15, 1968

IN THE PRIVY COUNCIL No. 32 of 1967

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

IN THE MATTER of the estate of RITA BUCKLAND THOMPSON late of Mosman, in the said State, Married Woman, deceased

- and -

IN THE MATTER of the Stamp Duties Act 1920-1965

- and -

IN THE MATTER of the Appeal by CECIL WOLSEY CURTIS THOMPSON and ROSCOE WILLIAM GYLES HOYLE against the assessment of Death Duty upon the estate of the said deceased

B E T W E E N:

CECIL WOLSEY CURTIS THOMPSON and ROSCOE WILLIAM GYLES HOYLE Appellants

- and -

THE COMMISSIONERS OF STAMP DUTIES Respondents

C A S E FOR THE RESPONDENTS, THE COMMISSIONERS OF STAMP DUTIES

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1. This Appeal is brought by leave of the Supreme Court of New South Wales (Court of Appeal)

from a judgment of that Court dated 30th June 1967 which dealt with the validity of certain provisions of the Stamp Duties Act, 1920-1966.

2. The Stamp Duties Act is an Act of the Parliament of New South Wales providing, inter alia, for the imposition of death duty in the event of the death of persons to whom the Act applies.

3. The questions for decision in this appeal relate to the validity of ss. 102 (2)(a) (and alternatively 102 (2)(j)) of the Act, as extended by the provisions of s. 102 (2A). These sections are in the following form:-

Section 102

> "For the purposes of the assessment and payment of death duty but subject as hereinafter provided the estate of a deceased person shall be deemed to include and consist of the following classes of property:-
>
> (1) .....
>
> (2) (a) All property which the deceased has disposed of, whether before or after the passing of this Act, by will or by a settlement containing any trust in respect of that property to take effect after his death, including a will or settlement made in the exercise of any general power of appointment, whether exercisable by the deceased alone or jointly with another person:
> Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust.

.....

(j) Any property over or in respect of which the deceased had at the time of his death a general power of appointment.

(2A) All personal property situate outside New South Wales at the death of the deceased, when -

(a) the deceased dies after the commencement of the Stamp Duties (Amendment) Act, 1939; and

(b) the deceased was, at the time of his death, domiciled in New South Wales; and

(c) such personal property would, if it had been situate in New South Wales, be deemed to be included in the estate of the deceased by virtue of the operation of paragraph (2) of this section."

4. The definition of "general power of appointment" in section 100 is as follows:-

"General power of appointment" includes any power or authority which enables the donee or other holder thereof, or would enable him if he were of full capacity, to appoint or dispose of any property or to charge any sum of money upon any property, as he thinks fit for his own benefit, whether exercisable by instrument inter vivos or by will or otherwise but does not include any power exercisable by any person in a fiduciary capacity for the benefit of others only arising under a disposition not made by himself, or exercisable as tenant for life under Part IV of the Conveyancing and Law of Property Act, 1898, or as mortgagee."

5. The judgment from which the present appeal is brought determined that s.102 (2)(a) as extended by s. 102 (2A) was valid insofar as it purported to bring to duty the personal property outside the State of New South Wales which was disposed of by the will of the testatrix by virtue of the bequest of "all property over which I have a power of appointment under the will of my late father the late John Arthur Buckland".

6. Because of such determination, the court did not consider it necessary to decide the alternative question whether s. 102 (2)(j) as extended by s. 102 (2A) would validly bring to duty the said personal property.

7. The facts relevant to this appeal are set out in the case stated by the respondent Commissioner. The value of the personal property outside the State of New South Wales which passed under the will of the testatrix by virtue of the said bequest was $288,167.43.

8. The questions asked in the said stated case were as follows:-

1. Whether the said sum of $288,167.43 was for the purposes of the assessment and payment of death duty properly included in the final balance of the dutiable estate of Rita Buckland Thompson?

2. If the answer to question (1) is in the negative whether any, and if so, what part of the said sum of $288,167.43 was properly so included?

3. How should the costs of this stated case be borne and paid?

9. The court answered the questions as follows:-

1. Yes.
2. Not answered.
3. By the appellants.

10. The court consisted of the President of the Court of Appeal (Mr. Justice Wallace) and Judges of Appeal Walsh and Jacobs. The President agreed with the judgment of Walsh J.A. Walsh J.A. held that the fact that the testatrix had disposed by will of personal property outside the State by virtue of a general testamentary power of appointment was sufficient to make the testatrix' domicile in New South Wales at the date of her death a valid criterion for the imposition of death duty in her estate upon that property. His Honour was of the opinion that s. 102 (2)(a), as extended by s. 102 (2A), was within the legislative power of the State of New South Wales which, under s. (5) of the Constitution Act, 1902, has power, subject to the provisions of the Commonwealth of Australia Constitution Act, to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever.

