

(1969) 07 AP CK 0004

In the Andhra Pradesh High Court

**IN RE WEIRS SETTLEMENT TRUSTS. MACPHERSON AND WEIR
(VISCOUNT)**

Date of Decision : 30-07-1969

Acts Referred:

Finance Act, 1994 — Section 1, 2, 7

Citation : (1970) 76 ITR 53

Hon'ble Judges : Harman, J; Harman L., J

Bench : Division Bench

Judgement

July 30. HARMAN L. J. The judgment which Russell L. J. is about to deliver is the judgment of the court.

RUSSELL L. J. This case on estate duty raises questions concerning the relationship between section 1 and 2 of the Finance Act, 1894, and concerning their impact on discretionary trusts at a time when the answer to these question on future deaths is about to be provided by Parliament in the Finance Act, 1969.

The settlement dated November 26, 1957, was made by Viscount Weir on the occasion of the marriage of his widowed daughter Mr. Cartwright ("the wife") to Mr. Eustace Hoare ("the husband"). The sum settled was 50,000. A trust period was laid down, expiring 21 years after the death of the survivor of the then living descendants of King George V or the earlier expiration of 80 years. Clauses 4 was in the following terms :

From and after the solemnisation of the said intended marriage and subject as hereinafter provided the trustees shall pay or apply the income of the trust fund during the trust period to or for the maintenance and support or otherwise for the benefit of all or such one or more to the exclusion of the other or other of the husband and wife and the children or remoter issue of the said marriage for the time being living as the trustees (being at least two in number or a trust corporation) in their absolute discretion think fit with power for the trustees to pay any income which they may decide should be applied for the maintenance or otherwise for the benefit of any child or remoter issue of the said marriage to the guardian or guardians of such child or remoter issue without being bound to see

to the application thereof."

Clause 5 empowered the trustees during the trust period (but only with the written consent of the wife during her life) to transfer the whole or parts of capital to the wife or any issue of the marriage : also to revoke trusts and resettle the funds on other trusts in favour of the husband, the wife, or issue of the marriage, or on a subsequent marriage of the wife in favour of her and that husband and issue of that marriage.

Subject to those trusts capital was given to issue of the marriage with Mr. Hoare living at the end of the trust period per stirpes, and if none to the issue of any subsequent marriage of the wife then living. The ultimate trust was for the wifes daughter by her first marriage and her family if the trustee should so appoint, and subject thereto for that daughter absolutely.

The relevant facts are that (1) the husband died on July 9, 1961, (2) there was no issue of the marriage, and (3) at all times the whole income was paid by the trustees to the wife. The wife was thus left as the sole surviving member of the group of discretionary objects. The Crown claimed estate duty on the trust funds on the husbands death on the ground that an interest extending to the whole income ceased on his death (see section 2(1)(b) and 7(7)(a) of the Finance Act, 1894) : or on the ground that the trust funds were property which passed on the husbands death within the language of section 1 of that Act unaided by section 2.

The contention of the Crown based upon section 2(1)(b) was but faintly urged before us, and we consider could not be sustained in the light of the decision of the House of Lords in *Gartside v. Inland Revenue Commissioner* [1968] A. C. 553 : [1968] 70 ITR 663 That case concerned a claim u/s 43 of the Finance Act, 1940. There had been an advancement of capital to a beneficiary during the currency of a discretionary trust over income expressed to determine on a death, and the question was, whether on that death, duty was exigible in respect also of the advanced funds. The answer depended firstly upon whether there was an "interest" u/s 43 that had been determined by the advance. In order to see whether an "interest" existed the House decided that it must bear the same meaning as that word bore in sections 2(1)(b) and 7(7) of the Act of 1894, and in considering the word "interest" in those two section further decided that the rights of any one object of the discretion could not be so described, and that it was not permissible to attempt in some way group the competing rights of all discretionary objects and label the result as an "interest" ceasing on the death extending to the whole income. It would indeed appear to us difficult in the extreme, the deceased being one of the discretionary objects, to fit such a concept to the language of section 2(1)(b), which refers to "property in which the deceased or any other person had an interest." It is true that *Gartside* was a case of a non-exhaustive discretionary power or trust over income. there being provision for accumulation of unapplied income. But we are unable to distinguish the present case on that ground.

