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*Oct. 23, 24.
*Dec. 21.

EXECUTORS OF ESTATE OF ISAAC UNTERMYER, DECEASED ..... APPELLANTS;

AND

ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA .. .. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Succession Duties—Succession Duty Act, R.S.B.C. 1924, c. 244—Valuation of mining company shares—"Fair market value" at date of death—Method of determining—Price on stock exchange—Question as to allowance for market depression if large block placed for sale—Constitutional law—Imposition of duty under said Act as to shares of British Columbia company owned by deceased domiciled abroad—"Property situate within the province"—Taxation within the province—Direct or indirect taxation.

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

U. died domiciled in the State of New York and owning a large block of shares in a British Columbia mining company. Shares of the company were dealt with on several stock exchanges. The executors of his estate appealed from the judgment of the Court of Appeal for British Columbia (39 B.C. Rep. 533) affirming the finding of a commissioner, appointed under s. 30 of the *Succession Duty Act*, R.S.B.C. 1924, c. 244, as to the "fair market value," for succession duty purposes, of U.'s shares at the date of his death.

Held: The value found below should stand, as it could not be said to exceed the fair market value.

In such cases, where the market price has been consistent and not spasmodic or ephemeral, that price should determine the "fair market value"; no deduction should be made on the assumption that all the deceased's shares would be placed on the market at once, thus depressing the market value, as no prudent stockholder would pursue that course.

Held, further, that the shares in question were "property situate within the province" within the meaning of said Act (*Brassard* v. *Smith*, [1925] A.C., 371, at p. 376, referred to), and that the taxation imposed under said Act in respect of the shares was direct taxation, and *intra vires*.

APPEAL by the executors of the estate of Isaac Untermyer, deceased, from the judgment of the Court of Appeal for British Columbia (1) affirming the finding of A. D. Macfarlane, Esq., a commissioner appointed under s. 30 of the *Succession Duty Act* of British Columbia (R.S.B.C. 1924, c. 244), as to the value, for succession duty purposes, of 318,800 shares of stock owned by the said deceased in Premier Gold Mining Company, Limited, a British Columbia company, with its head office and place of share registration in that province. The deceased died on August 31, 1926, domiciled in the State of New York.

Section 3 of said Act provides that "in determining the net value of property * * * the fair market value shall be taken as at the date of the death of the deceased."

The shares were of the par value of $1 each. The executors' valuation of the shares was $1.19 per share, based on what was alleged to be their book value as at the date of death. The contention of the government department having charge of the collection of succession duties was that the value should be arrived at by taking the market quotation at the date of deceased's death, which was $2.20 per share. The commissioner fixed the value at $2 per share, which was affirmed by the Court of Appeal (2).

(1) 39 B.C. Rep. 533; [1928] 2 W.W.R. 209.

(2) 39 B.C. Rep. 533; [1928] 2 W.W.R. 209.

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It was urged on behalf of the appellants that the market quotation was not a fair criterion; that the test of a "fair market value" was the amount the shares would have brought in the market if offered for sale at the date of the deceased's death; that the evidence shewed that the market quotation at said date was based on share transactions of a very limited quantity, and a comparatively limited market, and that the available markets at the time of death could not absorb all the deceased's shares at the price of $2.20, and that the best price possible could be obtained only through an underwriting syndicate and that such price would not be more than $1.50.

It was also contended on behalf of the appellants that the deceased's shares were not liable to succession duty, on the ground that they were not "property situate within the province" within the meaning of the Act; also that the provisions of the Act purporting to impose duties in a case such as that in question were *ultra vires*, as not being taxation within the province, and as being indirect taxation.

J. W. de B. Farris K.C. for the appellants.

E. F. Newcombe for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—The late Isaac Untermyer, among other property, was possessed at his death of 320,800 shares of Premier Gold Mining Company, Limited, a British Columbia corporation. Of these shares, of a nominal value each of one dollar, two thousand were held by him in trust, and the controversy here is restricted to the balance, 318,800 shares. The total share capital of the company is stated to be 5,000,000 shares. Untermyer was domiciled in New York, and left a will disposing of an estate said to be worth $1,555,000. His executors obtained probate of the will in New York and they also applied for ancillary probate in British Columbia.

