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**Cox** *et al* (*Appellants*) *v.* **Minister of National Revenue** (*Respondent*)

Present: Cattanach J.—Ottawa, September 9, November 14, 1969.

*Estate Tax—Gift of money to purchase insurance policy at its cash value—Death of insured within three years—Whether face value of insurance policy taxable. Estate Tax Act, secs.* 3(1)(*c*), 58(1)(*s*)(ii).

On October 22, 1962, *C* transferred to his wife an insurance policy for $50,000 on his life. The policy then had a cash surrender value of $4,550. Two days later *C* gave his wife a cheque for $6,076.50, and, as it was intended, she gave him back a cheque for $4,550 and used the remaining $1,526.50 to pay the next annual premium on the policy. *C* died on September 19, 1965, and his wife as beneficiary of the policy received $50,000 from the insurer. The Minister took the view that *C* had made a gift of the policy to his wife within three years of his death, and that under secs. 3(1)(*c*) and 58(1)(*s*)(ii) of the *Estate Tax Act* the full amount of the policy must therefore be included in the aggregate net value of *C*'s estate.

*Held,* allowing the estate's appeal, there had not been a gift of the policy by *C* to his wife but a gift of money by *C* to his wife followed by a purchase of the policy by his wife from *C*.

*Can. Taxicab Assoc. v M.N.R.* [1954] S.C.R. 82; *Duke of Westminster v C.I.R.* [1936] A.C. 1, referred to; *Carmichael Estate v M.N.R.*, 39 Tax A.B.C. 83, approved.

APPEAL from estate tax assessment.

*M. A. Putnam for* appellant.

*D. G. H. Bowman* for respondent.

CATTANACH J.: This is an appeal by the executors of the estate of Harris Cox from an assessment by the Minister under section 24 of the *Estate Tax Act*[1] whereby the Minister included, in computing the aggregate net value of the property passing on the death of Harris Cox, an amount of $50,000 being the face value of a policy of life insurance issued by the Great West Life Assurance Company on the life of the late Harris Cox which was assigned and transferred by him to his wife, Mary Ada Cox.

The Minister, in assessing the estate as he did, did so on the ground that the proceeds of the policy were part of the aggregate net value passing on the death of the deceased as property disposed of by him under a disposition operating or purporting to operate as an immediate gift *inter vivos,* made within three years prior to his death in accordance with section 3(1)(*c*) of the *Estate Tax Act*[2] and that the value thereof was $50,000 being the fair market value thereof at the date of the death of the deceased in accordance with the definition of "value" in section 58(1)(*s*)(ii) of the said Act.[3]

Prior to trial the parties, by their respective solicitors agreed upon the following statement of facts:[4]

AGREED STATEMENT OF FACTS

1. The appellants are the executors of the will of Harris Cox (hereinafter referred to as "the deceased") and the appellant, Mary Ada Cox, was the wife of the deceased at his death.

2. The deceased died on September 19, 1965.

3. On October 22, 1962, the deceased assigned and transferred to his wife a policy of life insurance issued by The Great-West Life Assurance Company on the deceased's life. The cash surrender value thereof at that date was $4,550.00.

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[1] S. of C. 1958, c. 29.

[2] 3. (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing.

. . .

(*c*) property disposed of by the deceased under a disposition operating or purporting to operate as an immediate gift *inter vivos,* whether by transfer, delivery, declaration of trust or otherwise, made within three years prior to his death;

[3] 58. (1) In this Act,

(*s*) "value",

. . .

(ii) in relation to any other property, means the fair market value of such property, computed in each case as of the date of the death of the deceased in respect of whose death such value is relevant or as of such other date as is specified in this Act, without regard to any increase or decrease in such value after that date for any reason.

[4] Somewhat abbreviated in this report—ED.

4. On October 24, 1962, the deceased delivered to his wife a cheque in the amount of $6,076.50 payable to her. The said cheque was immediately deposited by the deceased's wife in a bank account maintained in her name. On the same day the deceased's wife drew a cheque on her said bank account in the amount of $4,550.00 payable to the deceased and delivered the said cheque to the deceased and he deposited it to his account.

5. On November 8, 1962, The Great-West Life Assurance Company acknowledged receipt of the assignment and recorded the transfer of ownership to the deceased's wife on the same day.

