for carrying this Act into effect, and in particular may make regulations:—

(*c*) prescribing what rule, method and standard of mortality and of value, and what rate of interest shall be used in determining the value of annuities, terms of years, life estates, income, and interests in expectancy.

The only regulation to which we were referred is regulation 19 which reads in part as follows:

19. (1) The value of every annuity, term of years, life estate, income, or other estate and of every interest in expectancy, shall be determined,

(ii) if the succession depends on life contingencies, on the basis of interest as aforesaid, together with the standard of mortality as defined in Table II below . . .

In my opinion, the terms of this regulation are thus expressly limited, as is s. 34 itself, to the valuation of the interests mentioned *which are included in the succession, the duty in respect of which is being determined.* Again, both a basis of interest and a standard of mortality enter into the computation and it is clear from Table II itself, which bears the heading, "Standard of mortality prescribed for the purposes of section 34", that the basis of computation prescribed by the regulation is for use only under that section. Even if s. 58 could stand alone, therefore, no regulation has been passed under it which could apply to the valuation of the item here in question as part of the residuary estate of Mary Catherine Fisher.

Appellants also asked in their statement of claim that the court should determine the fair market value, and both parties led evidence on the point.

In determining the fair market value where there is no competitive market at the date as of which the value is to be ascertained, other indicia may be resorted to as pointed out by Sir Lyman Duff C.J. in *Montreal Island Power Co.* v. *Town of Laval des Rapides* (1). The learned Chief Justice went on to say:—

> There may be reasonable prospects of the return of a market, in which case it might not be unreasonable for the assessor to evaluate the present worth of such prospects and the probability of an investor being found who would invest his money on the strength of such prospects; and there may be other relevant circumstances which it might be proper to take into account as evidence of its actual capital value.

This principle was applied by this court for succession duty purposes in *Attorney General of Alberta* v. *Royal Trust Company* (2). The subject matter of that case was the value of land and buildings, and the court took into consideration the revenue producing qualities of the property.

The respondent contends that the item here in question is "a bequest of $10,000 a year", that is, "a bequest of one-third of the annual rental of $30,000." The appellants, on the other hand, contend that their testatrix was entitled only to "one-third of the net income" from the property in question; that the gross rental was subject to certain charges and one annuity to one of the two annuitants who survived Mrs. Fisher; and that payment

(1) [1935] S.C.R. 304 at 306. (2) [1945] S.C.R. 267.

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of the rent was further subject to certain contingencies, such as, for example, the continued solvency of the tenant. From the standpoint of the outstanding annuity alone, the income from the rent was obviously subject to reduction to that extent. In addition, the trustees of the Woodward estate were entitled under the *Trustee Act* of British Columbia to compensation, and the income from the rents would be subject to some reduction on this account. It is further pointed out that the lease contains the usual exception of reasonable wear and tear and damage by fire and tempest from the lessee's covenant to repair, and that this would involve some expenditure on the part of the Woodward estate to keep the building intact. The witnesses for both parties agree that such expense together with the expense of extra insurance, which the owners as a matter of good business practice should carry, would total approximately $3,000 per year. It cannot, therefore, be said that there was "a bequest of $10,000 per year."

Further, while the rent is collaterally secured by two mortgages given by the tenant on adjoining property owned by it, and while the lessee covenanted to pay rent, taxes, light, gas and telephone charges, and to return the property at the end of the term with a building thereon worth not less than $125,000 in a good and sufficient state of repair, and to keep the building insured for $100,000, one cannot disregard entirely the possibility of insolvency of the tenant or even the possibility of some disaster occurring during the term of the lease, which had some 44 years to run at the date of Mrs. Fisher's death. A purchaser would no doubt make some allowance for such eventualities.

Perhaps the two most outstanding features of this asset are, first, the uncertainty of the term, in that it depends upon four lives, one of those lives being that of a person at the date of Mrs. Fisher's death engaged in combat service in the Royal Canadian Air Force. The other important consideration is that the asset is not a capital asset but income, and therefore subject in the hands of a purchaser to income taxation.

The appellants called two experts with respect to value. One, William Reeve, said that the asset would be a very difficult thing to sell as it involved considerations of a

highly speculative nature. He himself had had no actual experience in selling such an interest. In his opinion, the fair market value would be not more than $67,230. He arrived at that figure by taking the annual net income as $9,000 and considering that any purchaser would require the return of his capital in not more than twenty years and would expect an interest rate of 12 per cent. In the opinion of the other witness called by the appellants, D. S. Mansell, a purchaser might have been found in October 1943 who would have paid $55,000. He pointed out, in addition to the factors already mentioned, that at that date the country was engaged in a world war. His figure of $55,000, he said, was on the basis of return of the principal within 13½ years with interest at 4 per cent.

The witness called for the respondent made a valuation of $150,000 but left entirely out of consideration the fact that the subject matter of sale was income and therefore subject in the hands of a purchaser to income tax. For this reason alone I think his evidence is to be disregarded.

On all the evidence, there would be no justification, in my opinion, for putting a higher value upon the asset in question than the figure given by Mr. Reeve, namely, $67,230, on the basis of the income being $9,000 per year, which may well be too high.

It was suggested by Mr. Boultbee, the respondent's witness, that the element of uncertainty as to the duration of the term could be eliminated by the purchase of life insurance. It may well be that this would be the case, but the premium or premiums would be substantial and would involve an increase in the purchaser's outlay. The evidence with respect to this aspect of the matter was not sufficiently related to the computation of value to permit of the fixing of an amount greater than $67,230, the higher of the two figures put forward by the appellants.

I therefore would allow the appeal and reduce the valuation to the figure mentioned. The appellants should have their costs here and below.

Appeal allowed with costs.

Solicitors for the appellants: *Robinson and Haines.*

Solicitor for the respondent: *I. G. Ross.*