

Privy Council Appeal No. 31 of 1966

Eric Blechynden Moller and Ralph Blechynden Moller – *Appellants*

v.

Commissioner of Estate Duty – – – – – *Respondent*

FROM

THE FULL COURT OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 7TH JUNE 1967

Present at the Hearing :

VISCOUNT DILHORNE

LORD HODSON

LORD GUEST

LORD UPJOHN

SIR HUGH WOODING

[*Delivered by* LORD GUEST]

This appeal raises a procedural point relating to a claim by the respondent for \$46,423,149 being as to \$23,920,000 for estate duty on property valued at \$46,000,000 and as to the balance interest thereon. Nils Eric Amelon Moller died in Singapore on 13th March 1954 and Probate of his Will was issued by the Supreme Court of Hong Kong on 28th March 1955. He left a wife, four sons, two of which are appellants in this appeal and two daughters. None of the sons was an executor of the deceased's Will.

Before his death, the deceased had on 15th May 1940 transferred certain shares in 11 Shanghai registered companies to his four sons. The transfers were acknowledged by the deceased in a Memorandum of Gift executed on the same day.

On 19th August 1940 the four sons transferred the shares to Mollers Trusts Ltd. a company incorporated in Shanghai under the Hong Kong Companies Ordinance, 1932. On 30th September 1941 by a Deed of Undertaking and Guarantee which recited the Memorandum of Gift the four sons covenanted to pay to the deceased during his life and after his death to his wife during her life the sum of £1,000 per month and Mollers Trusts Ltd. covenanted *inter alia* to pay the monthly sums, if the sons defaulted in payment.

Estate duty is payable in Hong Kong on *inter alia* property taken under a disposition made by the deceased purporting to operate as an immediate gift *inter vivos* if *bona fide* possession and enjoyment shall not have been assumed by the donee immediately and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise.

It is on this basis that the Commissioner of Estate Duty for Hong Kong claims that estate duty is payable on the death of the deceased upon the shares in Mollers Trusts in virtue of section 5 and section 6 (1) (c) of the Estate Duty Ordinance. The basis of the Commissioner's claim is that in terms of section 6 (1) (c) the shares were taken under a gift by the deceased of which property *bona fide* possession and enjoyment was not assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise. The appellants have at all times disputed that any

estate duty is payable on the deceased's death in respect of the shares either under section 5 or section 6(1)(c) of the Estate Duty Ordinance. With these and other objections this appeal is not concerned.

The parties are in dispute as to whether the appeal procedure provided by section 19 of the Estate Duty Ordinance is applicable in the circumstances under which the appellants deny the validity of the claim for estate duty and any liability to estate duty on the shares. The question of the applicability of section 19 was submitted by a Special Case under Order 9, Rule 8 of the Code of Civil Procedure for the decision of the Supreme Court of Hong Kong. That Case contained a statement, which in their Lordships' opinion is of cardinal importance in this appeal in these terms:

"No account or affidavit within the meaning of the Estate Duty Ordinance has been delivered by any of the four sons or called for by the Defendant in regard to the said shares and none of the four sons has ever paid any Estate Duty in connection with the death of the deceased on the said shares or at all."

The Full Court of Hong Kong (consisting of Rigby, Huggins and Jennings JJ.) to which the Special Case had been remitted decided on 22nd June 1966 that section 19 was applicable. The appellants appealed by leave to the Board.

It is at the outset necessary to quote in full the provisions of section 19 (1) of the Estate Duty Ordinance which is in the following terms:

"Any person aggrieved by the decision of the Commissioner with respect to the amount of estate duty payable on an affidavit or account or with respect to the repayment of any excess duty or to any claim for additional duty by the Commissioner, and whether he is aggrieved on the ground of the value of any property or the rate charged or otherwise, may, on payment of, or giving security for, as hereinafter mentioned, the duty claimed by the Commissioner or such portion of it as is then payable by him, appeal to the Supreme Court within three months from the date of the decision and the amount of the duty shall be determined by the Supreme Court and if the duty is less than that paid to the Commissioner the excess shall be repaid. Where the value as alleged by the Commissioner of the property in respect of which the dispute arises does not exceed one hundred thousand dollars, the appeal under this section shall be to the Supreme Court in its summary jurisdiction."