6. It was intended that the deceased's wife would, immediately upon receipt of the said cheque in the amount of $6,076.50, pay to the deceased the sum of $4,550.00, being the cash surrender value of the policy as of the date of transfer, in the manner set out in paragraph 4 hereof, and it was intended that the exchange of cheques, as aforesaid, should be contemporaneous.

7. The purpose for which the deceased gave to his wife the cheque for $6,076.50 was to enable her to pay to him the sum of $4,550.00 (the cash surrender value of the policy) in the manner set out in paragraph 4 hereof and to pay the next annual premium of $1,526.50 to fall due under the policy.

8. As of the date upon which the deceased transferred the policy to his wife she owned beneficially the securities set out in Exhibit ASF-5.

9. Subsequent to the said assignment the deceased's wife paid the annual premium on the policy in the sum of $1,526.50 each year until her husband's death. Immediately prior to her payment of the said premiums the deceased provided her with funds, as follows, and the purpose of his doing so was to enable her to pay the said premiums:

| | | |
|---|---|---|
| October 24, 1962 | $1,526.50 | (being a portion of the sum of $6,076.50 referred to above) |
| October 25, 1963 | $1,500.00 | |
| November 1, 1964 | $1,526.50 | |

10. The beneficiary named in the policy on the date of the assignment was the deceased's estate. After the assignment the wife was named as beneficiary. On the death of the deceased his wife, as beneficiary under the policy, received from the Great-West Life Assurance Company, the sum of $50,000.00, the face amount of the policy.

11. In the estate tax return filed on behalf of the estate of the deceased and dated January 25, 1966, the sum of $50,000.00, being the proceeds of the policy as well as the value thereof as of the date of death of the deceased, was not included in computing the aggregate net value of the property passing on the death of the deceased. In filing the return the sum of $6,076.50 was included by the executors in computing the aggregate net value of the property passing on the death of the deceased.

12. By notice of assessment dated October 13, 1967, the Minister of National Revenue assessed tax under the *Estate Tax Act* and included in computing the aggregate net value of the property passing on the death of the deceased the sum of $50,000.00. He did not include the said sums of $6,076.50, $1,500.00 and $1,526.50 referred to above.

13. The value of the said insurance policy as of the date of death of the deceased was $50,000.00.

14. The purpose of the transfer as described above was to avoid the inclusion in the aggregate net value of the property passing on the death of the deceased the face amount of the policy pursuant to the provisions of section 3(1)(*m*) of the *Estate Tax Act*.

Section 3(1)(*m*) referred to in paragraph 14 of the agreed statement of facts is reproduced in a footnote below.[5]

I have also reproduced by way of footnote section 3(5)(*a*)[6] which sets forth the badges of "ownership" of a policy of insurance for the purposes of section 3(1)(*m*).

There was no dispute between the parties that prior to the transfer and assignment of the policy of insurance herein by Mr. Cox to Mrs. Cox that Mr. Cox was the "owner" of the policy, as contemplated by section (3)(1)(*m*) of the *Estate Tax Act* and that subsequent to the transfer and assignment Mrs. Cox became the "owner" of the policy. She would be the "owner" in either the event that the transfer and assignment of the policy was by gift from her husband or that there was a purchase of the policy from him by Mrs. Cox from funds supplied to her by her husband.

Assuming that on the facts of this appeal there had been a gift of the policy by Mr. Cox to his wife, no submission was put forward by counsel for the appellants that the value of the policy was other than $50,000. There is no question that as at the date of the death of Mr. Cox the value of the policy was $50,000 but that the value of the policy was that identical amount as at the date of the gift of the policy, if there was a gift of the policy, almost three years prior to the date of death, is, I think debatable. However in view of the conclusion I have reached it is not necessary for me to express an opinion on this point which I might otherwise have to do even though the valuation of the policy by the Minister on the assumptions made by him was not challenged and the question was not fully argued before me.

The contention of the appellant is that there was not a gift of the policy by Mr. Cox to Mrs. Cox, but rather there was a gift of $6,076.50 on October 24, 1962, being the total of the cash surrender value of the policy of $4,550 and $1,526.50 being the amount of the premium falling due, followed by gifts of $1,500 on October 25, 1963 and $1,526.50 on Novem-

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[5] 3. (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,

. . .

(m) any amount payable under a policy of insurance effected on the life of the deceased (whether or not to a preferred beneficiary within the meaning of any statute or law relating to insurance applicable to such policy), where such policy was, immediately prior to the death of the deceased,

(i) owned, either alone or jointly or in common with any other person,

(A) by the deceased,

. . .

