1949

Sept. 13, 14
Dec. 30

BETWEEN:

CHARLES McCARROLL SMITH and PHYLLIS G. RUDD, two of the successors under and by virtue of the will of MARY C. CATHERINE FISHER, deceased..... APPELLANTS;

AND

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

Revenue—Succession Duty—Dominion Succession Duty Act, Statutes of Canada 1940-41, ss. 3, 4 and 68, Regulation 19—Valuation of interest in estate—"Life estate"—"Income or other estate"—Method of valuing an "annuity, term of years, life estate, income or other estate" in respect of which duty is payable—Appeal dismissed.

The appeal is brought by the beneficiaries of the estate of Mary Catherine Fisher, a daughter of the late Charles Woodward. By the terms of Charles Woodward's will, Mary Catherine Fisher became entitled absolutely to a share of the income arising from certain real estate belonging to him. The appeal is concerned with the valuation placed by the respondent on the interest of the deceased Mary Catherine Fisher in that real estate. Appellants contend that this interest should be assessed at its fair market value.

Held: That Mary Catherine Fisher had acquired a "life estate" or an "income or other estate" which was within the terms of s. 34 of the Dominion Succession Duty Act, Statutes of Canada 1940-41, c. 34, and must be valued accordingly.

APPEAL under the Dominion Succession Duty Act.

The appeal was heard before the Honourable Mr. Justice Cameron at Vancouver.

John Robinson, K.C. and *H. R. Barclay* for appellants.

F. A. Sheppard, K.C., A. J. MacLeod and *D. K. Petapiece* for respondent.

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

CAMERON J. now (December 30, 1949) delivered the following judgment:

This appeal is from an assessment made by the respondent under the provisions of *The Dominion Succession Duty Act*, 1941, as amended. The appellants are respectively the

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nephew and niece of the late Mary Catherine Fisher who died at Vancouver on October 23, 1943, and probate of whose last will and testament and a codicil thereto was duly granted to Cora Lillie Smith, the executrix therein named, who is also the mother of the appellants. The appeal is taken in regard to one matter only, namely, the valuation placed by the respondent on the interest of the deceased in one-third of the income arising from the Vancouver real estate of Charles Woodward, deceased, father of the said Mary Catherine Fisher.

Charles Woodward, a merchant of Vancouver, under date of December 21, 1922, leased to Woodward's Limited, Lot 16 in Block 4, Old Granville Townsite, being the northwest corner of Hastings and Abbott streets in the city of Vancouver, on which is situated a five-storey building forming a portion of a very large departmental store (known as Woodward's Stores) for the term of sixty-five years, at an annual rental of $30,000, plus taxes. In order to further secure the payment of the said rentals, he obtained from Woodward's Limited a mortgage dated April 17, 1924, in his favour, covering an adjoining Lot 15 and the easterly 20 feet of Lot 14 (on which the main part of the departmental store is constructed) in the sum of $150,000. Under date of June 17, 1930, he obtained a further mortgage over the same property for an additional sum of $150,000, making added security in all of $300,000.

Charles Woodward died on June 2, 1937, Exhibit 2 is a copy of his last will and testament and a second codicil thereto duly admitted to probate. He directed his trustees to hold the income from the above-mentioned Vancouver real estate for his two daughters and the daughter of a deceased daughter, in equal shares, and (except for special directions applicable to the income arising therefrom during the first three years after his death) provided that his trustees *should distribute the whole of such income* annually during the lifetime of the last survivor of five persons, namely, his two daughters, (Mrs. Smith and Mrs. Fisher), his granddaughter (Mrs. MacLaren, a daughter of a deceased daughter) and the appellants herein, in equal shares between his two daughters and the said Mrs. MacLaren. Provision was also made that if either of his

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daughters or Mrs. MacLaren should predecease him leaving children, the children of such deceased person should take the share of the mother and if more than one equally between them. Mrs. Fisher survived her father and became entitled to one-third of the income from his Vancouver real estate. On application made, it has been held by Mr. Justice Coady that the gift to Mrs. Fisher of the share of the income from the Vancouver real estate vested in her on the death of her father and did not become divested upon her death. The executrix of the will of Mrs. Fisher is therefore entitled to receive Mrs. Fisher's share in that income until the death of the last of the present four survivors of the group named in the will of Charles Woodward.

