Privy Council Appeal No. 41 of 1975

Perpetual Trustee Company Limited – – – – *Appellant*

v.

The Commissioner of Stamp Duties – – – – *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES ADMINISTRATIVE LAW DIVISION

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH APRIL 1976

Present at the Hearing:

LORD WILBERFORCE
VISCOUNT DILHORNE
LORD CROSS OF CHELSEA
LORD FRASER OF TULLYBELTON
LORD RUSSELL OF KILLOWEN

[*Delivered by* LORD WILBERFORCE]

This is an appeal from a judgment of the Supreme Court of New South Wales (Waddell J.) deciding that the residuary estate of the late Everest Reginald York Seymour was not exempt from death duty under the Stamp Duties Act, 1920, as amended (" the Act of 1920 ").

Mr. Seymour died on 9 January 1966 and his will and two codicils were proved by the Appellant, named as executor therein, on 29 August 1966.

The residue of his estate was disposed of by Cl. 5 of the will which reads as follows:

> " 5. AS TO the entire residue of my Estate of whatsoever kind and wheresoever situated IT IS MY WISH that my Trustees shall use the same for the purpose of the purchase or construction of a building (or to go towards a Fund for the purchase or construction of a building) in the City of Sydney to serve as a Centre for the cultivation, education and performance of musical and dramatic Arts befitting the City of Sydney AND I DIRECT my Trustees to transfer or to vest such residue of my Estate for the purposes mentioned in the Council of the Municipality of the City of Sydney or the University of Sydney or the New South Wales Government or in such other Public Authority as my Trustees shall consider fit."

On 16 October 1967 the Respondent issued an assessment of the death duty payable in respect of the deceased's estate. This was on the basis that the dutiable estate for the purposes of the Act of 1920 included the residue. The assessment showed the duty payable as $429,370·00.

On 29 October 1970 the Appellant, pursuant to Cl. 5 of the will, selected the University of Sydney as the body to administer the trusts created by that clause and on 3 December 1970 it requested the Respondent to amend the assessment on the basis that the residuary estate should be exempt from death duty by virtue of the Educational Institutions (Stamp Duties Exemption) Act, 1961, (" the Act of 1961 "). The Respondent refused to admit this exemption and on 16 March 1971 the Appellant, under protest, paid the balance of death duty claimed in accordance with the assessment. These proceedings were commenced on 15 March 1974 under s. 140 of the Act of 1920 to recover the duty paid on the ground that the residue was " wrongly included in the dutiable estate ". This claim was rejected by Waddell J. in his judgment dated 7 March 1975.

The exemption was and is claimed on two alternative grounds, namely, (*a*) that the residue was exempted under the Act of 1961; (*b*) that the Act of 1920 itself did not apply so as to tax the residue.

The Act of 1961 contains the following provisions:

" 2. (1) This Act applies to the following educational institutions, that is to say:—

. . . .

(*b*) The University of Sydney, ...

(3) Nothing contained in the Stamp Duties Act, 1920, or in any Act amending that Act, whether passed before or after the commencement of this Act, applies to any real or personal property of any nature or kind whatsoever comprised in any gift, bequest or devise made to—

(*a*) any educational institution to which this Act applies or to the trustees of any such institution or to the person or authority governing and managing any such institution, ...".

The question therefore is whether the Appellant can establish that the residuary estate was comprised in a gift, bequest or devise to the University of Sydney. The argument for the Appellant is that, in the event, the University of Sydney takes the residuary estate and moreover that it takes it by means of a gift or bequest in the testator's will. Admittedly it takes only as Trustee, but the terms of the Act of 1961, listing as it does a wide variety of charitable Institutions, must include gifts to these Institutions as Trustee, at least when the trusts on which they are to hold the subject matter of the gift are trusts for the purposes of the Institution.

Their Lordships however are of opinion that there are two reasons why this argument fails.

