

IN THE MATTER OF JAMES S. SMITH, SUCCESSOR—BERNARD E. SMITH ESTATE

APPLICANT;

Ottawa 1965 Dec. 2 Dec. 16

AND

THE MINISTER OF NATIONAL REVENUE

RESPONDENT.

Estate tax—Federal—Estate Tax Act, S.C. 1958, c. 29, ss. 12, 13, 14, 41(1) —Liability of successor for estate tax—Whether issuance of certificate and service of writ of extent against successor valid when not preceded by assessment addressed to him in respect of his liability for tax.

The estate of Bernard E. Smith (domiciled in the United States) had been assessed by the Minister in the amount of \$64,481 in respect of property situated in Canada and the Minister was attempting to recover part of that tax from the applicant, as successor, on whom liability would rest under s. 14, whether or not any notice of assessment had been sent to him.

In the instant case the only assessment issued was that sent to the executors in respect of the estate tax payable.

Nevertheless a certificate was issued against the applicant and pursuant thereto a writ of extent was obtained.

This process was challenged on the grounds that the applicant was not a successor within the meaning of s. 14 and that the Minister could not issue a certificate against the applicant on the strength of an assessment made against someone else.

Held, only the second issue needed to be considered and s. 14 did not contemplate the issuance of a certificate against "A" predicated on an assessment made and addressed against "B".

The writ of extent should be vacated and the certificate set aside.

MOTION for an order requesting that a writ of extent be vacated and the relevant certificate set aside.

Terence Sheard, Q.C. for applicant.

G. W. Ainslie for respondent.

GIBSON J.:—This is a motion for an order requesting that a writ of extent issued September 29, 1965 under Part III of the Estate Tax Act be vacated and that the certificate also dated September 29, 1965 as to the amount of tax alleged to be due and payable, (upon the validity of which the issuing of the said writ of extent depends) be set aside.

The Applicant, James S. Smith, resides in New York and is one of the executors of the estate of Bernard E. Smith, an American citizen who died domiciled in the United States leaving certain assets having a situs in Canada

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within the meaning of s. 38 of the *Estate Tax Act*. The Applicant is also a residuary beneficiary of the said estate to the extent of $\frac{1}{8}$ th when such residue has been ascertained. The estate has not been fully administered as yet by the executors and therefore as of now there is no clear residue.

A notice of assessment under s. 12 of the *Estate Tax Act* was prepared, is dated February 27, 1964 and was addressed and sent to "Executors, Est. of Bernard E. Smith, % Messrs. Netter, Netter, Dowd and Fox, 660 Madison Ave., New York 21, N.Y., U.S.A." and reads as follows:

		Interest		
Tax Assessed	Assessed Credited	Balance Unpaid	Refund	
\$64,481.57	\$7,640.58	\$72,122.15		

Although the said certificate and writ of extent were issued against the Applicant as a "successor" under s. 14 of the *Estate Tax Act*, no notice of assessment was prepared, addressed to or sent to the Applicant in his capacity as a "successor" to part of the estate of Bernard E. Smith.

The said certificate against the Applicant under Part III of the *Estate Tax Act* purportedly pursuant to s. 41(1) was issued by Thomas E. Weldon, Supervisor of Collections, Taxation Division, Department of National Revenue dated September 29, 1965 certifying that pursuant to an assessment dated February 27, 1965 (i.e. the assessment against the executors referred to above) that the Applicant owed the sums for estate tax which are set out in such certificate as follows:

That under the Estate Tax Act there is now due, owing and unpaid by the said JAMES S. SMITH, Successor-Estate of BERNARD E. SMITH the following arrears of Estate Tax

Assessment Date	Tax	Penalty	Interest	Interest Computed to
27 Feb/64	\$7,890.30	—	\$1,517.52	15 Sept/65

Constituting a total amount of \$9,407.82 together with additional interest at the rate of 5 per cent per annum on the sum of \$7,890.30 from 16th day of September 1965, to date of payment.

2. That 90 days have expired since the day of mailing of the notice of assessment herein.

A writ of extent then was obtained on the praecipe of a solicitor for the Taxation Division, Department of National Revenue pursuant to the said certificate and the relevant parts of it read as follows:

Seal a Writ of Extent directed to the Sheriff of the County of York, Ontario to levy of the lands, goods and chattels of JAMES S. SMITH,

Successor-Estate of BERNARD E. SMITH in the sum of the following arrears of 41 (1) of the Estate Tax Act 1958 c. 29

Year or Date of Assessment	Tax	Penalty	Interest	Interest Computed to
27 Feb/64	\$7,890.30	—	\$1,517.52	15 Sept/65

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together with additional interest at the rate of five per centum per annum on the sum of \$7,890.30 from the 16th day of September 1965 to date of payment: (and \$11 00 Costs as provided for by the general rules and Orders of this Honourable Court).

This writ of extent was served upon the Toronto firm of Peat, Marwick, Mitchel & Co., Certified Public Accountants, Prudential Building, King and Yonge Streets, Toronto 1, Ontario which the Applicant by affidavit alleges is associated with the New York firm of Peat, Marwick, Mitchel & Co. of which the Applicant is a partner but which is a separate and distinct firm from the Toronto firm.

The said certificate above referred to alleging that the Applicant as a successor owes the said amount of estate tax and the said writ of extent obtained pursuant to this certificate were based on the assessment dated February 27, 1964 which as stated was made against, addressed to and sent to the executors of the estate of Bernard E. Smith pursuant to the liability of such executors for the payment of such estate taxes under s. 13 of the *Estate Tax Act*. But as stated no assessment was sent to the Applicant as a "successor" pursuant to his liability to pay his proportionate share of the estate tax in his capacity *qua* "successor" under s. 14 of the *Estate Tax Act*.

The issues on this motion are firstly, whether or not the Applicant is a "successor" within the meaning of s. 14 of the *Estate Tax Act* at the date of this application; and secondly, whether under s. 41 of the *Estate Tax Act* the Minister has the right to levy by way of writ of extent against the Applicant, which writ issued on the basis of a certificate which depends for its validity on an assessment made, addressed and sent to someone else namely, the executors of the estate of Bernard E. Smith.

On this application it is only necessary to consider the second issue.

As to the second issue I am of opinion that any certificate alleging any amount of tax due or payable under the Act must be based on an assessment made under s. 12 of

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the Act directed against the particular person in respect to whom such certificate is issued. Section 41 (1) (b) reads as follows:

- 41. (1) Any amount due and payable under this Act that has not been paid or such part of any amount due and payable under this Act as has not been paid may be certified by the Minister
- ...
- (b) otherwise, upon the expiration of ninety days after the day of mailing of any notice of assessment sent by the Minister pursuant to section 12.

This section does not contemplate the issuance of a certificate against A predicated on an assessment under s. 12 made and addressed against B.

This is precisely what was done in this case. An assessment was issued against the executors of the estate of Bernard E. Smith under s. 12 pursuant to the charging section against executors under s. 13. Then a certificate was issued against the Applicant in his personal capacity *qua* a successor of the said estate pursuant to the liability of a successor under s. 14. In my view the said certificate so issued in this matter is a nullity and the writ of extent upon which its validity depends is also a nullity.

In the result therefore, an order will go vacating the said writ of extent issued September 29, 1965 and setting aside the said certificate of Thomas E. Weldon also dated September 29, 1965.

The Applicant is entitled to his costs.