[6] 3. (5) For the purposes of paragraph (*m*) of subsection (1)

(*a*) a reference to a policy of insurance owned by any person includes a reference to a policy of insurance in which that person had such an estate or interest or in relation to which he had such a general power as would, if he were *sui juris*, have enabled him either alone or in concert or by arrangement with any other person to do any one or more of the following things:

(i) change the beneficiary,

(ii) charge or pledge the policy as security for any purpose,

(iii) borrow from the insurer on the security of the policy,

(iv) cancel, surrender or otherwise terminate the policy, or

(v) assign the policy or revoke any assignment thereof; and

ber 1, 1964, which latter two amounts were funds provided by Mr. Cox to his wife to pay further premiums as they came due, a total of $9,103 as outlined in paragraphs 9 and 10 of the agreed statement of facts.

By virtue of section 4(1) of the Act[7] there shall not be included in computing the aggregate net value of property passing on death the value of any property sold by the deceased by *bona fide* sale for a consideration to be paid or agreed to be paid unless that consideration was otherwise than full consideration of the property sold.

It was agreed by counsel for the Minister for the purposes of this appeal that the cash surrender value of the policy of $4,550 was the value of the policy as at October 22, 1962, the date of its transfer and assignment and that that amount would constitute adequate consideration therefor.

Appended to the agreed statement of facts were a photocopy of the insurance policy in question, the assignment of the said policy by the insured to his wife, an extract from the account of Harris Cox with the Canadian Bank of Commerce, an extract of Mrs. Cox's account with the same bank and a statement indicating that Mrs. Cox owned Canada Savings Bonds to the amount of $16,000.

The only exhibits which merit particular comment are the statements of bank acounts of Mr. and Mrs. Cox.

The statement of Mr. Cox's account indicates that on October 23, 1962, his balance was $1,671.89. On October 24, 1962, he wrote a cheque in the amount of $6,076.50 (which is the cheque payable to Mrs. Cox). If that were the only transaction that day, it would have resulted in a debit of $4,404.61. However, on the same day there was credited to Mr. Cox's account an amount of $4,550 (which is the cheque in his favour written by Mrs. Cox) which results in a credit balance of $145.39. The next ensuing day, October 25, 1962, Mr. Cox deposited $6,374.44, making a balance of $6,519.83.

The bank statement of Mrs. Cox's account shows a credit balance of $453.40 on October 22, 1962. On October 24, 1962, she wrote a cheque in favour of her husband for $4,550. Again if that were the only transaction that day, there would have been a debit of $4,096.60. However on that same day there was a deposit of $6,076.50, being the cheque in her favour written by her husband, which results in a credit balance of $1,979.90.

It is obvious that Mr. Cox's cheque for $6,076.50 to his wife and Mrs. Cox's cheque to her husband for $4,550 were both honoured by the bank.

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[7] 4. (1) Notwithstanding section 3, there shall not be included in computing the aggregate net value of the property passing on the death of a person the value of any such property acquired pursuant to a bona fide purchase made from the deceased for a consideration in money or money's worth paid or agreed to be paid to the deceased for his own use or benefit, unless such purchase was made otherwise than for full consideration in money or money's worth paid or agreed to be paid as hereinbefore described, in which case there shall be included in computing the aggregate net value of the property passing on the death of the deceased in respect of the property so acquired only the amount by which the value of the property so acquired computed as of the date of its acquisition exceeds the amount of the consideration actually so paid or agreed to be paid.

. . .

It is frankly conceded in paragraph 10 of the agreed statement of facts that the transfer of the policy as it was accomplished was to avoid the inclusion of the face value of the policy in the aggregate net value of the property passing on the death of Mr. Cox.