It is a feature of the British Columbia *Succession Duty Act, R.S.B.C.*, 1924, c. 244, that probate of a will cannot be obtained until the succession duties are paid, or security for their payment is given to the satisfaction of the provincial authorities (ss. 21 and following). The applicant

for probate, or for letters of administration, must file two duplicate original affidavits of value and relationship, and this was done in the present instance. The amount of the duties depends on the relationship of the beneficiaries to the deceased, and also, of course, on the value of the property transmitted. The Act deals very briefly with the basis of valuation. It states that "net value" means the value of all the property of the deceased after the debts, encumbrances or other allowances or exemptions are deducted therefrom (s. 2). In determining this net value, the "fair market value" is taken as at the death of the deceased, less the allowances and deductions (s. 3). After the filing of the affidavit of value and relationship, the Minister of Finance through his deputy may determine the amount of succession duty (s. 22), or, if he be not satisfied with the value stated in the affidavit, the Lieutenant-Governor in Council may appoint a commissioner under the *Public Inquiries Act* "to inquire into and report what property of the deceased is subject to duty under this Act, and what is the value thereof or of any part thereof." The commissioner gives to the persons applying for probate of the will or for letters of administration one week's written notice of the time and place at which he will make such inquiry, and of the nature of the inquiry, and it is his duty to appraise the property of the deceased "at its fair market value," and to make his report in writing, in duplicate, one copy to be sent to the Lieutenant-Governor in Council, and the other copy to the executor or administrator, as the case may be, or to his solicitor (s. 31).

All this was done in the present case. There was no suggestion that all the property of the deceased had not been disclosed in the affidavit, nor was there any dispute as to its valuation with the exception of these shares. The inquiry was held both in Victoria and Vancouver, several witnesses, chiefly stock brokers and financial agents, were called, and the commissioner—Mr. A. D. Macfarlane, a barrister of Victoria—made his report in writing on December 23, 1927, appraising the shares in question at $2 each, or a total valuation for the 318,800 shares of $637,600. In the affidavit, the executors had valued the shares at what was said to be their book value, to wit $1·1924 a share, or $1.19, making a total valuation of $382,521.92.

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The Act states that any person dissatisfied with the report, or any portion of the report, of the commissioner, may appeal therefrom to the Court of Appeal, and the powers of that court in respect of the appeal are the same as in the case of an ordinary appeal to the Court of Appeal from any judgment of a judge of the Supreme Court (s. 33).

An appeal was brought by the present appellants from the report of Mr. Macfarlane, and this appeal was unanimously dismissed by the Court of Appeal (1). The respondent cross-appealed, seeking to have the value of the shares placed at $2.20 a share, and this cross-appeal was also dismissed (1). The appellants now appeal to this Court from the decision of the Court of Appeal. The respondent has not brought any further cross-appeal.

Mr. Farris, in his argument, attacked the report on two grounds:—

1. The valuation of the shares was too high;
2. The shares in question are not liable for succession duty.

Dealing with the second ground first, Mr. Farris summarized his contentions as follows:—

A. The words "property situate within the province" (s. 2 of the Act) are not intended to include *mobilia* of a deceased non-resident.

B. Intangible property cannot have a *situs* within the meaning of the *Succession Duty Act*.

C. The shares in question are taxable only under section 10 of the Act, and that section is *ultra vires* as being indirect taxation, and as not being taxation within the province.

At the hearing the Court was of opinion that Mr. Farris had not established a case on his second ground of appeal, calling for a reply from the respondent. It is impossible to hold, on the construction of the Act, that this taxation is other than direct taxation. And it appears clear to us that these shares in the capital stock of a British Columbia corporation, which are carried on the share register kept in the province, are "property situate within the province." The question of the *situs* of these shares is concluded by several pronouncements of the Privy Council. It will suffice to refer to the recent case of *Brassard* v. *Smith* (2).

(1) 39 B.C. Rep. 533; [1928] 2 W.W.R. 209.

(2) [1925] A.C., 371.

At page 376 of the report, their Lordships state that the test is "Where could the shares be effectively dealt with?" The answer here must be that these shares could be effectively dealt with in British Columbia. They were, therefore, at the death of the deceased, situate within the province.

There remains only the first ground of appeal, the contention that the valuation of the shares was too high. On this point we have had the benefit of full argument.

I have carefully read the evidence before the commissioner. The deceased died on August 31, 1926, in New York. Shares of the Premier Company, on September 1, 1926, were quoted on the stock exchange of Victoria and Vancouver at $2.20 a share, this referring to sales made the previous day, the day of Untermyer's death.