Accordingly the next problem that faces us is whether estate duty was leviable by force of the language of section 1 simpliciter, unaided by section 2. The first question hereunder is the vexed question of the relationship between sections 1 and 2. For the appellant trustees it was argued that the decision in the Arnholz case, *Public Trustee v. Inland Revenue Commissioner* [1960] A. C. 398., established the complete reverse of the views expressed by Lord Macnaghten in *Earl Cowley v. Inland Revenue Commissioners* [1899] A. C. 198, that us to say established that section 2 exhaustively laid down the only circumstances in which estate duty was leviable, and that if the circumstances could not be brought within section 1 as being circumstances set out in section 2, that was the end of the matter, the phrase in section 1 "property which passes on the death" having no content independent of section 2.

Our view of the relationship of the two section is as follows. It is section 1 that imposes the charge of estate duty on the value of property described as "property which passes on the death." Section 2(1) does not describe a different category of property, being property deemed to pass on a death. Section 2(1) states certain situation in relation to property which involve that property in section 1 as property which passes on a death. We see no reason to hold that section 2(1) was intended exhaustively to define and limit the situation in relation to property which thus involve that property. The language is not apt for that purpose : and the fact that the situation envisaged embrace occasions when without guidance from section 2(1) the property would be manifestly "property which passes on the death" does not mean that they embrace all such occasions.

On the other hand, if section 2 states a particular situation and qualifies in some respect in that particular situation the imposition of the charge, for example by an exception in particular instances, that qualification must, whenever that situation arises, operate. Inasmuch as, for example, the situation stated in section 2(1)(b) must be read into the phrase "property which passes on a death" in section 1, so must the exceptions to it.

This was the decision in Arnholz [1960] A. C. 398 and in our view the only one. It was certainly not decided by the majority that as a matter of construction the entire content of "property which passes on a death" in section 1 was to be found in section 2 : nor do we consider that had Viscount Simonds or Viscount Radcliffe intended to express that opinion they would have expressed themselves otherwise than in that direct manner. Moreover, such an expression of opinion would not have been necessary to the decision in Arnholz [1960]) A. C. 398. Viscount Simonds in certain passages in his opinion certainly used language capable of the meaning for which the appellants contend : but he said, at p. 413 :

"Section 2 may well not be a definition section in the sense that any property escapes the charge which is not included in it, though I have not for myself been able to think of any property which would not be so included."

Viscount Radcliffe in *Sanderson v. Inland Revenue Commissioners* ([1956] A. C.

491) (in which he first showed his disapproval of the Cowley³ approach) had said, at p. 498 :

"I have never known it disputed that the exclusion provision which is contained in section 2(3) applies to all property passing, whether it passes u/s 1 simpliciter or u/s 1 so enlarged or interpreted by section 2(1)."

In *Gartside* ([1968] A. C. 553) Lord Reid expressed the ratio decidendi of *Arnholz* ([1960] A. C. 398) as follows, at p. 610 :

"What the case did was to decide that sections 1 and 2 are not mutually exclusive and that the excepting words in section 2(1)(b) are operative in regard to property which falls within that subsection even though that property may also fall within the wide words of section "(per Lord Simonds).

Accordingly, in our judgment the fact that a situation described in section 2 does not exist does not necessarily mean that there is no charge to estate duty : though if a situation described in section 2 does exist, but by reason of an exception or otherwise the section makes the charge impossible or reduces its impact the Crown cannot resort to section 1 as if section 2 did not exist : for in truth sections 1 and 2 are a combined single enactment and do not offer the Crown a choice of two charging clauses. In considering any case it is accordingly correct to look first at the explanatory section 2 in order to see whether a situation exists that is envisaged by that section as bringing some property within the charge of section 1 as "property which passes on the death, "with or without exemption or modification. If no such situation exists it may be possible that the facts of the case reveal a property which passed on a death as that phrase is fairly to be understood by itself.