The appellants under the will of the said Mary Catherine Fisher are each entitled to the income for life from one-half the residue of Mrs. Fisher's estate, of which residue her interest in the Charles Woodward Estate forms a part.

In assessing the estate of the late Mrs. Fisher in regard to this asset, the respondent proceeded under the provisions of section 34 of the Dominion Succession Duty Act and the applicable regulation made under section 58(2) (*c*) of the Act, all of which are as follows:

34. The value of every annuity, term of years, life estate, income, or other estate, and of every interest in expectancy in respect of the succession to which duty is payable under this Act shall for the purposes of this Act be determined by such rule, method and standard of mortality and of value, and at such rate of interest as from time to time the Minister may decide.

58. (2) The Minister may make any regulations deemed necessary for carrying this Act into effect, and in particular may make regulations:—

(*c*) prescribing what rule, method and standard of mortality and of value, and what rate of interest shall be used in determining the value of annuities, terms of years, life estates, income, and interests in expectancy.

Regulation 19—as amended, and as published in the *Canada Gazette* November 8, 1941, and as in effect at the death of Mrs. Fisher:

19(1) The value of every annuity, term of years, life estate, income, or other estate, and of every interest in expectancy, shall be determined,—

(i) if the succession does not depend on life contingencies on the basis of compound interest at the rate of four per centum per annum with annual rests, and

(ii) if the succession depends on life contingencies, on the basis of interest as aforesaid, together with the standard of mortality as defined in Table II below,

and Tables I, III and IV, below, which are derived from the bases aforesaid, shall be used so far as they may be applicable in the valuation of any succession.

(2) The amount of the duty payable in respect of any succession coming within the terms of section 7(3) (*a*) (ii) shall be determined in accordance with Table V below.

As indicated in para. 8 of the Statement of Defence, the respondent determined that under the will of Charles Woodward the estate of Mrs. Fisher was entitled to receive annually the sum of $10,000 until the death of the last survivor of Charles McCarroll Smith, Phyllis G. Rudd, Mrs. Cora Lillie Smith and Mrs. Eleanor MacLaren who, at the time of Mrs. Fisher's death were, respectively, 30, 33, 57 and 36 years of age, and that the value of that interest on the date of Mrs. Fisher's death, in accordance with the Tables referred to in Regulation 19 and at a rate of 4 per cent, was $213,667.

The appellants do not dispute the accuracy of the computation so made by the respondent but they say that the respondent has proceeded on entirely wrong principles. They allege that it was the duty of the respondent to assess the value of this interest at its fair market value and that the interest here in question does not come within the provisions of section 34 (*supra*). The appellants take the position that the Fisher Estate is entitled to receive a one-third share in the net income from the Vancouver realty and not an income or annuity of $10,000 per year. They submit that the proper valuation to be placed on that asset is what it would realize at a sale; that by para. 4 of the will of Mrs. Fisher this asset was given to her trustee upon trust to sell the same (para. 8 of the will, however, gives the trustee power and discretion to postpone the sale of any part of her estate and to retain the same as an investment thereof without responsibility for any loss occasioned thereby,) and that, therefore, it would be the duty of her trustee to sell the asset within a reasonable period after the death of Mrs. Fisher; and that an intending purchaser (after giving consideration to all the factors involved, such as the uncertainty of the period during which the income would be paid, the possibility of depreciation in value of the leasehold property, the possible failure of the lessee thereof, or of the lease being surrendered and the consequent necessity of having to convert the realty into a self-con-

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tained store, and the incidence of income tax) would not pay more than $55,000 for the asset as a whole, and that that sum—alleged to be the fair market value of the assets—should be the valuation established by the respondent.

The respondent, however, considered that under all the circumstances of the case the asset to be valued was not an interest in realty, but, in fact, a bequest of the sum of $10,000 annually, terminable only upon the death of the last survivor of the four-named persons.

