1964
June 4
June 29

BETWEEN:

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

AND

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

Revenue—Estate tax—"Successive approximations" and "algebraic" methods of calculating deduction under s. 7(1)(d) of Estate Tax Act—Estate tax and succession duty principles—Computation of aggregate taxable value of estate—Computation of estate tax where gift to charity—Computation of estate tax where estate tax and provincial succession duty payable out of charitable gift—Estate Tax Act, R.S.C. 1958, c. 29, ss. 7(1)(d) and 8(1)(w).

This is an appeal from an assessment of the respondent for tax under the *Estate Tax Act* on the assets of the Estate of Edward William Bickle. By his will the deceased had set aside 50% of his estate to provide for his wife for life, and, after making certain other provisions, he had left the balance of his estate, after payment of all succession duties and estate taxes, to the E. W. Bickle Foundation. It was not disputed that the Foundation is an organization, a gift to which, in computing the aggregate taxable value of property passing on death, gives rise to a deduction from the aggregate net value of the property by virtue of s. 7(1)(*d*) of the *Estate Tax Act*.

The sole question in issue is the computation of the amount of the "aggregate taxable value" within the meaning of the *Estate Tax Act*, and the sole difficulty in arriving at this figure arises from a dispute as to how the deduction envisaged by s. 7(1)(*d*) of the *Estate Tax Act* should be computed.

Held: That the assessment based on the computation of the deduction under s. 7(1)(*d*) of the *Estate Tax Act* by the "successive approximations" and the "algebraic" methods is wrong in law, firstly because succession duty principles were applied in making the calculation whereas estate tax principles should have been applied, and secondly because the first calculation, in any event, is wrong in law in that the amount of the Ontario succession duty calculated on the exempt portion of the estate was deducted from the aggregate net value in determining the aggregate taxable value of the estate, whereas s. 7(1)(*d*) authorizes the deduction from the exempt portion of the estate of only the "combination" of Ontario duty and estate tax, and until the figures for both Ontario duty and estate tax have been computed it is not correct to make a deduction at all.

2. That in the case of succession duty, the tax is on the disposition or devolution from the deceased to the successor who is called upon to pay the tax, and the amount is dependent on the total value of the

estate, the value of the particular succession and the relationship of the beneficiary to the deceased; however, under the *Estate Tax Act*, the tax is in no way affected by the relationship of the beneficiary to the deceased or by the size of the individual bequest, but is determined by the size of the taxable estate, which is the value thereof after gifts to charity and other permissible deductions have been made.

3. That under the *Estate Tax Act* the tax falls upon the property passing on the death of the deceased and is therefore, in the main, an indirect tax falling primarily on the executor who passes the burden on to the persons who pay, whereas succession duty is essentially a direct tax falling on the successors.

4. That the deduction under s. 7(1)(*d*) of the *Estate Tax Act* should be computed by deducting from the "aggregate net value" of the estate the amount of the exempt gift to charity without regard to the special provisions for estate tax by reason of s. 7(1)(*d*) of the Act, thereby obtaining the net value of the estate. From this figure the deduction of the basic and survivor exemptions produces the tentative "aggregate taxable value" of the estate. The gross tax should then be computed from the "aggregate taxable value" by using the table set out in s. 8(1)(*w*) of the Act. The appropriate Ontario Tax Credit (on the assets which qualify) should then be deducted from the gross tax, and the resulting figure is the estate tax payable (except for the situation envisaged by s. 7(1)(*d*) where the charity is to bear the costs of the succession duty and estate tax).

5. That because of s. 7(1)(*d*) of the *Estate Tax Act* there is not a full exemption of the gift to charity in cases where the cost of estate tax and Ontario succession duty is payable out of the charitable bequest and it is therefore necessary to make one more calculation which is the same as the first calculation except that the computation of net value of the estate is made by subtracting from the "aggregate net value" the amount of the exempt gift to charity less the Ontario succession duty and also less the estate tax found in the first calculation.

6. That the appeal is allowed.

APPEAL from assessment under the *Estate Tax Act*.

The appeal was heard by the Honourable Mr. Justice Gibson at Toronto.

J. J. Robinette, Q.C. for appellant.

The Honourable R. L. Kellock, Q.C. and *M. A. Mogan* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

GIBSON J. now (June 29, 1964) delivered the following judgment:

This is an appeal by the Executors of the Estate of Edward William Bickle under the *Estate Tax Act*, 1958 R.S.C., c. 29 as amended, from an assessment dated July

1964

BICKLE *et al.* v. MINISTER OF NATIONAL REVENUE

Gibson J.