It was forcibly remarked by Cross J., and urged upon us, that the legislature should not be taken to have given only partial assistance concerning the scope of the phrase "property which passes on a death,"and that section 2 must, therefore, be exhaustive. But partial definition is commonly the case when the relevant enactment merely uses the word "includes." And, as Lord Radcliffe remarked in *Sandersons* case ([1956] A. C. 491), "pass" was not a word of art when the Finance Act, 1894, was introduced, and had been previously used in legislation.

Having formed the view that it is possible, despite some statement in *Arnholz* ([1960] A. C. 398), that there may be a passing on a death though no section 2 situation exists, the next question is whether there was such a passing the trust funds on the husband's death in the present case.

The Crown relied in particular upon *Scott & Coutts & Co. v. Inland Revenue Commissioners* ([1937] A. C. 174) and *Burrell & Kinnaird v. Attorney-General* ([1937] A. C. 286) in the House of Lords, which were decisions involving the determination of a discretionary trust of income on a death followed in one case (*Scott* ([1937] A. C. 174)) by a tenancy in tail in one of the discretionary objects,

and in the other case by another discretionary trust in favour of a group of objects with some overlap in the two groups. In both cases it was decided that there was a passing of the trust funds u/s 1 unaided by section 2 . One argument for the appellants before us was that there could not conceivably be such a mutation in beneficial enjoyment as to constitute a passing u/s 1 simpliciter if, as Gartside ([1968] A. C. 553) had established, no one had an "interest" u/s 2(1) (b). In pursuing that line of argument it became apparent that in involved the proposition that Gartside ([1968] A. C. 553) had apparently by a side-wind established that Scott ([1937] A. C. 174) and Burrell ([1937] A. C. 286) had been wrongly decided, together with, perhaps, the accumulation cases of *In re Hodsons Settlement Trusts* ([1939] Ch. 343) and *Westminster Bank v. Attorney-General* ([1939] Ch. 610). Having regard to our subsequent conclusions we need not express a view on this argument.

This brings us to the final question-whether in the light of case such as Scott ([1937] A. C. 174), Burrell ([1937] A. C. 286), and *In re Kirkwood* ([1966] A. C. 520) the trust found should be said to have passed on the husbands death u/s 1 simpliciter.

The Crown contends : (1) that the effect of the trusts declared by clause 4 in the events which happened is the same as if the clause had in the terms provided at its end that in the event of the husband dying leaving the wife but no issue of the marriage him surviving, the trustees should hold the trust funds upon to pay the income thereof during the trust period to the wife for life : and accordingly (2) the clause provides for a passing of the beneficial enjoyment of the property from the discretionary class to the wife whose life tenancy was thus created. On examination of this analysis of such a clause it emerged that it involved the proposition that in a discretionary trust in which there might from time to time be only one object alive, by deaths, and from time to time to time be only one objects alive, by deaths, and form time to time more than one object alive, by new entrants being born, there could be spelled out a series of discretionary trusts and a series of determinable life interests, Suppose the class to be the children from time to time living of A, B. and C. : A1 and B1 are the living objects : A1 dies and the property passes, B1 acquiring a defeasible of interest : C1 is born and the discretionary trust revives; but C1 is a sickly child and only survives one week and on his death there is once more a passing u/s 1 simpliciter : and so on, potentially. In truth we do not consider that clause 4 does create a life interest as suggested. The wife became entitled to receive the income by virtue of her being not a tenant for life but the sole object of the discretionary trust and under that same trust. In respect of income in hand and not applied at the husbands death, her claim as sole living discretionary object would extend to that as well as to subsequent dividends declared in respect of a trust period (we assume no alteration in the trusts) her estate would have no claim to later-received dividends declared in respect of a period before her death, because her rights under the discretionary trust would not be those of a life tenant but only those of a discretionary object, who must necessarily survive at