In assessing the appellants as he did, the Minister acted upon the assumptions set out in paragraph 7 of his reply to the notice of appeal as follows:

(*a*) that on or about October 22, 1962, within three years of the death of the deceased, the deceased assigned and gave to his wife a policy of life insurance issued on his life by The Great-West Life Assurance Company;

(*b*) that the said assignment by the deceased constituted a disposition by the deceased of property under a disposition operating or purporting to operate as an immediate gift *inter vivos* made within three years prior to the deceased's death;

(*c*) that the value of the property so disposed of by the deceased as of the date of death of the deceased was $50,000.00 and accordingly the said sum of $50,000.00 was to be included in computing the aggregate net value of the property passing on the death of the deceased by virtue of section 3(1)(*c*) of the *Estate Tax Act*;

(*d*) that the procedure whereby the deceased purported to give to his wife a cheque in the amount of $6,076.50 and the deceased's wife then purported to give back to him a cheque in the amount of $4,550.00 was a scheme or device under which the said policy was to be transferred to the deceased's wife without consideration;

(*e*) that it was intended at all times that the deceased's wife would, immediately upon receipt of the said cheque in the amount of $6,076.50 repay to the deceased the sum of $4,550.00 being the cash surrender value of the policy ostensibly in payment therefor;

(*f*) that the sum of $6,076.50 represented the aggregate of the cash surrender value of the policy of $4,550.00 (which amount was intended would be repaid immediately to the deceased by his wife) and the next annual premium of $1,526.60 to fall due under the policy;

(*g*) that the gift made was in substance and in fact a gift not of the sum of $6,076.50 but of the policy;

(*h*) that the sum of $6,076.50 was intended, as to $4,550.00, to be repaid immediately to the deceased and as to the balance, to be used to pay the premium under the policy and that the sum of $4,550.00 was intended to be paid to the deceased out of the said sum of $6,076.50;

(*i*) that the said purported gift to the deceased's wife of the sum of $6,076.50 as well as the said purported payment by her to the deceased of the sum of $4,550.00 was not a *bona fide* transaction or a gift of cash and subsequent purchase by the deceased's wife of the said insurance policy but rather that the transaction in its entirety constituted a gift by the deceased to his wife of the said insurance policy.

Particularly in paragraphs 6, 7 and 14 of the agreed statement of facts the assumptions of the Minister are not challenged except that in paragraph 7(*d*) to the effect that the procedure was a scheme or device under which the policy was to be transferred to the deceased's wife without consideration and the reference in paragraph 7(*e*) that the repayment of the cash surrender value of the policy by Mrs. Cox to her husband was an "ostensible" payment therefor.

In *Johnston v. M.N.R.*[8] Rand J. in delivering the judgment of the Supreme Court of Canada, said at page 489:

> ... Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant.

The appellants' position is, as I understood it, that in accepting the Minister's assumptions to the extent above mentioned in the agreed statement of facts, there being no other evidence adduced, the appellants did so on the basis that even if the assumptions were justified they do not of themselves support the assessment.

The issue is whether the transactions described in the agreed statement of facts constitute a gift of the policy of insurance to Mrs. Cox by her husband, as contended by the Minister or whether there was a gift of $4,550 by Mr. Cox to his wife followed by a sale of the policy by him to her, as contended by the appellants. The issue, as I see it, therefore resolves itself into a determination of what was the subject matter of the gift, was it a gift of the policy or was it a gift of the money?

I do not think that the acknowledged and over-all purpose of Mr. Cox, which was to transfer ownership of the policy of insurance on his life without cost to her, provides the means of solving the problem as to what was the subject matter of the gift.

The approach taken by counsel for the Minister, as I understand it, is that for all practical purposes Mrs. Cox was given a gift of the insurance policy by her husband. He submitted that the exchange of cheques, between the husband and wife was merely the machinery which the husband used to make a gift of the policy to his wife. Specifically he pointed to the state of their respective bank accounts and drew the conclusion that, since there were not sufficient funds in either account to validate either cheque, without the deposit of the other party's cheque to support the respective cheques written by them, the cheques were merely bookkeeping entries off-setting one another. He contended that, in the result the deceased divested himself of the policy, for which he received no consideration so that the policy was given to his wife gratuitiously which is the very essence of a gift. He added that regard must be had to the reality and substance of the transactions.

It is well settled that in considering whether a particular transaction brings a party within the terms of the *Income Tax Act,* its substance rather than its form is to be regarded (see *Dominion Taxicab Association v. M.N.R.* [1954] S.C.R. 82). The same principle is equally applicable to the *Estate Tax Act.*

However the substance of a transaction must be determined from the legal rights which flow therefrom ascertained upon ordinary legal principles. (See *Duke of Westminster v. C.I.R.* [1936] A.C. 1).