31, 1962, wherein a tax was levied in the sum of $1,132,929.08 on the assets of this estate.

The relevant facts in this matter are that the late Edward William Bickle died at Toronto, in the Province of Ontario, on May 2, 1961, and probate of his Last Will and Testament and Codicil was granted to the Executors, the appellants herein, by the Surrogate Court of the County of York, on May 19, 1961.

By his Last Will and Testament and Codicil, the deceased set aside 50 per cent of his estate to provide for his wife for life, made certain other provisions regarding her maintenance, made certain cash payments and then, provided that after her death, his daughter and grandchildren should take that part of the estate absolutely.

The will and codicil further provided that, after payment of all succession duties and estate taxes, the balance of the residue was to be paid to the E. W. Bickle Foundation.

It is not in dispute that the E. W. Bickle Foundation is an organization, a gift to which, in computing the aggregate taxable value of property passing on the death, gives rise to a deduction from the aggregate net value of the property by virtue of s. 7(1)(*d*) of the *Estate Tax Act*.

By notice of assessment dated July 31, 1962, the Minister of National Revenue assessed the estate tax owing in the sum of $1,132,929.08.

In making such assessment, the Minister computed the amount of the deduction in respect of the gift to the E. W. Bickle Foundation in the sum of $528,712.34.

The "aggregate net value" of this estate, within the meaning of s. 2 of the *Estate Tax Act* is not in dispute.

The sole question in issue is the computation of the amount of the "aggregate taxable value" within the meaning of the *Estate Tax Act;* and the sole difficulty in arriving at this figure arises from a dispute as to how the deduction envisaged by s. 7(1)(*d*) of the *Estate Tax Act* should be computed.

This particular deduction is the amount of the tax under the *Estate Tax Act,* because on the facts of this case, it is necessary to compute the estate tax in order to determine the amount of the gift going to the charity after the tax has been paid.

The subject of the dispute might be put another way, namely by saying that the amount of the deduction, which is in dispute between the parties, which is allowable under s. 7(1)(*d*) of the *Estate Tax Act* is dependent on the amount of tax payable; and at the same time the amount of the estate tax payable under the *Estate Tax Act* is dependent on the amount of this particular deduction which is in dispute.

Only one witness gave evidence, namely Mr. John Kroeker, an actuary with the Department of Insurance of the Government of Canada. He said that the technique employed by the Minister in computing the deduction in dispute was what is known as the "successive approximations" method. By this method, in this particular case, (as will be noted hereunder) the Minister made ten calculations before arriving at what is termed the "Final Computation", by which computation the Minister found the estate tax payable to be $1,132,929.08.

Mr. Kroeker stated that all calculations to the 10th calculation, in his opinion, were mathematically correct, and that the tax applied in each calculation was based on the table contained in s. 8 of the *Estate Tax Act,* and that in this particular case the provisions contained in s. 8(1)(*w*) applied.

He also stated that it required 16 calculations in order to reduce the successions to nil; but the Minister had stopped at 10 calculations because the difference in tax, by not continuing the calculations beyond the 10th to the 16th calculation, was very small.

Exhibit R-1 filed in this appeal sets out the calculations numbered 11 to 16 made by Mr. Kroeker, which demonstrates this.

Mr. Kroeker also said that there was another method which could have been used to compute the estate tax payable, and it is known as the "algebraic method".

Exhibit R-2 is a memorandum consisting of seven (7) pages prepared by him showing how he calculated the amount of estate tax using the algebraic method, and allowing for a deduction under s. 7(1)(*d*) of the *Estate Tax Act.*

Mr. Kroeker's evidence was to the effect that, conforming to the same premises that were adopted in the successive

1964

BICKLE *et al.* v. MINISTER OF NATIONAL REVENUE

Gibson J.

approximations method in the computation by the algebraic method, the same amount of estate tax was computed.

To assist in explaining how this assessment was made, there is set out hereunder the first, the second, the ninth, and the tenth calculations, and the Final Computation made by the Minister by which he found the estate tax payable to be $1,132,929.08:

1st Calculation

Aggregate Net Value	$ 5,242,455.21
Exempt Section 7(1)(*d*) $2,261,847.64—$600,212.95 (P.V.)	1,661,634.69
Net Value	3,580,820.52
Basic and Survivor Exemption	60,000.00
Aggregate Taxable Value	$ 3,520,820 52
Tax on $3,520,820.52	$ 1,637,743 08
Provincial Tax Credit Schedule A	813,011.58
Estate Tax	$ 824,731.50

