
BETWEEN:

ALMA CATHERINE BURNS and RICHARD JOHN BURNS, Executors of the Estate of MICHAEL JOHN BURNS, deceased ..... APPELLANTS;

1958
Feb. 3 & 4
1959
Feb. 13

AND

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

Revenue—Succession Duty—Valuation of interest in estate—Where no rule, method and standard of mortality etc. prescribed by Minister, fair market value applicable—Dominion Succession Duty Act, S. of C. 1940-41, c. 14 ss. (2)(a)(e)(m), 5(1), 34, 58(2)(c) as amended, Regulation 20, Tables I, II, III and IV.

At the time of his death on June 23, 1953, Michael John Burns was entitled to a 15.9455 interest in the capital of the estate of the late the Honourable Patrick Burns, who died in 1937, but such interest

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would not become distributable under the terms of the latter's will until the death of a person who when John Michael Burns died had a life expectancy of twenty-five years. In valuing such interest for the purposes of the *Dominion Succession Duty Act* the Minister applied Regulation 20 entitled "Valuation of annuities etc., Section 34" and the tables approved for the purposes of that section and thereby assessed the value at some $180,647. On an appeal from the Minister's assessment to this Court

Held: That Regulation 20 and the tables referred to therein having been made at a time when s. 34 did not empower the Minister to prescribe rules, methods or tables etc. for the valuation of such an interest, neither Regulation 20 nor the tables were applicable in valuing the interest in question. *Smith and Rudd v. Minister of National Revenue* [1950] S.C.R. 602, referred to.

2. That while s. 34 as re-enacted by S. of C. 1952, c. 24, s. 8, may empower the Minister to prescribe a rule, method and standard of mortality etc. for the valuation of such interest, no such rule, method or standard etc., had been made at the time of the death of John Michael Burns and accordingly the interest in question fell to be valued for the purposes of the Act at its fair market value to be ascertained by any relevant evidence of such value.

3. That on such evidence the fair market value did not exceed $486,035 and the appeal should therefore be allowed and the assessment referred back to the Minister to be revised accordingly.

APPEAL under the *Dominion Succession Duty Act.*

The appeal was heard before the Honourable Mr. Justice Thurlow at Ottawa.

K. E. Eaton and *R. H. McKercher* for appellants.

G. H. Milvain, Q.C. and *F. J. Cross* for respondent.

THURLOW J. now (February 13, 1959) delivered the following judgment:

This is an appeal by the executors under the will of Michael John Burns, deceased, from an assessment of succession duties made by the Minister of National Revenue on or about October 27, 1955 and confirmed by him with a minor alteration on August 2, 1956 in respect of successions to property under the will of the said deceased. The deceased died on June 23, 1953, leaving among other assets a 15.9455 per cent interest in the capital of the estate of the late the Honourable Patrick Burns, which would become distributable under the latter's will upon the death of Millicent Elizabeth Burns, and the matter in issue in this appeal is the value of that 15.9455 per cent interest on June 23, 1953 for the purposes of the *Dominion Succession Duty Act,* Statutes of Canada 1940-41, as amended.

It is agreed between the parties that on June 23, 1953, when Michael John Burns died, the assets held by the trustees of the estate of the late the Honourable Patrick Burns had a total value amounting to $13,260,593 and that Millicent Elizabeth Burns at that time had a life expectancy of approximately twenty-five years. The late the Honourable Patrick Burns had died in 1937, prior to the coming into force of the *Dominion Succession Duty Act.*

In the assessment under appeal, the Minister valued the 15.9455 per cent interest in question at $810,647.28, having reached this result by the following calculation:

15.9455% of $13,260,593.00 x .3833812 = $810,647.28

The figure .3833812 involved in this calculation was itself obtained by the following formula:

$$1-(.04 \times 15.41547)=.3833812$$

In this formula, .04 is a rate of interest and 15.41547 is the value on June 23, 1953 of an annuity of $1 per annum for life for a person of the age of Millicent Elizabeth Burns, according to a table of present value of life interests or life annuities approved by the Minister pursuant to s. 34 of the Act, which table itself is based on a standard of mortality prescribed by the Minister pursuant to s. 34 in another table.