On the agreed statement of facts there are *ex facie* two transactions (1) a gift of $6,076.50 by Mr. Cox to Mrs. Cox and (2) a sale of a policy

[8] [1948] S.C.R. 486.

of insurance by Mr. Cox to Mrs. Cox for $4,550.[9] These transactions were carried out by the exchange of cheques as described and the bank honoured both cheques and made the appropriate entries in the respective accounts of Mr. and Mrs. Cox. These are not mere bookkeeping entries. If parties account with each other and sums are stated to be due on the one side and sums due on the other side of that account and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides have been paid. There is no need to go through the form and ceremony of handing money backwards and forwards. There is actual, not merely notional or constructive payment. The transaction is necessarily bilateral. The evidence or material embodiment of the transaction may consist of book entries made in pursuance of the arrangement but what has happened is, if so intended, equivalent to the receipt of money. (See Lord Wright in *Trinidad Lake Asphalt Operating Co. v. Com's of Income Tax for Trinidad and Tobago* [1945] A.C. 1 at page 10 *et seq.*)

In the present case the exchange of cheques by Mr. and Mrs. Cox and the debits and credits in their respective accounts are evidence of an actual receipt of $6,076.50 by Mrs. Cox from her husband and the payment of her of $4,550 to her husband and that same result might well pertain even if there had been no exchange of cheques if the transactions were susceptible of proof by other means.

In *W. K. Carmichael Estate v. M.N.R.*[10] Mr. Weldon, a member of the Tax Appeal Board, acknowledged that a proper transfer of a policy of insurance can be effected from husband to wife so that it no longer forms an asset of the husband's estate. I agree with that statement. He added by way of *obiter dictum* at page 89:

> ... What both husband and wife should realize, in changing the ownership of a life assurance policy from the former to the latter, is that they are embarking on a scheme fraught with difficulty, particularly if the wife has no separate personal estate, and that they should be prepared to rebut the common law notion that they are one in law, so far as their life assurance policy transaction is concerned, by readily provable, business-like arrangements.

Here the parties did exactly what they intended to do and the exchange of cheques and the bank honouring their respective cheques and consequent debits and credits in their bank accounts are evidence that the arrangement between them was carried out.

Lord Reid, in the concluding paragraph of his speech in *Sneddon v. Lord Advocate*[11] said in an obiter dictum at page 280:

> ... One can figure a case where the donor hands over money with instructions to buy a particular investment with it and the taker is obliged to follow those instructions. In such a case it might be said that the real subject of the gift is that investment.

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[9] Compare paragraph 7 of the agreed statement of facts, "The purpose for which the deceased gave to his wife the cheque for $6,076.50 was to enable her to pay him the sum of $4,550 (the cash surrender value of the policy) . . ."

[10] (39 Tax A.B.C.) 83.

[11] [1954] A.C. 257.

Later in commenting upon the above quoted passage Lord Patrick in *Potter v. C.I.R.*[12] said at page 57 that he did not understand Lord Reid to be expressing a concluded opinion on the matter but was merely pointing out that the matter was debatable.

There is no doubt that Mrs. Cox ultimately received the policy of insurance. She received funds in the amount of $6,076.50 from her husband with which to pay her husband the cash surrender value of the policy for the assignment of the policy to her and she did use part of the funds so given to her as the means of carrying out the purchase of the policy without having to resort to her own resources.

In order for the face value of the insurance policy to be properly included in the aggregate net value of the estate it must be found that the gift of $6,076.50 by Mr. Cox to Mrs. Cox and the sale of the policy by Mr. Cox to Mrs. Cox for $4,550 were shams and that the real transaction was an assignment of the policy without consideration, i.e. a gift with an arrangement to conceal the true nature of the transaction by a sham voluntary gift of money, followed by a sham sale of the insurance policy for a money price.

On the facts as agreed upon I do not think I am entitled to so find.

On the facts of the present case I think that there were two real transactions, not one, a gift of money by Mr. Cox to his wife and a purchase of a policy of life insurance by Mrs. Cox from her husband. Where in fact and in law there were two transactions, one voluntary and one for value, I cannot treat them as being what in fact and in law they are not, a single transaction without consideration.

Accordingly I have come to the view that it cannot be said there was a disposition by way of a gift of the policy of insurance but rather the disposition by way of gift was an amount of $6,076.50 subsequently supplemented by further gifts of $1,500 and $1,526.50.

For these reasons the appeal is allowed with costs and the assessment is referred back to the Minister for re-assessment accordingly.

[12] [1958] T.R. 55.