[HIGH COURT OF AUSTRALIA.]

MOSS AND ANOTHER . . . . . APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

H. C. OF A. 1947.

SYDNEY, *Sept.* 18.

MELBOURNE, *Oct* 3.

Williams J.

Estate Duty (Cth.)—Dutiable estate—Gifts of money within three years of donor's death—Money so given used by donee for various purposes—Traceability of the money—Identifiable assets—Inclusion in donor's notional estate—Estate Duty Assessment Act 1914-1942 (*No.* 22 *of* 1914—*No.* 18 *of* 1942), *s.* 8 (4).

Section 8 (4) of the *Estate Duty Assessment Act* 1914-1942 provides that property which has passed from a deceased person by any gift *inter vivos* within three years before his death shall for the purposes of the Act be deemed to be part of the estate of the person so deceased.

Held that gifts of money by a deceased within three years before her death formed part of her estate within the meaning of s. 8 (4) only to the extent to which they could still be traced as money or could be traced into other assets and identified and valued at the date of death.

APPEAL under *Estate Duty Assessment Act.*

The executors of Mrs. Sybil Moss, who died on 26th August 1942, appealed to the High Court from the inclusion by the Commissioner of Taxation in the deceased's dutiable estate for the purposes of Federal estate duty of various sums of money given by the deceased to her son and daughter respectively, within three years before her death.

The appeal was heard by *Williams* J. in whose judgment the facts and relevant statutory provisions are sufficiently set forth.

Weston K.C. and *Kerrigan*, for the appellants.

Kitto K.C. and *O'Meally*, for the respondent.

Cur. adv. vult.

Williams J. delivered the following written judgment:—This is an appeal by the executors of Mrs. Sybil Moss, who died on 26th August 1942, from the inclusion by the respondent in her dutiable estate for the purposes of Federal estate duty of sums amounting to £6,899 14s. 6d. given by Mrs. Moss to her son, the appellant G. E. Moss, and sums amounting to £3,603 15s. 10d. given by Mrs. Moss to her daughter, Mrs. Collingwood, within three years of her death.

Section 8 of the *Estate Duty Assessment Act* 1914-1942 provides that (i) subject to this Act, estate duty shall be levied and paid upon the value, as assessed under this Act, of the estates of persons dying after the commencement of this Act. The estates of persons so dying consist partly of property of which they die possessed and partly of property which is notionally considered to belong to them for the purposes of duty. Section 8 (3) defines the actual estate and s. 8 (4) the notional estate for the purposes of the Act. Section 8 (4) provides that property (*a*) which has passed from the deceased person by any gift *inter vivos* within three years before his decease shall for the purposes of this Act be deemed to be part of the estate of the person so deceased.

The substantial question that arises for decision is whether the respondent was entitled to include these sums in the dutiable estate irrespective of the manner in which the son and daughter used the moneys between the dates of gift and that of death, or whether he was only entitled to include these sums to the extent to which they could still be traced as money or could be traced into other assets and identified and valued at the date of death.

When the appeal came on for hearing I was informed that Mrs. Collingwood lived in England and that a writ of commission *de bene esse* would be required to take her evidence before it would be possible to ascertain the extent to which the sums paid to her could still be traced at the date of death. But I was requested by both parties to proceed with the appeal, because if I held that the sums themselves should not be included in the dutiable estate it would be necessary to order that the present assessment should be set aside or amended and the respondent if so advised could then appeal to the Full Court. If that appeal succeeded there would then be no necessity to take Mrs. Collingwood's evidence in England. On the other hand, if that appeal failed, I was informed that the parties would probably agree upon the extent to which the sums paid to her could be traced and upon the value of the gifts to her on that basis.

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Evidence was given of the extent to which the sums given to the son could be traced at the date of death, but I was asked not to value the sum of £6,899 14s. 6d. on this basis, but merely to indicate the traceable items, and I was informed that the parties would then probably agree upon their value.

At the relevant period the son was carrying on the business of a grazier on a station called " Alloway " in the district of Gilgandra. He had an account in Sydney with the Bank of Australasia into which the gifts of money were paid, and an account in Gilgandra with the Bank of New South Wales out of which he paid the expenses of running the station. Some of the sums paid into the Sydney account were transferred to the account at Gilgandra. During the relevant period the station was worked at a loss. Part of the station lands were conditionally purchased lands, and the whole of the station lands were subject to mortgages to secure the principal sum of £10,000, and interest payable thereon at the rate of five per cent. In 1939 the son had insured his life with the Prudential Assurance Co. Ltd. for £5,000 payable to the assured or his executors, administrators or assigns on the assured attaining the age of ninety years, or his previous death. The premiums were £39 13s. payable quarterly until he attained the age of ninety years. There is evidence that part of the sums given to the son were used to purchase a motor truck for £400, to build a shed on the station costing £80, to purchase cattle for £150, war savings certificates worth £125, and Commonwealth bonds of the face value of £200, and that the son still retained these assets at the date of death. There is also evidence that by the application of the rule in *Devaynes* v. *Noble* (*Clayton's Case*) (1) about £50 of the sums paid into the bank account in Sydney still remained in that account at the date of death. There is also evidence that part of the gifts of money were used to pay the interest on the mortgages, the instalments of the conditional purchase moneys, and the premiums on the policy of life insurance.

