

1956
*June 18, 19
*Oct. 2

IN THE MATTER OF the Estate of and the Settlement
created by HARRY C. HATCH, deceased.
THE TREASURER OF ONTARIO }
(Respondent) }

APPELLANT;

AND

MILDRED HATCH DOYLE, CARR
HATCH, NANCY HATCH, HENRY
CLIFFORD HATCH, JOAN HATCH,
WILLIAM DOUGLAS HATCH and
IRENE FRANCES HATCH, and
THE OFFICIAL GUARDIAN, on behalf
of infants and any unborn grand-
children (*Appellants*)

}
RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Succession duties—Valuation of property—Creation of trust comprising shares in incorporated company—Subsequent redemption of shares and reinvestment of moneys by trustee—Increase in value of shares bought on reinvestment—The Succession Duty Act, 1939, 2nd sess. (Ont.), c. 1, ss. 1(f)(i), 2(1)(d)(i).

A settlor conveyed to a trustee a block of shares in B. Co., to be divided into equal parts for the four children of the settlor. In 1945 B. Co. redeemed the shares, and the trustee purchased shares in G.W. Co. in substitution for them. The settlor died in 1946, at which time the shares in G.W. Co. had greatly increased in value.

Held: The value of the “disposition” for succession duty purposes was the amount received by the trustee on the redemption of the shares in B. Co., rather than the value, as at the date of death, of the shares in G.W. Co. The execution of the trust agreement, coupled with the transfer of the shares, constituted a “disposition” within the meaning

of s. 1(f)(i) of *The Succession Duty Act*, and by s. 2(1)(d)(i) the value of that disposition was the amount of money into which the shares had been converted during the lifetime of the deceased. The subject-matter of the disposition, or the "property", within the meaning of the clauses referred to, was the shares in B. Co., and not a merely equitable interest in the shares or their proceeds.

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Succession Duties—Settlement of personal property for benefit of life tenant and remaindermen—Whether life tenant has "the beneficial interest"—The Succession Duty Act, 1939, 2nd sess. (Ont.), c. 1, s. 1(f)(iv).

The trustee under the settlement above referred to was directed to pay the income on each share to the settlor's child for life, and upon the child's death to pay the capital as directed in the trust deed.

Held: Each child, during his life, had "the beneficial interest" in the shares (or their proceeds) within the meaning of s. 1(f)(iv), and hence payments of income to him were excluded from income by the clause, and were not dutiable. It could not be successfully argued that because of the interests of the persons (as yet unascertainable) who would become entitled on the death of the child, the latter had only "a" beneficial interest, rather than "the" beneficial interest.

APPEAL by the Treasurer of Ontario from the judgment of the Court of Appeal for Ontario (1), affirming the judgment of Stewart J. (2). Appeal dismissed.

J. D. Arnup, Q.C., for the appellant.

J. J. Robinette, Q.C., and *P. B. C. Pepper*, for the respondents *Doyle et al.*

F. T. Watson, Q.C., for the Official Guardian, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario (1) dismissing an appeal by the Treasurer of Ontario from the judgment of Stewart J. (2) which allowed the appeals of the respondents from the statement of succession duty delivered by the Treasurer on October 15, 1952.

On December 27, 1941 the late Harry Clifford Hatch, hereinafter referred to as "the deceased", entered into an irrevocable trust agreement with The Toronto General Trusts Corporation, hereinafter referred to as "the trustee", establishing a trust with respect to 1,000 preference shares of T. G. Bright Co., Limited, hereinafter referred to as

(1) [1955] O.R. 752, [1955] C.T.C. 170, [1955] 4 D.L.R. 14 (*sub nom. RE HATCH ESTATE*).

(2) [1954] O.W.N. 797, [1955] C.T.C. 36, [1955] 1 D.L.R. 237.

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“Bright”, “and such cash and/or other securities as may from time to time be paid, transferred to or purchased by the Trustee” on the instructions of the deceased. The trustee was directed to divide the trust property into four equal parts and to set aside one part for each of the four children of the deceased, the respondents Mildred Hatch Doyle, Carr Hatch, Clifford Hatch and Douglas Hatch, and to pay the net income from each part to the child in respect of whom that part was set aside. Upon the death of a child there was a gift to the issue of such child in equal shares *per stirpes* and if a child died leaving no issue, such child’s part was directed to be added equally to the other parts. On January 2, 1942 an additional 1,000 shares of “Bright” were transferred to the trustee under the trust, and on January 2, 1943, a further 1,000 shares were so transferred.

