Toronto 1965
Oct. 19
Ottawa Oct. 27

BETWEEN:

EXECUTORS OF ESTATE OF FRANCIS HERBERT CRISPO . APPELLANTS;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Estate tax—Sale of business by deceased—Contract by purchaser to employ deceased's widow—Whether device for disposing of estate property—Estate Tax Act, 1958, c. 29, s. 3(1)(l)(ii).

C, a manufacturer's agent in Toronto, imported about 90% of his goods from two United States manufacturers with whom he had established friendly relations, being sole Canadian importer of their wares though without any exclusive rights. In 1958 he sold his business to A. The sales contract provided for the transfer of the business to a company to be incorporated, that C should be employed by the company as a consultant, and that on his death his wife should be employed as consultant for life at $10,000 a year until she reached the age of 70 and then at $5,000 a year. The clause providing for the wife's employment was inserted at A's suggestion because of his view that her continued association with the business would help to retain the two U.S. manufacturers.

Held, the payment of salary by the company to the widow pursuant to the above clause did not fall within the language of s. 3(1)(l)(ii) of the *Estate Tax Act,* S. of C. 1958, c. 29 Such clause was not in terms a covenant to pay her any amount but rather for her employment by the company, and this was the real bargain between C and A, the test being A's motive.

Mr. W. v. Minister of National Revenue [1952] Ex. C.R. 416 referred to.

APPEAL from re-assessment under *Estate Tax Act.*

Hon. R. L. Kellock, Q.C. for appellant.

Pierre Genest and *B. Verchere* for respondent.

JACKETT P:—This is an appeal from a re-assessment under the *Estate Tax Act* chapter 29 of the Statutes of 1958, as amended, in respect of the estate of Francis Herbert Crispo.

The question raised by the appeal is whether the Minister was in error in re-assessing so as to include, in the computation of the "aggregate net value" of the property passing on the deceased's death, certain payments made after his death to his widow by a company that had, some time before his death, acquired the business carried on by

the deceased during most of his business life. The answer to this question depends upon the application to the facts of section 3(1)(*l*) of the Act, which reads in part as follows:

3 (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,

* * *

(*l*) property disposed of by any person on or after the death of the deceased

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(ii) under the terms of any agreement made by the deceased for valuable consideration given by him providing for the disposition of such property on or after his death, whether or not such agreement is or was enforceable according to its terms by the person to whom such property was so disposed of;

The deceased had, since he was a young man, carried on a business as "manufacturer's agent, importer and distributor" under the name of "F. H. Crispo & Company". In the main, the business consisted in importing goods from the United States and selling them in Canada.

Almost all the goods so imported were acquired from either one of two United States manufacturers. About 60 per cent. of them were acquired from a New York man with whom the deceased had had close business and social associations ever since they were young men together in the United States. About 30 per cent. of the goods imported by the deceased were acquired from a Chicago manufacturer with whom the deceased had also become friendly over the years.

While the deceased had been, in fact, the sole importer into Canada of the New York manufacturer's wares and, for some time, the sole importer into Canada of the Chicago manufacturer's wares, there was no agreement in either case that this state of things should continue. Either manufacturer could, at any time, have started selling to other persons desiring to import their wares into Canada.

While his volume of sales was relatively large, the deceased had a very small business organization consisting, in effect, of a small office staff and a couple of salesmen as well as himself. One of the salesmen, Robert David Archer, had, over the years, gradually acquired greater seniority until he had become manager of the business under the deceased. By 1958, Archer was being paid a salary in the neighbourhood of $20,000 per annum.

In 1958, as a result of medical advice, the deceased decided to sell his business and negotiated an agreement with Archer under which Archer acquired the business on terms that it would be vested in a company to be incorporated and known as "F. H. Crispo Company Limited". The agreement contemplated that, at the time of transfer, the "assets" and "liabilities" would be "equal". Presumably, the deceased was to withdraw assets before the transfer to the extent, if any, that he had more in the business than the liabilities of the business. The deceased covenanted not to compete. The shares of the company were to be issued to Archer or his wife except for 1 common share to be issued to the deceased and $15,000 worth of redeemable preferred, which was to be issued to the deceased and was to be redeemed fifteen days after the transfer of the business.

The agreement also contained provisions for the deceased being associated with the Company. It provided that the deceased "shall be employed by the Company as a consultant and shall also be a director" (paragraph 4) and that "the duties" of the deceased "as consultant to the Company shall be determined only by him" (paragraph 5)[1]. The agreement further provided that the deceased be paid by the Company a salary of $5,000 per annum effective from the transfer of the business (paragraph 5) and certain additional amounts or bonuses depending on the Company's net earnings (paragraph 6). The agreement provided that the deceased "shall be paid the above-mentioned salary so long as he shall live" but that there should be no bonus after his 75th birthday (paragraph 7).