2nd Calculation

Aggregate Net Value	$ 5,242,455.21
Exempt Section 7(1)(*d*) $2,261,847.64—600,212.95 (P.V.)—824,731.50=	836,903.19
Net Value	$ 4,405,552.02
Basic and Survivor Exemption	60,000.00
Aggregate Taxable Value	$ 4,345,552.02
Tax on $4,345,552 02	$ 2,083,098.09
Provincial Tax Credit Schedule (B)	1,034,009.34
Estate Tax Payable	$ 1,049,088.75

9th Calculation

Aggregate Net Value	$ 5,242,455.21
Exempt Section 7(1)(*d*) $2,261,847.64—600,212.95—1,132,897 61=	528,737.08
Net Value	$ 4,713,718.13
Basic and Survivor Exemption	60,000.00
Aggregate Taxable Value	$ 4,653,718.13
Tax on $4,653,718.13	$ 2,249,507.79
Provincial Tax Credit Schedule (J)	1,116,585.44
Estate Tax Payable	$ 1,132,922.35

10th Calculation

Aggregate Net Value	$ 5,242,455.21
Exempt Section 7(1)(*d*) $2,261,847.64—600.212.95 (P.V.)—1,132,922.35=	528,712.34
Net Value	$ 4,713,742.87
Basic and Survivor Exemption	60,000.00
Aggregate Taxable Value	4,653,742.87
Tax on $4,653,742.87	$ 2,249,521.14
Provincial Tax Credit Schedule (K)	1,116,592.06
Estate Tax	$ 1,132,929.08

Final Computation

Total Value of Estate as per ET.60			$ 5,072,540.45
Increase as per attached ET.85			229,778.55
			$ 5,302,319 00
General Debts	$ 59,616.60		
Add Additional Surrogate Court fees	471 00		
Income Tax 1960 Year	683.46		
	$ 60,771.06		
Less Income Tax Refund 1961 year	$ 14 67		
Disallow Interest on Nixon Note	892.60	907.27	59,863.79
Aggregate Net Value			$ 5,242,455 21
Brought Forward:			$ 5,242,455.21
Exempt Section 7(1)(*d*) $2,261,847.64—600,212.95—1,132,922.35=			528,712.34
Net Value			$ 4,713,742 87
Basic and Survivor Exemption			60,000.00
Aggregate Taxable Value			$ 4,653,742.87
Tax on $4,653,742.87			$ 2,249,521.14
Provincial Tax Credit as per Schedule (K)			1,116,592.06
Estate Tax Payable			$ 1,132,929 08

On this appeal the following cases were cited by counsel for the Minister in support of the assessment made in this matter: *New York Central Railway* v. *Minister of National Revenue*[1] and *John Foster Dulles et al. v. Johnson*[2].

[1] 53 D.T.C. 5; 7 Tax A.B.C. 334. [2] 273 F.R., 2nd Series, 362.

1964

BICKLE *et al.* v. MINISTER OF NATIONAL REVENUE

Gibson J.

Counsel for the appellant in support of the submission that these successive calculations were wrong in law cited: *Arlow* v. *Minister of National Revenue*[1].

The principle of law to be applied in interpreting the provisions of s. 7(1)(*d*) of the *Estate Tax Act* on the facts of this particular case, is not to be found in any decided case in our Courts.

In adjudicating upon the true meaning of this subsection, it seems patent that consideration should be given to the premise that the Parliament of Canada when it enacted s. 7(1)(*d*) of the *Estate Tax Act* must have intended that the calculation of the deduction authorized could be understood and made by the great body of practicing solicitors, accountants, trust officers, insurance advisers, and others, who day to day are called upon to advise individual members of the public in matters such as this and which advice is now usually given in connection with what is called Estate Planning; and that the services of an actuary should not be necessary for these purposes.

I am of the opinion that, although the "successive approximations" method and the "algebraic method" of computing the deduction under s. 7(1)(*d*) may be technically correct, based on the premises stated to the assessor of the Minister who made these calculations, and to Mr. Kroeker the witness in this case, they were in law incorrectly employed in the computation of the deduction in dispute in this particular case.

In the result, I have reached the conclusion that the assessment is wrong in law in two respects.

Firstly, it is wrong in law because succession duty principles were applied in making the calculations to compute the estate tax assessed as payable herein, whereas estate tax principles should have been applied.

Secondly, irrespective of whether succession duty principles were applied, or estate tax principles should have been applied, the First Calculation of the assessor for the Minister, above noted, is wrong in law, and therefore all the other successive calculations, however made, are also wrong in law.

[1] [1954] Ex. C.R. 420.

1964

BICKLE *et al.* v. MINISTER OF NATIONAL REVENUE

Gibson J.