In substance, the result of the formula is to subtract from each dollar of the value of the assets of the estate of the late the Honourable Patrick Burns a portion thereof in respect of the postponement of the time when the assets will become distributable and to produce a sum which, if invested at four per cent compound interest on June 23, 1953, would amount to $1 at the time of distribution. Thus the sum of .3833812, invested on June 23, 1953 at four per cent compound interest, would produce $1 at the termination of the life expectancy of Millicent Elizabeth Burns some 25 years thereafter and, as explained by Mr. W. Riese, who gave evidence at the trial, the sum of $810,447.28 so invested would then produce $2,114,467.86, which was equal to 15.9455 per cent of $13,260,593.

In support of the assessment, the Minister relied, both in his decision affirming it and in this Court, on s. 34 of the Act and on Regulation 20 of regulations made by him

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under s. 58 of the Act and published in the *Canada Gazette* on December 8, 1948. By s. 58(2), it was provided as follows:

58. (2) 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 regulations published as above mentioned are entitled "SOR/48-513 Dominion Succession Duty Act—Regulations made under Section 58 of the Act." Regulation 20 was entitled "Valuation of annuities, etc., Section 34." It provided as follows:

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

(*i*) if the succession does not depend on life contingencies, on the basis of compound interest at the rate of four per centum per annum with annual rests; and

(*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; and Tables I, III and IV, below, which are derived from the bases aforesaid, shall be used so far as they may be applicable in the valuation of any succession.

The tables referred to in this regulation were entitled as follows:

TABLES

The Tables hereby approved pursuant to Section 34 of the Act and referred to in Regulation 20 are as follows:

Table I

PRESENT VALUE OF DEFERRED GIFTS

* * *

Table II

PRESCRIBED STANDARD OF MORTALITY

* * *

Table III

PRESENT VALUE OF LIFE INTERESTS OR LIFE ANNUITIES

* * *

Table IV

PRESENT VALUE OF AN ANNUITY FOR A TERM CERTAIN

The figure 15.41547 appears in Table III as the value of an annuity of $1 per annum for life for a person of the age which Millicent Elizabeth Burns had attained on June 23, 1953. No other regulation was referred to or relied on.

In my opinion, the valuation made by the Minister cannot be justified under Regulation 20 or under any of the tables referred to therein. Broadly speaking, there are two purposes of the Act for which determinations of value must be made. The first is the ascertainment of the "aggregate net value" by which the initial rate of duty prescribed by s. 10 is governed. "Aggregate net value" is defined by s. 2(*a*) (so far as material to this case) as "the fair market value as of the date of death of all the property of the deceased wherever situated. . . ." The word "succession" does not appear in the material part of this definition. The value of the interest in question, as part of the aggregate net value of the estate of Michael John Burns, is what is in issue in these proceedings.

The other purpose of the Act for which determinations of value must be made is the ascertainment of "dutiable value" by which additional rates of duty prescribed by s. 11 are governed and to which both the initial and the additional rates are applied. "Dutiable value" is defined by s. 2(*e*) (so far as material to this case) as "the fair market value as at the date of death of all property included in a succession to a successor."

"Succession" is defined by s. 2(*m*) as follows:

2. In this Act, and in any regulation made thereunder, unless the context otherwise requires,

* * *

(*m*) "succession" means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any deceased person, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any such deceased person, to any other person in possession or expectancy, and also includes any disposition of property deemed by this Act to be included in a succession;

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"Successor" is defined as the person entitled under a succession, and "deceased person" is defined as meaning a person dying after the coming into force of the Act. The Act came into force on June 14, 1941. By s. 5(1), it is further provided:

> 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.

It will be observed that the scheme of the statute is to impose taxation which is measured by the fair market value of property of persons dying after the coming into force of the statute. The taxation so imposed is thus dependent upon an objective and well-known criterion. It is one that may present difficulties where the property is of a kind not commonly bought or sold, but it is nevertheless one as to which a body of jurisprudence has been built up over a long period of time in the course of many judicial endeavours to apply it in particular situations. Whether difficult of application in particular instances or not, it is a concept capable of general application to all property, and in the provisions mentioned it is prescribed as one of the foundations on which the tax imposed by the statute is based. From this, it appears to me to follow that, under the *Dominion Succession Duty Act,* taxation by it is the rule and that any exception to it which may be found in the statute is to be strictly construed.

Now, when the statute came into force on June 14, 1941, it contained in s. 34 a provision the purpose of which, in my opinion, was to enable the Minister, in the cases therein mentioned, to prescribe rules, methods, standards, etc., by which the fair market value of property of the deceased from which annuities were to be paid, or in which life or other interests had arisen on the death of the deceased, might be apportioned to the several successors to interests in such property. The section read as follows:

> 34. The value of every annuity, term of years, life estate, income, 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.