In the first place it is necessary to decide at what point of time the Act of 1961 takes effect if it takes effect at all. Upon the death of any person, a claim for death duty, under the Act of 1920, arises by virtue of and upon the death. If the estate or any part of it is to be exempt from the duty which would otherwise be imposed, it is necessary for the personal representative to be able to present to the Commissioner evidence of a state of fact which gives rise to an exemption. If the exemption is claimed under the Act of 1961, and the exemption is claimed by virtue of some disposition contained in the will, it is necessary to be able to point to a gift, bequest or devise in favour of a designated institution. Otherwise there is no answer to the Commissioner's claim. Another way of putting the same point is that a claim, such as the present, for repayment of duty paid can only succeed if the property in question was wrongly included in the dutiable estate (s. 140 of the Act of 1920). The

dutiable estate consists of all property of the deceased referred to in s. 102 of that Act, which (subject to the second argument to be considered below) includes the whole of the residue, and is to be ascertained as at the death. A claim that some property was wrongly included must therefore be made and made good at the point when the dutiable estate is being ascertained. This reasoning was substantially that adopted by the Supreme Court in *Re Smith: Permanent Trustee Co. of N.S.W. Ltd. v. Commissioner of Stamp Duties* (1965) 82 W.N. (Pt. 1) (N.S.W.) 507.

The Appellant sought to answer this argument by reliance upon cases concerned with special powers of appointment which decided that for certain purposes, for example for applying the rules against perpetuities, an exercise of a special power is read back into the instrument creating the power. Reference was made to well known authorities in Australia and the United Kingdom, *Pedley-Smith v. Pedley-Smith* (1953) 88 C.L.R. 177 and *Muir v. Muir* (H.L.) [1943] A.C. 468. But these cases do not establish more than that an exercise of a special power is read back for the purpose of determining the source and the validity of the gift to the appointee: as was said in the High Court it is the instrument creating the power which has the operative effect, (cf. *Pedley-Smith v. Pedley-Smith l.c.* p. 191). They do not establish, as to avail the Appellant they would have to establish, that in point of time the instrument exercising the power is to be dated back. Indeed Lord Hardwicke L.C. decided the contrary in *Duke of Marlborough v. Lord Godolphin* (1750) 2 Ves. Sen. 61, 78 and on this point the decision has not been displaced. (See *Pedley-Smith v. Pedley-Smith l.c.* p. 190 and *Muir v. Muir l.c.* p. 485.)

The relevant question in the present context is whether at the death there was a gift: to this the answer must be that the property might or might not be given to the University of Sydney: clearly it was not given at this stage.

In relation to such a situation—(of " might " or " might not ") there is a substantial body of authority under an Act *in pari materia*, the (Commonwealth) Estate Duty Assessment Act 1914, s. 8(5) of which provides:

> " Duty shall not be assessed or payable upon so much of the estate as is devised or bequeathed or passes by gift *inter vivos* or settlement . . . [for the benefit of designated purposes or institutions]."

This section, on a number of occasions, has come up for consideration by the High Court, which has consistently held that a " might or might not " situation does not attract the exemption. Of the more recent cases reference is made to *Public Trustee v. Federal Commissioner of Taxation* (1964) 112 C.L.R. 326, 331, per Windeyer J., distinguishing special powers of appointment; *Downing v. Federal Commissioner of Taxation* (1971) 125 C.L.R. 185; *Ryland v. Federal Commissioner of Taxation* (1973) 128 C.L.R. 404. In the last mentioned case Barwick C.J. said (p. 410):

> " The question . . . is whether . . . the gift to the Association can be said, as at the date of the death of the testatrix, to fall within the provisions of section 8(5). The duty of course must be assessed as at that date. The gift therefore must then fall within the terms of the exemption. It is nothing to the point that, though it may not do so as at that date, it may do so later, or that though it then falls within the terms of the section, for reasons other than the terms of the gift it may not do so at the date when the gift becomes effective in possession."

Their Lordships consider that the same principles must logically apply to the similar type of exemption conferred by the New South Wales Act of 1961.

The second reason, why the argument for exemption under the Act of 1961 fails, is closely allied to the first: it is that, in their Lordships' opinion, there was no gift or bequest by the will to the University of Sydney at all—not even when the Trustee had selected the University as Trustee under Cl. 5 of the will. The true nature of the gift in Cl. 5 was a gift for charitable purposes which can be summarised as the provision of an Arts Centre befitting the City of Sydney. The testator then designated a number of alternative institutions which might realise these purposes, of which the University was one. The distinction between a gift for charitable purposes, and a gift to a charitable institution (unless there is a total coincidence between the one and the other as, for example, a gift for the purposes of the University of Sydney), is clearly a fundamental one; see as to this *Public Trustee v. Federal Commissioner of Taxation* 112 C.L.R. 326 referred to above and cf. cases under the English Statutes of Mortmain: *Attorney General v. Tancred* (1757) 1 Eden 10; *Attorney General v. Munby* (1816) 1 Mer. 327. It is quite clear, in their Lordships' view, that the Act of 1961 exempts and exempts only gifts of the latter type. The gift here, however, was of the former.