There is no dispute that, if the sum of £6,899 14s. 6d. should not be included in the dutiable estate at that figure, the value of the truck, shed, cattle, war savings certificates, and Commonwealth bonds at the date of death, the instalments of conditional purchase moneys so far as they represented capital, and the sum of about £50, should be so included.

But there is a dispute whether the sums paid as interest on the mortgages, as instalments of the conditional purchase moneys so far as they represented interest, and the premiums on the policy of insurance should be included. In my opinion, all these sums

(1) (1816) 1 Mer. 572 [35 E.R. 781].

should be included. If the interest on the mortgages had not been paid the debt for interest would have been added to the debt secured upon the station lands and to that extent the value of the equity of redemption would have been reduced. The payments of interest are therefore reflected in the value of the equity of redemption at the date of death. In the same way the payment of interest on the conditional purchases is reflected in their value at the date of death. The policy of life assurance is a contract between the son and the assurance company whereby the company agrees that in consideration of the payment of the premiums it will pay the sum of £5,000 at a future date. The policy had a cash surrender value after it had been in force for two full years. Each payment of premium was in substance an instalment of purchase money and was reflected in the value of the policy at the date of death. In order to trace gifts of money into identifiable assets it is only necessary to establish an underlying identity in a practical sense, and in this sense it can, I think, be said that the equity of redemption of the station lands, the conditionally purchased lands, and the policy of life assurance had an increased value at the date of death at least to the extent of these payments.

But Mr. *Kitto's* main contention was that the matter under discussion is quite irrelevant because, in the case of an out and out gift of money made by a deceased person within three years of death such as the sums in question, s. 8 (4) (*a*) of the *Estate Duty Assessment Act* requires that the sum given should be included in the dutiable estate notwithstanding that it is not existing in an indentifiable form at the date of death, and that such a gift should be valued at the amount of money given. In my opinion, this contention is opposed to the true construction of the Act irrespective of authority, and conflicts with *Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (1), a case relating to s. 8 (4) (*a*), and with *Commissioner of Stamp Duties* (*N.S.W.*) v. *Perpetual Trustee Co. Ltd.* (*Watt's Case*) (2), a case relating to the corresponding provisions of s. 102 (2) (*b*) of the *Stamp Duties Act* 1920 (N.S.W.). The overriding consideration is that the assets included in the dutiable estate of a deceased person both actual and notional must be valued at the date of death. Money can only be included in the category of property which passed from a deceased person by a gift *inter vivos* within three years of death if it is property within the meaning of s. 8 (4) (*a*). It is not disputed that if the gift is a gift of tangible property which is destroyed before the death of the

(1) (1941) 65 C.L.R. 134.

(2) (1925) 25 S.R. (N.S.W.) 467; (1926) 38 C.L.R. 12.

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donor there is no property which can be valued at the death, or that if such property increases or diminishes in value between the date of the gift and that of death it is the increased or diminished value of the property which should be included in the dutiable estate. It could hardly be contended that if the gift is £50 in notes, and the notes are subsequently destroyed prior to the death of the donor, the sum of £50 should be included in the dutiable estate. If this is so, it is difficult to see why a gift of money which has been spent and cannot be traced into any property at the date of death should be included. It is clear that a sum of money spent by the deceased within three years before his death does not form part of his actual estate, and there is no logical reason that I can see why a similar sum given by the deceased but spent by the donee within the same period should form part of his notional estate. In my opinion, a gift of property consisting of money must, like any other kind of property, be capable of being identified in its original or some derivative form at the date of death before it can be included in the notional estate, and must be valued in the form in which it exists at that date.

Mr. *Kitto* relied upon statements in the judgments in *National Trustees Executors & Agency Co. of Australasia Ltd.* v. *Federal Commissioner of Taxation* (1) that s. 8 of the *Estate Duty Assessment Act* is dealing with only one subject of taxation, namely, all property which a man has owned at any time within a period of one year (now three years) before his death and has not disposed of for valuable consideration. But the Court in that case was discussing the question whether s. 8 infringed s. 55 of the Constitution because it dealt with more than one subject of taxation. The gift *inter vivos* in that case was a gift of real estate, and there is nothing to suggest that the Commissioner had not valued this gift at the date of death. There is nothing in the judgments to suggest that gifts of money should be valued on a different basis to other gifts of property. In *Watt's Case* (2) the testator had within one year of his death paid £200 for the benefit of a friend who was going to America. £109 was paid for the steamship ticket and the balance was given to the friend who took it to America and spent it there. The Supreme Court of New South Wales and this Court on appeal held that the sum of £200 did not form part of the notional estate of the deceased within the meaning of s. 102 (2) (*b*) of the *Stamp Duties Act* 1920 (N.S.W.). That section provides that property comprised in any

(1) (1916) 22 C.L.R. 367.