It will be noted that the person aggrieved must as a condition precedent to his appeal to the Supreme Court either pay or give security for the duty claimed by the Commissioner. Every executor has to specify in accounts annexed to an affidavit for the Commissioner all the property in respect of which estate duty is payable upon the death of the deceased and is accountable for the estate duty in respect of all the property of which the deceased was competent to dispose at his death (section 11(4)) and has to pay the estate duty in respect of that property on delivering the affidavit for the Commissioner (section 9(2)). Where property passes on the death of the deceased and his executor is not accountable therefor, *inter alios* every person to whom any property so passes for any beneficial interest in possession, is accountable for the estate duty on that property and has to deliver to the Commissioner an account specifying the property in question (section 11(5)). Those accountable are required to pay the duty due on such property on delivering the account (section 9(4)).

It is the Commissioner's duty to check the accounts and affidavits delivered to him (section 11(8)) and it is only if no payment has been made on delivery of the accounts and affidavits or less has been paid than he thinks is due or no payment has been made on property on which liability to duty arises, that a claim by the Commissioner for estate duty can arise.

Their Lordships now approach the critical sub-sections of section 11 which are in the following terms:

“(9) When the Commissioner has ascertained the amount of estate duty payable in respect of any accounts delivered to him in pursuance of this Ordinance he shall notify the accountable person of his decision by means of a certificate in the prescribed form. If such amount exceeds the amount of estate duty already paid in respect of the said accounts the accountable person shall forthwith pay the excess to the the Commissioner.

(10) In every case in which the Commissioner is satisfied that too much estate duty has been paid, the excess shall be repaid by him.

(11) Where the accountable person discovers that for any reason too little estate duty has been paid he shall forthwith deliver to the Commissioner a further account, verified by oath, and shall at the same time pay the difference between the estate duty chargeable according to the true value of the estate and the estate duty already paid.

(12) Where the Commissioner discovers that any property which ought to have been disclosed by affidavit or account has not been so disclosed he shall notify the accountable person and call upon him to disclose such property and pay the estate duty thereon, and the accountable person shall, within one month of the giving of such notice by the Commissioner, deliver an original or a further account, as the case may require, disclosing such property, and shall at the same time pay the estate duty thereon.”

The decision of the Commissioner, under sub-section (9) is, it is important to note, a decision as to amount, the amount of duty payable “in respect of any accounts delivered to him”. If no accounts have been delivered to him, he has no power to decide the amount of duty. He may decide that too little has been paid by an accountable person either on an original account delivered to him or upon a further account delivered under sub-section (11). He may by virtue of sub-section (12) call upon an accountable person to disclose property which ought to have been disclosed by affidavit or account and has not been and that person has then to deliver an original or further account disclosing that property. If he does so, sub-section (8) applies and after checking the account, the Commissioner is able to give his decision as to the amount of duty payable in respect of that account by virtue of sub-section (9).

Turning now to section 19(1), it appears that the provisions of that sub-section relate back to and follow the sequence of the sections just quoted from section 11.

The first category is of persons aggrieved by the decision of the Commissioner “with respect to the amount of estate duty payable on an affidavit or account”. Such persons may be an executor who is accountable under sub-section (4) of section 11 and a non-executor who is accountable under sub-section (5) of section 11. In each case the “decision” of the Commissioner in respect of accounts delivered to him is made under sub-section (9) of section 11 by notifying the accountable person of his “decision by means of a certificate in the prescribed form”. So far it is clear that it is only the amount of the estate duty which is the subject of appeal procedure under section 19(1). The second category of persons aggrieved under section 19(1) is those aggrieved by the decision of the Commissioner “with respect to the repayment of any excess duty” under sub-section (10). This again would relate to the amount of the duty; the appeal would be by a person aggrieved by the decision of the Commissioner on a claim for repayment of duty as to the amount of the excess. Finally, the third category of persons aggrieved is those aggrieved by the decision of the Commissioner with respect “to any claim for additional duty by the Commissioner”. This would cover the case envisaged in sub-section (12), where the Commissioner discovers that property which ought to have been disclosed by affidavit or account has not been disclosed. He notifies the person accountable and the latter has to deliver an original or further account. In each of these three categories of persons aggrieved

the person accountable has to deliver an account to the Commissioner and the Commissioner can only act under sub-section (9) after he has ascertained the amount of estate duty payable in respect of accounts delivered to him "in pursuance of this Ordinance" and then and then only does he notify his decision to the accountable person by means of a certificate in the prescribed form. The delivery of accounts to the Commissioner is a prerequisite to his making a decision.