Dealings in these shares took place on several stock exchanges, but principally in Victoria and Vancouver (the quotations of which may be taken to have been the same; dealings on these exchanges exceeded in volume the transactions on any other stock exchange in so far as the shares of this company are concerned) and in New York (where the shares were dealt with on what is termed the curb). Exhibit 6, filed before the commissioner, shows the Vancouver and New York quotations of this stock, week by week, from the week ending August 29, 1925, to the week ending August 27, 1927. During the period of one year previous to Untermyer's death none of these quotations on the Vancouver stock exchange was under $2, the vast majority being considerably higher than that figure. For instance, the last week before Untermyer's death, the stock stood at $2.27 bid and $2.30 asked; and the lowest quotation during the whole previous year was $2.08 bid and $2.11 asked.

The evidence shows that on this stock, before and at the time of Untermyer's death, a quarterly dividend of eight cents a share was paid. This is an annual return of thirty-two per cent. on the face or nominal value of the shares; and these dividends had been paid regularly up to the time of the enquiry before the commissioner.

According to the *Succession Duty Act,* the property subject to the duty is to be appraised at its "fair market value" at the death of the deceased. The parties before

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the commissioner seem to have considered that the best test of "fair market value" was the price for which Untermyer's holdings could have been sold, but they differed widely in their views of the means whereby such a sale could have been best effected. All the witnesses recognized that it would have been impracticable to attempt to sell at once this large block of shares. Such a course would have broken the market where, of course, to a large extent, price is regulated by the economic law of supply and demand, and it fluctuates according as one or the other of these elements predominates. The suggestion of the respondent was that, if they had decided to sell, the executors would have acted reasonably, that they would have taken time, three months or even a year, to dispose of the stock, and that if they had done so they could have sold it for at least $2.20 a share. The appellants' witnesses thought that no such disposal was possible—they point to the fact that in the closing months of 1926 the stock declined below $2, presumably because a large block had been placed on the market—and they said that the only practicable course would have been to get a group of brokers to underwrite the shares, which would not have given a price exceeding $1.50 a share.

The learned commissioner considered that the possibility of a sale of the shares by private negotiation had not been sufficiently looked into. He arrived at a valuation of $2 per share, a figure which, as I read the testimony, was not suggested by any of the witnesses. He was impressed, he said, by a statement by one of the witnesses that he would adopt other methods than putting the stock on the market in the usual way, and by a remark of another witness that a good broker would be careful not to break the market, and he adds:—

> Using the market quotations as a guide I find that the sum of $2 per share or a total value of $637,600 would represent the fair market value of the Premier Gold Mining shares owned absolutely by the late Isaac Untermyer.

He was of opinion, he had said in a previous part of his report, that "fair market value"

> means such sum as could be obtained by sale of the property under conditions where you have a willing but not an anxious seller and where you have all possible potential purchasers acting under normal circumstances brought into consideration.

We were favoured by counsel with several suggested definitions of the words "fair market value." The dominant word here is evidently "value," in determining which the price that can be secured on the market—if there be a market for the property (and there is a market for shares listed on the stock exchange)—is the best guide. It may, perhaps, be open to question whether the expression "fair" adds anything to the meaning of the words "market value," except possibly to this extent that the market price must have some consistency and not be the effect of a transient boom or a sudden panic on the market. The value with which we are concerned here is the value at Untermyer's death, that is to say, the then value of every advantage which his property possessed, for these advantages, as they stood, would naturally have an effect on the market price. Many factors undoubtedly influence the market price of shares in financial or commercial companies, not the least potent of which is what may be called the investment value created by the fact—or the prospect as it then exists—of large returns by way of dividends, and the likelihood of their continuance or increase, or again by the feeling of security induced by the financial strength or the prudent management of a company. The sum of all these advantages controls the market price, which, if it be not spasmodic or ephemeral, is the best test of the fair market value of property of this description.

I therefore think that the market price, in a case like that under consideration, where it is shown to have been consistent, determines the fair market value of the shares. I do not lose sight of the fact that mining operations are often of a speculative character, that there is always a danger of depletion, and that a time will sooner or later arrive when no more minerals will be available, unless other properties are secured to keep up the supply. But all these elements have an effect on the price of the shares on the stock exchange, and no doubt they were fully considered by the purchasers of the stock at the then prevailing prices.

I would not deduct anything from the market value of these shares on the assumption that the whole of them would be placed on the market at one and the same time, for I do not think that any prudent stockholder would

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pursue a like course. To make such a deduction in a case like the one at bar, would be to render the "sacrifice value" or "dumping value" of the shares the measure of valuation. It is certainly impossible to say that the price allowed by the learned commissioner and approved in the Court of Appeal exceeded the fair market value of these shares.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Farris, Farris, Stultz & Sloan.*

Solicitor for the respondent: *H. C. Hall.*