Finally, the agreement provided that, if the deceased were survived by his wife "then she shall be employed by the Company as consultant for the remainder of her life at a fixed salary of $10,000 until the end of the fiscal year of the Company following her 70th birthday and thereafter her fixed salary shall be $5,000 per annum" (paragraph 7).

(The agreement was in due course confirmed and ratified by the Company, which acknowledged that it was bound by its terms.)

The proposed Company was incorporated, the business was transferred to it, the deceased became the holder of a

[1] Whether this clause made the contract a contract of service or a contract for services would seem to be immaterial

single common share, was made a director and functioned as a consultant to the Company, in which capacity he was, of course, very useful. (The deceased also received the $15,000 worth of preferred and it was redeemed. Archer and his wife acquired the balance of the issued shares and became the other two directors.)

After the deceased's death on August 31, 1960, the widow was elected a director of the Company in the place of her husband and the Company commenced paying her the salary mentioned in the agreement. Apart from her duties as a director, any actual services that she performed for the Company were so unsubstantial as to warrant their being classified as nominal. She took an interest in the business and kept in touch with Archer, who chatted with her from time to time in a general way concerning major business problems such as the acquisition of new lines of goods.

From the time of the deceased's death until February 1963, the Company paid his widow the "salary" contemplated by the 1958 agreement. In that month a new agreement was entered into between the widow and the Company. However, in order to avoid confusion, I propose to consider the correctness of the Minister's assessment in respect of the payments during the period ending in February 1963, without referring to what happened in that month.

The Minister's case, according to the submission of counsel for the Minister, is that each payment of salary to the widow is "property disposed of by any person...after the death of the deceased...under the terms of any agreement made by the deceased for valuable consideration given by him providing for the disposition of such property on or after his death" within the meaning of those words in section 3(1)(*l*)(ii) of the *Estate Tax Act*, which I repeat here for convenience.

3. (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,

* * *

(*l*) property disposed of by any person on or after the death of the deceased

* * *

(ii) under the terms of any agreement made by the deceased for valuable consideration given by him providing for the disposi-

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Jackett P.

tion of such property on or after his death, whether or not such agreement is or was enforceable according to its terms by the person to whom such property was so disposed of;

The Minister contends that each payment of salary by the Company to the widow was "property disposed of" by the Company, that such property was "disposed of" under the "terms" of the 1958 agreement and that the 1958 agreement was made by the deceased for valuable consideration.

The "terms" of the 1958 agreement under which counsel for the Minister attempts to bring the payments consist of that part of paragraph 7 that provides that "she shall be employed by the Company as consultant for the remainder of her life at a fixed salary of $10,000 until...her 70th birthday and thereafter ...$5,000 per annum". This is not in "terms" a covenant for payment of any amount to the widow but for the creation of a relationship between the widow and the Company by an agreement between them under which certain salary payments would be made. Counsel faced up to this difficulty by submitting that the Court must read that part of paragraph 7 of the 1958 agreement as though it in "terms" was a mere covenant by the Company to pay the widow the amounts in question.

This latter submission was really part and parcel of the theme running through the whole argument for the Minister that the true bargain between the deceased and Archer was a sale of the goodwill and assets of the business together with his part time services during his lifetime for the $15,000 payable by the preferred shares device, annual payments to be made to the deceased during his life and annual payments to be made to his widow after his death and that, regardless of what the agreement says, it was no part of the bargain that the widow should become a consultant to the Company either as an employee or as an independent contractor.

Certainly, if it were established that the real bargain was as counsel submitted and that the contents of the written documents, in this respect a least, did not therefore truly represent the real bargain, the Court would have to decide the case having regard to the real bargain and not to the written document.

The feature of the facts that tends to lend support to the Minister's contention is that the widow had no business experience and that it was never contemplated, either in 1958 or later, that she should take any real part in the activities of the business. That the operator of a business would agree to pay such a person as a "consultant" $10,000 per year, on the face of it, seems so improbable as to suggest that, whatever the reason for the payment, it is not a payment for her services. If, therefore, there were no explanation, I should have had to give serious consideration to the question whether, having regard to the circumstances, the real bargain must be found to have been an agreement to make annual payments to the widow as part of the consideration for the transfer of the business to the company in 1958.