(2) (1925) 25 S.R. (N.S.W.) 467; (1926) 38 C.L.R. 12.

gift made by the deceased within three years before his death shall be part of his notional estate. Section 105 (2) of that Act provides that, save as in the Act expressly provided, the value of the property included in the dutiable estate shall be estimated as at the date of the death of the deceased. It was held in *Watt's Case* (1) that the sum of £200 was not assessable because only property situated in New South Wales and identifiable at the date of death formed part of the dutiable estate. The relevant passages in the judgments of the Supreme Court and of this Court are set out in *Trustees, Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (2), and I shall not repeat them. It is true that for the purposes of estate duty the personal property of the deceased, actual or notional, need not be situated in Australia at the date of death But the *Estate Duty Assessment Act* like the *Stamp Duties Act* requires that the actual and notional property shall be valued at the date of death, so that it is just as necessary under the former as under the latter Act to be able to identify the notional property at this date in order to ascertain its value. In my opinion this was so decided in *Trustees, Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (3). In that case all the members of the Court thought that there had been gifts totalling £42,000 in money by the deceased to the trustee company so that the trustee company might apply and pay for 42,000 shares in Bennie Teare Pty. Ltd. But it was held unanimously that the value of these gifts was not the value of the money at the date of the gift, but the value of the shares into which the money could be traced and identified at the date of death. In *Vicars* v. *Commissioner of Stamp Duties* (*N.S.W.*) (4), *Latham* C.J., who did not sit in *Trustees, Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (3), said with reference to s. 105 (2) of the *Stamp Duties Act* 1920 (N.S.W.) that a provision in an Act that the value of the property included in the dutiable estate is to be estimated as at the date of death of the deceased "shows that, unless there is some express provision to the contrary, the property included in a dutiable estate must be property in existence at the date of the death of the deceased." In reference to *Trustees, Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (3) his Honour said (5) that "The question which arose was what should be valued, as at the time of the death, in a case where such a gift (of money) had plainly been made, but the money held by the trustees under a settlement had been used to purchase shares, . . . it was held that, in order to apply the admitted principle

(1) (1925) 25 S.R. (N.S.W.) 467; (1926) 38 C.L.R. 12.
(2) (1941) 65 C.L.R., at pp. 147, 148.
(3) (1941) 65 C.L.R. 134.
(4) (1945) 71 C.L.R. 309, at p. 321.
(5) (1945) 71 C.L.R., at pp. 330, 331.

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that the estate (as defined in the Act) should be valued as at the death of the settlor, the shares could be valued as having 'passed' by virtue of the gift of money." In the same case, *Dixon* J., who also did not sit in *Trustees, Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (1), said of *Watt's Case* (2) that the conclusion rested on three considerations "(1) . . . (2) . . . and (3) on the adoption by the Act of the date of death as the time when value is to be ascertained as well as for other purposes" (3).

For these reasons I am of opinion that the respondent should not have valued the sums of money given to G. E. Moss and Mrs. Collingwood at £6,899 14s. 6d. and £3,603 15s. 10d. respectively, and that he should only have included these sums in the dutiable estate to the extent to which they could be identified and valued on 26th August 1942. I therefore order the respondent to amend the assessment under appeal by including in the dutiable estate of Sybil Moss deceased the gifts of money made by the deceased to her son G. E. Moss and her daughter Mrs. Collingwood within three years before her death totalling £6,899 14s. 6d. and £3,603 15s. 10d. respectively at the value of the moneys and other assets into which these gifts can be traced and identified on 26th August 1942 in lieu of the values of £6,899 14s. 6d. and £3,603 15s. 10d. Order that the further hearing of the appeal be adjourned. Reserve all questions of costs.

Order that the respondent do amend the assessment under appeal by including in the dutiable estate of Sybil Moss deceased the gifts of money made by the deceased to her son G. E. Moss and her daughter Mrs. Collingwood within three years before her death totalling £6,899 14*s.* 6*d. and* £3,603 15*s.* 10*d. respectively at the value of the moneys and other assets into which these gifts can be traced and identified on 26th August* 1942 *in lieu of the values of* £6,899 14*s.* 6d. and £3,603 15*s.* 10*d. Further hearing of the appeal adjourned. All questions of costs reserved.*

Solicitors for the appellant, *W. R. Fincham & Co.*

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. B.

(1) (1941) 65 C.L.R. 134.

(2) (1925) 25 S.R. (N.S.W.) 467; (1926) 38 C.L.R. 12.

(3) (1945) 71 C.L.R., at p. 338.