the hypothetical case of the class of children of A., B. and C. already mentioned, a sole object for the time being would not necessarily survive at the time when income comes to the hands of the trustees. Similarly, in the hypothetical case of the class of children of A., B. and C. already mentioned, a sole object for the time being would not necessarily be entitled as such to insist upon payment over of every penny come to the hands of the trustees : the trustees on learning of an imminent addition to the class of objects, for example a child of an impoverished C., would be entitled to deep income in hand with a view to applying it for the benefit of C.s child.

It is with these considerations in mind, which show that in a real sense the one discretionary trust remains though but one object is living, that we examine whether the cases of Scott ([1937] A. C. 174), Burrell ([1937] A. C. 286) or Kirkwood ([1966] A. C. 520) lead to the conclusion that there was here a passing on the death u/s 1 simpliciter. It appears to us that they are distinguishable both on their facts and in respect of the ratio decidendi. In this connection we would refer also to the quotation from a judgment in this court in Kirkwood ([1966] A. C. 520) approved by Lord Guest in the House of Lords in the same case in [1969] A. C. 520, and by two other members of th House, concerning the relevance of the method employed in considering liability to estate duty, In Burrell [1937] A. C. 286. (decided on the same day as Scott [1937] A. C. 286 the test was applied of finding a new trust for a new trust, the wifes rights were as a member of the original group and not by virtue of any new qualifications. In the present case there was not a new trust, the wifes rights were as a member of the original group and not by virtue of any new qualification. In Kirkwood³ there was a new trust by virtue of any new trust by a different settler with necessarily a different qualification. In each case there was a fresh start, a new trust theme or purpose compared with the previous trust. In Scott¹ at the death a different trust began from that which then ended : the trust that began was the tenancy in tail under the settlement, by the 5th Earl after he bought it from the 6th Earl. In the present case the same trust continued a discretionary trust the purpose of which was and continued to be to provide for the support of such of the parties to the marriage and their issue as should be from time to time living.

It has always been accepted, a recent example being the speech of Lord Reid in Gartside (4), that the death of a discretionary object leaving two or more objects surviving, will not attract liability to estate duty, the trust continuing. It has been said that the reason for this is that the scope of the interest of the deceased is not capable of measurement. This reason, however, points to section 2(1)(b), which Gartside ([1968] A. C. 553) has dismissed as irrelevant to a discretionary trust. The true reason, in our view, is to be found in the distinction which we have pointed out : in such a case there is no passing u/s 1 simpliciter because there is no new trust in favour of a new group with new qualifications, and the same trust purpose or theme continues unchanged.

In summary, our views are accordingly as follows :

(1) In case such as this, section 2(1)(b) is not applicable : see Gartside ([1968] A. C. 553).

(2) Arnholz ([1960] A. C. 398) does not involve the proposition that in those circumstances it is not possible to find a passing on death.

(3) Scott ([1937] A. C. 174) and Burrell ([1937] A. C. 286) were in terms decisions u/s 1 simpliciter, and (since Gartside ([1968] A. C. 553) Kirkwood ([1966] A. C. 520) must be so regarded as unsound in law, having regard to our view of Arnholz ([1960] A. C. 398).

(4) The case of Scott ([1937] A. C. 174), Burrell ([1937] A. C. 286) and Kirkwood ([1966] A. C. 520) do not, however, lead us to the conclusion that there was a passing u/s 1 simpliciter in this case.

(5) This appeal should be allowed.

Appeal allowed with costs here and below.

Leave to appeal granted conditionally upon the Crown

(a) not seeking disturbance of order in Court of Appeal as to costs, and

(b) not asking the House of Lords to award costs.