It is to be noted that the Commissioner's powers under section 11 (12) can only be exercised against an accountable person—that is to say, against an executor (which by definition includes an administrator) who is made accountable expressly by section 11 (4) of the Ordinance or, for example, against a person to whom property has passed in circumstances such as are prescribed by section 6 (1) (c). But where, as here, a serious issue has been joined between the Commissioner and donees of property as to whether any such circumstances can be established, the Ordinance confers no authority on him to decide that the donees are accountable. Until their accountability has been determined, he has no power to call on them under section 11 (12).

The duty is clearly "additional duty" under sub-sections (11) and (12) and it may be that the third category was inserted *ex abundante cautela* to make it clear that those persons aggrieved have an equal right of appeal with the first category of persons aggrieved. Whether that be so or not, it is plain that section 19 (1) only comes into play when the Commissioner has made a "decision" under section 11 (9) and he can only make a decision after an account has been delivered to him by an accountable person. His authority to make a "decision" is conferred only by sub-section (9) and by section 26 (2) which deals with a separate matter. Although it would have sufficed if only the first category was in section 19 (1), to give any person aggrieved by the Commissioner's decision as to the amount due on the accounts the right of appeal, the draftsman wanted to make it clear beyond all doubt that section 19 (1) gave a right of appeal against all the decisions under section 11. To do so, he gave an express right not only as to decisions on the accounts but also as to repayment of excess and also to a decision with respect to any claim for additional duty. The section is not very happily drafted, but the appeal is with regard to his decision with respect to a claim for additional duty and his decision with respect to any such claim is his decision on the account delivered pursuant to a claim under sub-section (12). It cannot be anything else than on an account or affidavit.

Further as it is clear beyond doubt that the first two categories relate only to amount, it would be very odd if the third category went far wider and included questions of liability or accountability.

The respondent contended that section 19 was applicable to the circumstances of this case and that the appellants must as a condition of their appeal being heard pay or give security for the duty, unless excused by section 19 (3). He argued that the letter of 18th March 1966, together with the letter of 14th April 1966, both sent to the appellants' solicitors, the first of which enclosed a "Revised Assessment Memorandum" setting out details of the duty and interest demanded amounting to \$46,432.149-60, constituted a decision of the Commissioner with respect to a claim for additional duty by the Commissioner under section 19 (1). This, he argued, was a sufficient compliance by the Commissioner with sub-section (12) calling on the person accountable to disclose the property and pay the duty. In the first place, "a decision with respect to any claim for additional duty" is not an apt description of what the Commissioner has done. A decision to prefer a claim is not a decision with respect to a claim which implies the existence of a claim at the time of the decision. In the second place, the Commissioner has acted before the second part of sub-section (12), namely the delivery by the accountable person of an account has been complied with. To read the sub-section in the way in which the respondent does would give the Commissioner an option of calling on the accountable person to pay without delivering an account

in which case the appeal procedure of section 19(1) might or might not be applicable according to the proper construction of section 19(1) or of waiting for the delivery by the accountable person to the Commissioner of an account in which case the appeal procedure of section 19(1) would *ex concessis* be applicable.

Their Lordships are unable to construe section 11(12) so as to import in the circumstances of this case a decision of the Commissioner upon a claim for additional duty.

It was also argued for the respondent that the word "otherwise" to be found in section 19(1) in conjunction with the requirement that the person must be aggrieved by the decision of the Commissioner with respect to any claim for additional duty indicated that something other than amount was intended and was in fact applicable to a dispute as to liability. Their Lordships are not satisfied that this is necessarily so. It may be that where the Commissioner has acted under sub-section (12) and the accountable person has delivered an account, there might be a dispute as to whether the account disclosed property on which estate duty was payable, a question not raising the value of the property or the rate of duty. But in any case their Lordships do not consider that the use of the word "otherwise" in the context can enlarge the otherwise plainly restrictive scope of the section.