In considering the first error in law, it is relevant to observe that the difference between the succession duty principles and the estate tax principles is fundamental.

As is patent, in succession duty cases, the tax is on the disposition or devolution from the deceased to another person called the successor who is called upon to pay the tax; and the amount is dependent on the total value of the estate, the value of the particular succession and the relationship of the beneficiary to the deceased.

Under the *Estate Tax Act*, however, the tax is in no way affected by the relationship of the beneficiary to the deceased or by the size of the individual bequest. The rate of tax is determined by the size of the taxable estate, and the taxable estate is the amount after gifts to charity and other permissible deductions have been made; and it should be observed that these deductions are true deductions. For example, the statutory deduction for a surviving widow or children can be taken whether or not the surviving widow or children actually benefit; and another example is the deduction for provincial succession duty which may be taken whether or not a provincial duty is paid.

Under the estate tax enactments, the tax falls upon the property passing on the death of the deceased. The executor must pay the entire bill for the estate tax (subject to certain exemptions not relevant here).

The estate tax, therefore, in the main, is an indirect tax falling primarily on the executor who passes the burden on to the persons who pay.

Succession duty is essentially a direct tax falling on the successors.

Considering this particular estate, with estate tax principles in mind, it is clear that the testator made gifts to certain named beneficiaries and also gave these beneficiaries the entire Ontario succession duty and estate tax payable on those gifts.

In my opinion, however, he only gave such duty and tax once. The balance the testator gave to the charity.

The further calculations made by the Minister, in my opinion, are not made by applying true estate tax principles and the amounts found as a result are not amounts given

1964

BICKLE *et al.* v. MINISTER OF NATIONAL REVENUE

GIBSON J.

by the testator by his Will nor are the beneficiaries receiving any benefits from them.

The successive calculations reducing the successions to nil, applying succession duty principles in such calculations, therefore, are not correct in law in this case.

In considering the second error in law, namely the manner in which the first calculation was made, it should be noted that herein lies the substantial differential in the computation of both the deduction under s. 7(1)(*d*) of the Act and the estate tax payable.

As noted above, the assessor for the Minister found the aggregate net value of this estate at $5,242,455.21. The assessor then at this first stage deducted (purportedly under the authority of s. 7(1)(*d*) of the *Estate Tax Act*) the amount of the Ontario succession duty found in the sum of $600,212.95 from the sum of $2,261,847.64, the exempt portion of the estate, and thereby obtained a figure of net value. He then deducted from this figure of net value so found, the basic and survivor exemption of $60,000 to arrive at an aggregate taxable value which he found at $3,520,820.52.

This deduction of the Ontario succession duty, at this stage, in my opinion, should not have been done. It only should have been done commencing with the second and succeeding calculations (if it was correct in law to make succeeding calculations after the second calculation, which in my view it was not).

I say this was incorrect for two reasons.

Firstly, in a case such as this, section 7(1)(*d*) only authorizes the deduction from the exempt portion of the "combination" of Ontario duty and estate tax, and until the figures for both Ontario duty and estate tax have been computed, it is not correct to make a deduction at all.

Secondly, for a reason separate and unrelated to the direction given in this sub-section as to how the deduction should be computed by the employment of the word "combination", the deduction should not have been made for Ontario duty alone in this first computation because estate

tax under the *Estate Tax Act* is of general application throughout Canada and in the case of estates in provinces which have rented their succession duty to the federal government there could not be, in such first calculation, a deduction for provincial succession duty because there would be no figure to insert in such first calculation.

In this connection, I am of the opinion also that, in calculating the aggregate taxable value of this estate, there is nothing mathematically incorrect, whether the successive approximations method or the algebraic method is employed, in refraining from making any deduction from the exempt amount in the sum of $2,261,847.64 of the Ontario duty of $600,212.95 until a first figure is found for the estate tax payable in this matter.

This first figure of estate tax is the computation of it without regard to the fact that duty and tax are payable out of the deductible bequest.

Using the successive approximations approach, therefore, the assessor could have refrained, until he made the second calculation, from deducting the Ontario duty of $600,212.95, at which time he would also have had a first figure for estate tax and, at this stage of his calculations therefore he would have had the "combination" of such duties "including any tax payable under this Part" (which are the directory words employed in s. 7(1)(*d*) of the Act).

Using the algebraic method, it is also possible to give effect to the word "combination" contained in s. 7(1)(*d*) of the Act. It will depend, of course, on the premises upon which the person making the computation proceeds. In this case, Mr. Kroeker made his calculations on the premises of a memorandum delivered to him by the Department of National Revenue which directed that Ontario duty alone should be deducted in making the first calculation.