I am of the opinion that his conclusion was right. An examination of the will and codicil of Charles Woodward indicates that apart from other minor bequests which are not here of importance, he desired to provide a fixed income of that amount for his three daughters (later substituting a granddaughter, Mrs. MacLaren, for her mother who had died after the execution of the will). As the will points out, earlier provision had been made for the testator's sons who received no further benefits under the will and codicil. His daughters and their children were therefore his main concern. At the time he executed his will he was the owner of valuable realty which had been leased for a term of sixty-five years at an annual rental of $30,000, and taxes. The lessee was a very wealthy corporation whose covenants could be relied on as an adequate guarantee of the payment of the rental and the due performance of the other covenants contained in the lease throughout its full term. In addition, the lease required the lessee to ensure the property in the name of the lessor in the sum of $100,000, to keep the building in repair (except for ordinary wear and tear and damage by fire, lightning and tempest), and, at the end of the term, to return the property to the lessor with a building thereon worth not less than $125,000, in a state of good repair. There was no provision that the rent would cease or abate in the event of damage by fire. Steps had been taken to collaterally secure the payment of the annual rentals by the two mortgages I have above referred to, totalling $300,000, and being first charges on property worth many times that sum. The value of the land and buildings so leased was approximately $500,000.

While during his lifetime he had agreed with the lessees that the rental during his lifetime should be reduced to

$15,000 per annum (the reason for which is not apparent), he was careful to provide that upon his death the full annual rental of $30,000 would be paid thereafter, and by his will directed his trustees to hold his real estate in trust and to sell it only upon the death of the survivor of the five-named individuals—his daughters and their issue—and that in the meantime *the whole* of the income arising therefrom should be divided equally between his two daughters and the daughter of a deceased daughter. At the time of Mrs. Fisher's death this well-secured lease would continue to run for approximately forty-four years, and upon the expiry thereof if the lessee's covenants had been duly carried out, and even if the same lease were not renewed, the property would be of very considerable value and return a substantial income. Insofar as it was possible for him to do so, Mr. Woodward would seem to have taken every possible precaution to provide for the full annual payment of $10,000 to his daughter Mrs. Fisher (and to her executrix following her death) so long as one of the five-named individuals survived. I am of the opinion, therefore, that when the annual income was so fixed and determined and so well secured by the lease and additional securities, that it should be considered as a gift of that sum of money, payable annually and terminable only upon the death of the last survivor of the five-named persons. The same conclusion was reached by McFarlane, J. in considering the same question under the provisions of the Succession Duty Act of the Province of British Columbia: in *re Succession Duty Act and in re Fisher Estate* (1).

It is submitted, also, by the appellants that the asset to be valid is not one of those referred to in section 34 of the Act (*supra*), and specifically that it is not an annuity. In my opinion, it is sufficient to say that that which the Fisher Estate is entitled to under the will and codicil of the late Charles Woodward is the right to receive one-third of the total annual income from the Vancouver realty until the death of the last survivor of the five-named parties. That being so, that right may be properly described as a "life estate", or "an income or other estate", and so come within the ambit of section 34. It is unnecessary, therefore, to determine whether it is, in fact, an annuity.

(1) (1948) 2 W.W.R. 896.

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Pursuant to the powers contained in section 58 to make regulations in regard to such valuations, Regulation 19 (*supra*) was made by the respondent and was in effect at the time of Mrs. Fisher's death. The valuation made by the respondent under the Tables referred to in Regulation 19 was, therefore, made with statutory authority and it is not suggested that there was any error in such computation.

Counsel for the appellants also pointed out that by establishing a valuation of $213,667 on the one-third interest in the income arising from the Vancouver realty, it would follow that the total value of such income would substantially exceed the highest value placed by any of the witnesses on the land and buildings as of the date of Mrs. Fisher's death—namely, about $500,000. That is so, but the apparent absurdity disappears completely when it is kept in mind that it is not the value of the realty which is the subject of such assessment, but the income therefrom over a long period of years (estimated, I think, at a total of forty-nine years), adequately guaranteed and secured by the collateral mortgages of $300,000 and the value of the covenant of the lessee to pay the rent and of the other special terms of the lease to which I have referred.

For the reasons which I have stated, the assessment is affirmed and the appeal will be dismissed. The appellants will pay the costs of the respondent after taxation.

Judgment accordingly.