The provisions of section 19 are penal against the subject for it compels him to pay or provide security for the amount of duty claimed as a condition of appeal against the decision of the Crown and must therefore be construed against the Crown in cases of doubtful construction. These provisions (if applicable) at all events where, as in this case, any obligation to account, still less to pay any duty is denied, impose a great hardship upon the subject; this is indeed the main reason for the appeal before your Lordships for the appellants have been compelled to provide a large security which they maintain is crippling if they have to continue to provide it for the number of years which the substance of the dispute may take to determine them. Sections 11 and 19 can and must literally be applied, harsh though they may be, to cases where the subject has submitted to a degree of accountability by rendering an account acknowledging some liability to account (their Lordships would emphasise these latter words) upon which the Commissioner has some material provided by the subject to enable him to reach a "decision" based on the subject's own documents. But their Lordships cannot see how the sections can as a matter of construction be applied to cases where no such liability to account is admitted and no accounts have been delivered. Having regard to paragraph 2(vii) of the Special Case to which reference has already been made in this judgment, it seems to their Lordships that these sections have no application to the facts of this case.

The Commissioner has power by means of ordinary Crown process to recover estate duty where liability to the duty is contested and this would presumably be the method of procedure which the Commissioner would adopt in order to establish that the persons charged are accountable. Their Lordships are satisfied that this question cannot be decided within the framework of section 19(1).

The judges in the Supreme Court were not at one in giving their reasons for their decision. Rigby J., President of the Full Court had considerable hesitation in agreeing with his brethren. His doubt was whether the Ordinance could be construed as to make the Commissioner the judge in his own cause for the purpose of arbitrarily imposing a liability to duty on the taxpayer. This is precisely the ground upon which Jennings J. based his judgment when he said:

"Power is given to the Commissioner in section 11(12) of the Ordinance to require an accountable person to disclose within a month such property which the Commissioner discovers ought to have been disclosed by affidavit or account and at the same time to pay the estate duty thereon. In my view this power authorises the Commissioner

to decide what property, which has not been disclosed by affidavit or account, ought to have been so disclosed and to assess forthwith the duty payable thereon, and consequently empowers him to decide questions of liability as well as quantum in respect of additional duty."

Their Lordships can see no warrant in the Ordinance for any such wide power being given to the Commissioner. Huggins J. agrees that the Commissioner has proceeded "somewhat informally" under section 11 (12) and that he did not follow strictly the provisions of this section. He expresses the view that it does not matter that there was no account delivered before the Commissioner made his decision. As their Lordships have already indicated, they regard a strict compliance with section 11 (9) and (12) as necessary and that it is essential that before there is decision by the Commissioner under section 19 (1) he must have had the accounts delivered to him.

Their Lordships desire to add that section 11 (9) requires the Commissioner to notify his decision "by means of a certificate in the prescribed form". They were informed that no certificate had been prescribed under section 25 of the Ordinance. There was in this case no decision of the Commissioner contained in a certificate and until the form of the certificate has been prescribed, it is difficult to see how there can be any valid notification of the Commissioner's decision against the subject. If this point had been taken by the appellants either in the Court below or in their Case, it might well have been a factor decisive against the Commissioner. Their Lordships however do not base their decision on this ground, but it serves to reinforce their view that there is a necessity for formality and a strict compliance with the terms of section 11.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the decision of the Full Court of Hong Kong, dated 22nd June 1966 should be reversed and that the question of law for the Opinion of the Court in the Special Case, dated 23rd May 1966 should be answered in the negative.

No order for costs was made by the Full Court by agreement of parties, but the respondent must pay the appellants' costs of the appeal before the Board.



In the Privy Council

**ERIC BLECHYNDEN MOLLER AND
RALPH BLECHYNDEN MOLLER**

v.

COMMISSIONER OF ESTATE DUTY

**DELIVERED BY
LORD GUEST**