It will be noted that this section was applicable to the valuation of the property included in a succession. Valuation of property for the purpose of ascertaining aggregate net value is not mentioned.

In *Smith and Rudd v. Minister of National Revenue*[1], the Minister sought to apply this section and a regulation made pursuant to it in determining as part of the aggregate net value of the estate of Mary Catherine Fisher, who died after the *Dominion Succession Duty Act* came into force, the value of an interest which she held at the time of her death in the income to be derived from the estate of her father, Charles Woodward, who had died before the coming into force of the *Dominion Succession Duty Act,* such interest being terminable upon the death of the survivor of four named persons. Kellock J., in delivering the judgment of the Supreme Court of Canada holding that s. 34 had no application to the valuation of such interest as part of the property of Mary Catherine Fisher, said at p. 603:

> 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.

Then, after quoting the definitions of "aggregate net value" and "dutiable value" and s. 5(1) of the Act, the learned judge continued at p. 604:

> 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.

Now, both Regulation 20, above quoted, and the tables referred to therein purport to be made for the purposes of s. 34 of the Act, and at the time when they were made and published in December, 1948, s. 34 was still in the same form as it was when considered in *Smith and Rudd v. Minister of National Revenue.* Moreover, Regulation 20,

[1] [1950] S.C.R. 602.

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as well, is in precisely the same form as the one relied on and considered in that case. The regulation in question was number 19 of regulations published on July 12, 1941, as amended by a regulation published on November 8, 1941. By its terms it is limited to the valuation of annuities, etc., included in a *succession,* and it does not purport to be applicable to the determination of aggregate net value. Referring to this regulation, Kellock J. said at p. 604:

> 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.

Then, after quoting s. 58(2) and the portion of Regulation 19 corresponding to that of Regulation 20 above set out, and stating that the latter was the only regulation to which the Court had been referred, the learned judge proceeded:

> 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.

The wording of the heading of Table II, referred to in this passage, which appears in the tables published with the regulations on July 12, 1941, was not precisely the same as the heading quoted above of the tables published in December, 1948, but the latter heading applies to all four of the tables mentioned, and the effect, in my opinion, is the same. It follows, in my opinion, that neither Regulation 20 nor any of the tables therein referred to is applicable to the valuation of the interest here in question as part of the aggregate net value of the estate of Michael John Burns. If, therefore, the method used by the Minister for finding the value of the interest in question is to be upheld, authority for it must be found in s. 34 itself. That section, as in force when the *Smith and Rudd* case arose and when the regulations were published in December, 1948, was, however, repealed, and a new section was substituted by

Statutes of Canada 1952, c. 24, s. 8. In the section substituted, the words "in respect of the succession to which duty is payable under this Act" do not appear, and at the end of the section are found the words, "and the value so determined shall be deemed to be the fair market value." The substituted section is as follows:

> 34. The value of every annuity, term of years, life estate, income, or other estate, and of every interest in expectancy 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, and the value so determined shall be deemed to be the fair market value thereof.

The substitution of this provision seems to me to have wrought a considerable change, and it may well be that, on its present language, the scope of s. 34 has been made wide enough to apply to the valuation of the interest in question as part of the aggregate net value of the estate of Michael John Burns. But, as I interpret it, this provision is not, as contended on behalf of the Minister, an authority to him to decide individual cases by applying such rule, method, standard, etc., as he then sees fit to apply. Nor is it, as also contended, an authority to value arbitrarily. Despite the use in it of the words "may . . . decide", the authority conferred is not, in my opinion, a judicial power at all but is a power delegated to the Minister to legislate. It is an authority to decide from time to time what rule, method and standard of mortality and of value and what rate of interest shall be used in the determination of the value of property of the several kinds mentioned. It may be (though I do not think it is necessary for the purposes of this case to decide the point) that the decision to be made from time to time need not be made as a regulation under s. 58, though that is obviously one way in which the authority of s. 34 can be exercised, but on the other hand I do not think that such a decision can be made or that the power given by s. 34 can be exercised by the mere application to a particular case or to particular cases of what, in truth, is an inapplicable regulation or that the making of such a decision is to be inferred from the mere fact that such a regulation was applied in such cases even though, on its face, it was not applicable. The decision to be made in exercise of such a legislative authority, in my

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opinion, must be marked with more solemnity than that, and it must at least be a decision setting a rule, method or standard, etc. of general application to all like cases. Moreover, since s. 34 does not expressly or by any necessary intendment authorize the making of a decision with retroactive effect, I do not think any decision made pursuant to it can apply retroactively to the making of valuations the necessity for which under the statute has already arisen. The situation, accordingly, in the present case is that the interest of the deceased Michael John Burns in the estate of the late the Honourable Patrick Burns, which interest must be valued for the purposes of the Act, is property of a kind to which s. 34 may be applicable, but the Minister has not exercised the authority thereby conferred to prescribe a rule, method or standard, etc. by which property of this kind is to be valued.