For these reasons the Appellant's claim for exemption based on the Act of 1961 must fail.

The second, and more radical, ground upon which the Appellant relies is that the Act of 1920 does not cover a gift for charitable purposes at all. To enable this argument to be understood it is necessary to cite the relevant charging provisions. These are:

> " 102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property—
>
> (1) (*a*) All property of the deceased which is situate in New South Wales at his death . . .
>
> to which any person becomes entitled under the will or upon the intestacy of the deceased, except property held by the deceased as trustee for another person under a disposition not made by the deceased.
>
> (2) (*a*) All property which the deceased has disposed of, whether before or after the passing of this Act, by will or by a settlement containing any trust in respect of that property to take effect after his death, including a will or settlement made in the exercise of any general power of appointment, whether exercisable by the deceased alone or jointly with another person:
>
> Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust."

The Appellant's argument is that subsec. (1) (*a*) does not apply because it cannot be said, where there is a trust for purposes, that " any person becomes entitled under the will ". Subsec. (2) (*a*) does not, it is said, apply either because that subsection does not apply to property which is " actual " property of the deceased (included, if at all, by virtue of subsec. (1)), but only to " notional property ". This distinction, and the meaning of the word " entitled " in subsec. (1), was considered by their Lordships in the recent appeal of ***The Commissioner of Stamp Duties v. Bone and others*** (No. 18 of 1975).

As regards the first limb of this argument, relating to s. 102 (1) (*a*), there is no doubt that the four concluding lines are difficult to understand. In the predecessor of the Act of 1920 (Act No. 27 of 1898) the position was clearly stated: duty was charged upon " all estate whether real or personal which belonged to any testator or intestate dying after the commencement of this Act " (s. 49 (1)). No convincing explanation has been offered why this comprehensible language should have been changed in 1920. In *Commissioner for Stamp Duties of New South Wales v. Perpetual Trustee Co. Ltd.* [1943] A.C. 425, although this subsection was not directly relevant to the question then for decision, an argument was based upon it, and observed upon by this Board. After citing the four lines of the subsection the judgment adds, " words which can only mean property of which the deceased was the owner " (p. 447)—which is the same conception as that of the Act of 1898, and then proceeds to consider the puzzling exception of property of which the deceased was a trustee. The suggestion is there made that the new wording of the Act of 1920 came in by infection from the (United Kingdom) Finance Act 1894, s. 2 (3) of which excepted from " property passing on the death " property held by the deceased as trustee under a disposition not made by the deceased. If this is right, and no better explanation has been offered, the words " to which any person becomes entitled " should mean the same as " property which belonged to any testator or intestate and passing on his death ". This general meaning would then not be affected by the incomplete particularisation of such property as property to which any person became entitled under the will or upon the intestacy.

So to read the phrase involves a substantial degree of linguistic strain, but on any view the four lines are lacking in logic and clarity and the alternative to such a reading is one which produces an inept result. Exclusion of " charitable purpose trusts " from the ambit of s. 102(1) (*a*) might be intelligble policy, but it is inconceivable that had this been the policy the means of achieving it by the use of the words " persons entitled " would have been adopted. Their Lordships note in passing that the interpretation suggested above is consistent with and makes sense of the later amendments to the Act which from 1939 introduced a differential rate for certain charities.

In their Lordships' opinion therefore the residuary estate does not escape the charge for death duty imposed by s. 102 (1) (*a*). This makes it unnecessary to decide, as their Lordships thought it unnecessary in Bone's case (*u.s.*), whether, if this subsection does not apply, the case falls within the words " property . . . disposed of . . . by will " in s. 102 (2) (*a*) as the learned judge thought that it did.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed. The Appellant must pay the costs of the appeal.

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In the Privy Council

PERPETUAL TRUSTEE COMPANY LIMITED

v.

THE COMMISSIONER OF STAMP DUTIES

DELIVERED BY

LORD WILBERFORCE

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