In May and June, 1945, “Bright” redeemed the 3,000 preference shares at par and the trustee received \$300,000 cash. There were other assets subject to the trust at this time. The trustee used the \$300,000 to purchase 4,000 common shares of Hiram Walker, Gooderham & Worts Limited at \$75 per share.

The deceased died on May 8, 1946, and at this date the 4,000 common shares of Hiram Walker, Gooderham & Worts Limited still formed part of the trust property and had increased in value to the sum of \$558,000.

From the setting up of the trust until the date of the death of the deceased, his children received income from their respective parts of the trust estate, in the aggregate sum of \$89,750. On these facts two questions arose.

On the first question, the Treasurer asserts that the creation of the trust respecting the shares of “Bright” was a “disposition” under *The Succession Duty Act, 1939*, with respect to each beneficiary; that succession duty was payable in respect thereof; and that the valuation of such disposition should be based on the value of the interest of a beneficiary in the trust property as of the date of the death of the deceased. The beneficiaries assert that the valuation of the disposition should be made by including, as to each

beneficiary, the proportionate part of \$300,000 received upon the redemption of the shares of "Bright" and not the proportionate part of the value (at the date of the death of the deceased) of the shares of Hiram Walker, Gooderham & Worts Limited which had been purchased with such \$300,000.

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On the second question, the Treasurer asserts that succession duty was payable in respect of the income received in the lifetime of the deceased by the beneficiaries other than Mildred Doyle, who was at the deceased's death resident out of Ontario; as to the income received by Mrs. Doyle, the Treasurer asserts that it should be included in calculating the aggregate value of the estate of the deceased for the purpose of determining the rate of duty. The beneficiaries take the position that no duty was payable in respect of any of such income, and that it should be excluded in calculating the value of the estate of the deceased.

Stewart J. upheld the contention of the beneficiaries on all points (1) and the Court of Appeal unanimously affirmed his judgment (2).

The applicable statute, hereinafter referred to as "the Act", is *The Succession Duty Act*, 1939, 2nd sess. (Ont.), c. 1, as amended by 1940, c. 29; 1941, c. 55, s. 37; 1942, c. 34, s. 36; and 1946, c. 90*.

The answers to the questions raised do not appear to be affected by the facts that the shares of "Bright" were transferred to the trustee at different times, that other securities were also transferred to it from time to time or that the dispositions in favour of the four children of the deceased were made by means of a single trust document; and it will be convenient to consider, as was done by counsel on the argument before us, the effect of the statute in regard to the disposition made in favour of the respondent Carr Hatch, by the transfer to the trustee of the first 1,000 shares of "Bright".

(1) [1954] O.W.N. 797, [1955] 1 D.L.R. 237.

(2) [1955] O.R. 752, [1955] C.T.C. 170, [1955] 4 D.L.R. 14.

* Now R.S.O. 1950, c. 378.

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Under the terms of the trust agreement, upon the transfer of these shares to the trustee the deceased ceased to have any interest in them. The trustee became the legal owner of the shares and was obligated to set aside, immediately, 250 of them for Carr Hatch, to pay the net income derived from such shares (or from the proceeds thereof) to Carr Hatch during his lifetime, not to sell them except on the written direction of Carr Hatch, and, upon his death to divide them equally among his issue then living *per stirpes*, with special provisions as to issue under 21 years of age and a gift over to the brothers and sisters of Carr Hatch should he die without leaving issue him surviving.

It is common ground that the execution of the trust agreement coupled with the transfer of the shares constituted a "disposition" and that duty is payable with respect thereto. The first question is as to the dutiable value of such disposition and turns upon the construction of s. 2(1)(d)(i) of the Act, which reads as follows:—

2. (1) For the purposes of this Act, . . .

(d) the value of a disposition shall be the value at the date of death of the deceased of the property in respect of which such disposition is made, provided that,—

(i) if such property has been sold for or converted into money during the lifetime of the deceased, the amount of such money shall be the value of such disposition.