By what rule, method, etc. then is the value to be determined? While the strictest interpretation of the word "shall" in s. 34 might lead to the conclusion that no valuation at all could be made in this situation, in my opinion that is not the effect of the section. Such a construction would run counter to the whole purpose and tenor of the statute. As I interpret s. 34, it means that the value of property of the kind therein mentioned is to be determined by such rule, etc., as the Minister may decide, in all cases for which he may prescribe an applicable rule, etc. Where he has not prescribed any applicable rule, etc. and until an applicable rule, etc. is prescribed, the situation is simply that the legislative power conferred by s. 34 to prescribe a rule, etc., for determining value in some way other than by the ascertainment of fair market value has not been exercised, and the test of fair market value of such property is not ousted by s. 34 or any decision made under it but remains applicable for the purposes of the Act. Accordingly, I am of the opinion that what is to be ascertained as the value of the interest in question for the purposes of the Act is its fair market value on June 23, 1953, unaffected by any statutory provision or regulation, and that such fair market value is to be ascertained by any relevant evidence of such value.

In approaching the problem of finding the fair market value of the interest in question, it is, in my view, important to bear in mind that the right to be valued was not at the material time a right to $2,114,467.86, either presently or in the future. While the interest was a right at some future time to 15.9455 per cent of an estate the assets of which, at the material time, were worth $13,260,593, the assets in question were not those of Michael John Burns at the time of his death, nor was he entitled to 15.9455 per cent of them. His right was simply to 15.9455 per cent of such capital assets as might be held by the trustees when the time for distribution arrived. In the meantime, the assets were subject to the terms of the trust in the lawful discharge of which by the trustees such assets by the time of distribution could be expected to change and might well become more or less valuable than they were when Michael John Burns died but would be quite unlikely to be worth the same. The uncertainty arising from this feature of the interest in question is compounded by the further uncertainty of the date when the assets would become distributable, depending, as it did, on the life of a person with a life expectancy of 25 years. When to these features is added the fact that no income or return can be derived from this interest pending the arrival of the date of distribution which, though it might come quickly, might also not come until long after 25 years had elapsed, it seems to me to be obvious that any prudent prospective purchaser of the interest would not be willing to give for it the amount which, if invested at four per cent, would produce $2,114,467.86 by the time the expected date of distribution would arrive. No doubt, if he bought it for that amount and the date of distribution arrived much earlier than expected, he would be likely to have a profit, depending largely on how much earlier than expected the date of distribution arrived. But prudence would, I think, prompt him to think that the risks of no gain at all or of loss were just as great, if, indeed, they were not greater in the circumstances. And where other and less speculative investments were available in which, even if the life expectancy were not exceeded, he could do as well as or better than

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four per cent and with less risk, I think the most he would be willing to give for the interest in question would be much less than the $810,647.28 at which the Minister valued it.

The appellants called two expert witnesses on the question of value. The first of these was Mr. T. P. N. Jaffrey, who estimated the fair market value of the interest in question at the material time at $486,035. He also expressed the opinion that the interest could only have been marketed or disposed of under the most favourable of market conditions and to a most unusual investor. He had in mind two persons in Canada who, for their own financial reasons, might be interested in purchasing such an interest but said that in the United States the market was not so limited. The other witness, Mr. Gordon Page, put the fair market value at $456,428. The evidence of these two witnesses, both of whom, in my opinion, were eminently well qualified to appraise the value of such an interest from an investor's point of view, satisfies me that its fair market value at the material time did not exceed $486,035. On the other hand, with the chance of a number of different persons either in Canada or the United States being interested, I do not think I should regard it as unlikely that that figure would be realized if the interest were offered to such persons. In the result, therefore, I adopt $486,035 as the amount at which the value for the purposes of the *Dominion Succession Duty Act* should be set.

The appeal will be allowed with costs and the assessment referred back to the Minister to be revised accordingly.

Judgment accordingly.