In any event, the algebraic method is just a method of verifying what may be done under the successive approximation method, and the same result will obtain using this method as will obtain using the successive approximations method. But the result in either case will depend on the

1964

BICKLE *et al.* v. MINISTER OF NATIONAL REVENUE

Gibson J.

premises contained in the instructions given to the person making such computation.

It is my opinion that the calculations made herein by the assessor and by Mr. Kroeker were wrong in law because the instructions given to them were wrong for the above reasons.

In the result, therefore, I am of the opinion that the manner in which the deduction under s. 7(1)(*d*) of the *Estate Tax Act* should be computed so as to find the true estate tax payable is as follows:

a) the first figure to record is the amount of the "aggregate net value" of the estate;

b) from this figure should be deducted the amount of the exempt gift to charity, without regard to the special provisions for estate tax by reason of s. 7(1)(*d*) of the Act. A figure of net value results;

c) from this figure of net value should be deducted the basic and survivor exemption, which in this case is pursuant to s. 7(1)(*b*) of the Act;

d) this computation produces a figure of tentative "aggregate taxable value";

e) the gross tax should then be computed on this figure of "aggregate taxable value" by using the table set out in s. 8(1)(*w*) of the Act;

f) the appropriate Ontario Provincial Tax Credit, (on the assets which qualify) should then be deducted from the said gross tax found by making the computation referred to in the above paragraph, and the figure resulting is the estate tax payable (except for the situation envisaged by s. 7(1)(*d*) where the charity is to bear the costs of the succession duty and estate tax).

Because of s. 7(1)(*d*) of the Act there is not a full exemption of the gift to charity in cases such as this where the cost of the gift of estate tax and of Ontario succession duty is payable out of the charitable bequest, and it is therefore necessary to make one more calculation. This calculation should be done in the same manner as outlined above, except for one matter, viz. that the computation of net value (referred to in paragraph (*b*) above) is done by subtracting from "aggregate net value" the amount of the exempt gift to charity minus the Ontario succession duty and also minus the estate tax found pursuant to clause (*f*) above.

Putting these two calculations, above referred to, in other words and inserting figures, they are as follows:

1st Calculation

Aggregate Net Value		$ 5,242,455.21
Less Exemptions		2,261,847.64
Net Value		2,980,607.57
Less Basic and Survivor Exemptions		60,000.00
Aggregate Taxable Value		$ 2,920,607.57
Tax on $2,920,607.57		$ 1,313,627.78
Less Provincial Tax Credit: (Value of assets which do not qualify for Provincial Tax Credit: $25,624.85)		
$\frac{1}{2} \times \frac{\$2,980,607.57 - \$3.61 - \$25,621.24 \times \$1,313,627.78}{2,980,607.57} =$		651,167.13
Estate Tax Payable		$ 662,460.65

2nd Calculation

Aggregate Net Value		$ 5,242,455.21
Less Exemptions: $2,261,847.64—$600,212.95—$662,460.65 (Estate Tax found in first calculation)		999,174.04
Net Value		$ 4,243,281.17
Less Basic and Survivor Exemptions		60,000.00
Aggregate Taxable Value		$ 4,183,281.17
Tax on $4,183,281.17		$ 1,995,471.83
Less Provincial Tax Credit: (Value of assets which do not qualify for Provincial Tax Credit $30,658.50—computed:)	$ 38,250.63	
less: $\frac{38,250.63 - \$600. \times 999,174.04}{5,242,455.21 - 287,389.57} =$	7,592.13	
	$ 30,658.50	
$\frac{1}{2} \times \frac{\$4,243,281.17 - \$30,658\ 50 \times 1,995,471\ 83}{\$4,243,281.17}$		990,527.08
ESTATE TAX PAYABLE		$ 1,004,944.75

It should be noted that the above computations are made on the assumptions that there is no dispute about the following figures, namely:

1) that the aggregate net value is $5,242,455.21;

2) that the exemptions are $2,261,847.64;

1964

BICKLE *et al.* v. MINISTER OF NATIONAL REVENUE

Gibson J.

3) that the Ontario duty found is $600,212.95;

4) that the assets which do not qualify for Ontario provincial tax credit amount to $25,624.85 on the first calculation, and to $30,658.50 on the second calculation.

Therefore, on these computations I find that the amount of the gift to the E. W. Bickle Foundation is $656,689.94, and the estate tax payable I find is $1,004,944.75.

The appeal, therefore, is allowed with costs and the matter remitted for re-assessment, not inconsistent with these reasons.

Judgment accordingly.