It is the contention of the appellant that the property in respect of which the disposition which we are considering was made was not the 250 shares of "Bright" but was the equitable interest in such shares (or the proceeds thereof) acquired by Carr Hatch for his lifetime and the equitable interests therein acquired by such of the other respondents as are contingently entitled upon his death; that none of these equitable interests had been sold for or converted into money during the lifetime of the deceased; and that the dutiable value to be determined is the value of these equitable interests at the date of the death of the deceased. The argument appeared to assume that the total value of these equitable interests would be equal to the total value at such date of the $333\frac{1}{3}$ common shares of Hiram Walker, Gooderham & Worts Limited purchased by the trustee with the \$25,000 resulting from the redemption of the 250 "Bright" shares. It is argued that, as generally speaking the scheme of the Act is to levy duty on the person receiv-

ing a benefit from the deceased, it is important to ascertain not what property the deceased gave but rather what property the beneficiary received, and that none of the respondent beneficiaries at any time received any of the 250 "Bright" shares.

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In construing the words quoted above from s. 2 of the Act, it is first to be observed that these words contemplate that a disposition will be made in respect of property; it is next necessary to have regard to the definition of "disposition" in s. 1(f) and the words which are relevant to the question before us appear to me to be:—

(f) "disposition" shall mean,—

(i) any means whereby any property passes or is agreed to be passed, directly or indirectly, from the deceased during his lifetime to any person . . .

without consideration in money or money's worth . . .

and such means shall include . . .

(a) any creation of trust . . .

Reading these portions of the Act together it appears to me that in the case of a disposition carried out by means of the creation of a trust the word "property" in s. 2(1)(d) was used by the Legislature as meaning the property made subject to the trust or, as it is usually called, "the trust property". As is said in 33 Halsbury, 2nd ed. 1939, s. 156, p. 95:—

In order to create a trust there must be (1) a declaration which is or can be construed as imperative in its terms; (2) a designation of the subject-matter or property to be affected by it within the limits permitted by law; and (3) a designation of the object or the person or persons to be benefited by it within the limits permitted by law.

In the case of the trust deed executed by the deceased the property affected is the 250 "Bright" shares and in my opinion it is in this sense that the word "property" was used by the Legislature. I am accordingly in agreement with the conclusion reached by the Courts below on the first question.

The second question turns on the proper construction of s. 1(f)(iv) of the Act reading as follows:—

(f) "disposition" shall mean, . . .

(iv) any payment during the lifetime of the deceased to any person as a result of the creation of a trust by the deceased, exclusive of the payment of any income derived from any property in which such person had the beneficial interest.

The income received by Carr Hatch from the 250 "Bright" shares during the lifetime of the deceased was, of course, paid to him as a result of the creation of the trust by the

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deceased; and it is contended by the appellant that while Carr Hatch had "a" beneficial interest in the shares from which the income was derived he did not have "the" beneficial interest. It is argued that there are outstanding beneficial interests in the shares in the person or persons, as yet unascertainable, who will become entitled to the shares on the death of Carr Hatch. If this argument is accepted it would seem to follow that the exclusion in cl. (iv) of s. 1 (f) could operate only where the recipient of income under a trust was exclusively entitled to the whole of the corpus from which the income was derived, in which case he could demand the immediate transfer of the corpus, although he might as a matter of convenience leave it in the hands of the trustee. It is difficult to suppose that the Legislature intended to provide for so unusual a situation. In ordinary speech I think that where realty or personalty is settled on A for life with remainders over on his death it may be said that during his life A has the beneficial interest in the settled property. In the case at bar, so long as Carr Hatch lives no one else has any beneficial interest in possession in the shares nor has anyone else any vested beneficial interest in them. The exclusion is, in my opinion, intended to operate where the recipient of income derived from trust property has such beneficial interest in the property as to give him the absolute right to be paid the income. So long as he lives Carr Hatch has such absolute right.

It appears to me that to construe the exclusion as inapplicable to the facts of the case at bar would be virtually to deprive it of all meaning; and that to construe it as applicable will give effect to the apparent intention of the Legislature to avoid double taxation.

For these reasons I am in agreement with the conclusion reached by the Courts below on the second question also.

It follows that I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: W. D. Blair, Toronto.

Solicitors for the respondents other than the Official Guardian: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.