However, I am relieved from considering that question because Archer gave evidence, which is uncontradicted and which I accept, that the clause for the employment of the widow after the death of the deceased was inserted on his suggestion[1] because, in effect, he was strongly of the view that the probability of losing the United States supplier relationships (upon which the very existence of the business depended) was substantially diminished as long as the deceased continued to be a part of the Company's organization and, similarly, but probably to a lesser extent, after the death of the deceased, he would feel more secure concerning the retention of his United States suppliers if the widow were part of the organization. It is clear, notwithstanding much talk about consultations with the widow, suggestions by her, etc., that the real reason why, in 1958, Archer wanted an arrangement under which, upon the deceased's death, the widow would become associated with the company in some capacity, was that he thought that the "Crispo" relationship with the New York and Chicago people would have an advantage to the Company. He did not really expect her to perform services and she only performed the most perfunctory sort of services such as attending shareholder and director meetings. He did,

[1] The statement that the clause for the employment of the widow was put in at Archer's suggestion because he thought it desirable from the point of view of retaining the United States relationships was not challenged on cross-examination.

however, want her associated with the Company. He did, in fact, associate her with the Company and he paid her for that association exactly as contemplated in the 1958 agreement and for the same reason as that which caused him to put the clause about the widow into that agreement.

The sole question of fact that has to be decided is, as I have already indicated, whether the written agreement whereby Archer agreed that the Company would employ the widow as consultant at a salary of $10,000 per annum represented the real bargain made by the deceased and Archer in 1958 or whether the real bargain was a simple contract by Archer that the Company would make annual payments to the widow. While an undertaking to employ the widow at a salary of $10,000 per annum until she attains the age of 70 and thereafter at a salary of $5,000, although she was not expected to perform any service in the ordinary sense, does not seem to be the sort of undertaking that a business man would enter into unless he received some outside consideration therefor, the real test is what motivated Archer in entering into this particular undertaking. Archer's testimony satisfied me that, in his view, in 1958, having regard to the earnings of the business, the extent to which the continuance of the business depended upon the United States relationships and the extent to which the probability of continuing those relationships after the death of the deceased would be improved by having the widow associated with the business, the clause whereby the Company agreed to employ the widow was one that was in the interest of the proposed company. Archer seemed, when he gave evidence, to be of the view that his 1958 opinion had been shown to have been sound because he has had difficulties with the current management of the New York firm that would, in his view, have resulted in loss of the company's relationship with that firm had it not been for the widow's relationship with the family controlling that firm.

In the light of Archer's evidence, therefore, I reject the submission of counsel for the Minister that paragraph 7 of the agreement does not represent a part of the true bargain between the parties. The Company did not, therefore, make the salary payments to the widow under an agreement

between the deceased and the Company. For that reason, section 3(1)(*l*) does not apply to the payments made before February 1963.

The distinction between a payment "under the terms of any agreement" and a payment by virtue of an arrangement or relationship created by an agreement made "under the terms of any agreement" is not mere "hair-splitting" as might at first appear. What paragraph (*l*)(ii) of section 3(1) contemplates is that property disposed of under the terms of an agreement that was made by the deceased for valuable consideration given by the deceased and that provided for that disposition should be included in the "aggregate net value". In other words, where the deceased paid for property in his lifetime, it should be included in his estate for tax purposes even though it was delivered directly to a beneficiary on or after his death. Neither the words of paragraph *l*(ii), nor the apparent justification for its being in the law, extend to treating as part of the estate of the deceased remuneration paid by a third party under a contract of service or a contract for services merely because the deceased had made it a term of an agreement made by him with the third party that the contract of service or the contract for services should be entered into. In such a case, the remuneration is consideration for the service or services to which the third party was entitled from the recipient and it is not, in effect, a gift from the deceased. Similar reasoning would apply to a contract whereby a deceased had obtained an agreement for consideration from his partners to take a member of the deceased's family into the partnership after his death. Compare the facts in *Mr. W. v. Minister of National Revenue*[1]. It cannot be assumed that Parliament intended to sweep into the estate of a deceased all the profits or remuneration received after his death by a person who was an object of his benevolence during the whole of such other person's life merely because the deceased gave some consideration, no matter how small, for such person being employed or taken into partnership when, in terms, the statutory provision applies only to the very thing paid for by the deceased and delivered on or after his death.

[1] [1952] Ex C R. 416

If section 3(1)(*l*) does not apply to the payments before the agreement of July 1963, there can be no possible basis for applying that provision to the payments made after that agreement. There is no need, therefore, to review the circumstances giving rise to that agreement or its terms.

The appeal is allowed and the re-assessment is referred back to the Minister for re-assessment on the basis that the payments made by F. H. Crispo Company Limited to the widow of the deceased are not covered by section 3(1)(*l*) of the *Estate Tax Act*. The Minister will pay to the appellants their costs to be taxed.