11. Jacobs J.A. agreed with Walsh J.A. that the questions asked in the stated case should be answered as set out in paragraph 9 hereof. His Honour said that he thought the court should hold that the law governing the exercise of a general power of appointment is the law of the domicile of the donee of the power. His Honour held that it was within the competence of the Parliament of New South Wales to bring to duty the property the subject of a general power of appointment.

12. It was argued by the appellants that the fact that the definition of "general power of appointment" included a power to charge any sum of money upon any property led to the invalidity of s. 102 (2)(a) so far as it was purported to be extended by s. 102 (2A). Walsh J.A. thought it arguable, as a matter of construction, that, when s. 102 (2)(a) refers to property which the deceased has disposed of, it does not apply at all to property in respect of which all that the deceased has done is to charge a sum of money on that property. The respondent submits that this is the true construction of the provisions of

s. 102 (2)(a).

13. Walsh J.A. also held that, should the above mentioned construction of s. 102 (2)(a) be not accepted and should the definition of "general power of appointment" in s. 100 of the Act be too widely expressed to be entirely valid, the provisions of s. 144 of the Act acted to save so much of the definition as related to a power in the donee to make the property his own. Jacobs J.A. agreed with His Honour's conclusion that, even if there be a partial invalidity, the whole operation of s. 102 (2A) is not displaced. This view was based upon the application of the provisions of s. 144.

14. The respondent Commissioner submits that the decision of the Court of Appeal was correct and adopts the reasons stated by Walsh J.A. and by Jacobs J.A.

15. The respondent respectfully adopts the whole of the reasoning of Walsh J.A. and in particular relies upon the following passages of His Honour's judgment.

"On this territorial question, reliance is placed by the appellants upon the decision in Johnson -v- Commissioner of Stamp Duties (1956 A.C. 331), which denied validity to subsection (2A) insofar as it purported to extend to property not in New South Wales the provisions of paragraph (g) of section 102 (2). It is claimed that the reasons, for which it was held in that case that the domicile of the deceased was irrelevant and could not be regarded as providing a sufficient nexus, are applicable here. It is claimed that domicile in New South Wales of a deceased who had a "general power of appointment" (as defined in the Act) is irrelevant and cannot support the imposition of duty upon property outside New South Wales which has been disposed of by the deceased in exercise of the power or on property over or in respect of which the deceased had such a power.

It was suggested on behalf of the appellants that, if references to a general power had been left to be read without any extension of the ordinary meaning of that expression, there would be a stronger case for the validity of the legislation, but it was argued that, because the expression has been given a meaning going far beyond its ordinary meaning, it becomes clear that the attempt to impose duty goes beyond the point where a relevant nexus can be seen to exist and that this makes wholly invalid the provision, so far as it seeks to make dutiable, by reference to paragraphs (a) or (j), property which is outside New South Wales.

But the Commissioner claims that, although the provisions extend to powers which would not ordinarily be described as general powers, yet the circumstance that they are limited to powers by virtue of which the donee of the power is entitled to make the property his own, or to dispose of it as if it were his own, has the effect that the local domicile of the person having that power provides a sufficient basis for legislation which imposes death duty in respect of that property.

It could not be disputed that it is within power of the Parliament to bring into the dutiable estate of a person dying domiciled here personal property actually owned by that person but situated elsewhere, as it has done in section 102 (1). See Commissioner of Stamps (Queensland) v. Counsell (57 C.L.R. 248). Further, it is within power to bring to duty personal property outside New South Wales, which such a deceased does not own at the time of death but has formerly owned, and has transferred by way of gift. See Trustees Executors and Agency Co.Ltd. -v- F.C.T. (49 C.L.R. 220), where at 227 it was stated by Rich, Dixon and McTiernan J.J. that this was clearly not beyond power. The decision was on the Estate Duty Assessment Act of the Commonwealth, but, in my opinion, it is equally applicable in relation to the territorial

competence of a State Act imposing death duty. Thus it is shown that, at least to some extent, the connection for the purpose of death duty laws between a local domicile and personal property abroad can be regarded as a relevant and sufficient nexus in relation to "notional" property of the deceased, as well as in relation to property actually owned by the deceased at the time when the law operates.

On the other hand, it is clear that a local domicile is not always a sufficient basis for the validity of a law imposing a tax on property abroad, an interest in which passes on the death of the deceased. Having regard to the way in which the law operates and to its subject-matter, the domicile of the deceased whose death provides the occasion for the levying of the duty may in some situations be regarded as irrelevant. This was decided in Johnson's case in relation to the extension of paragraph (g) by sub-section (2A). In that case in the Supreme Court, the judgment of the Court (55 S.R. 398 at 409) included the following statements:-

> "It is well established particularly in taxation cases, that a subordinate legislature has wide powers with respect to persons domiciled or dying domiciled within its territory, and with respect to the taxation of the property of such persons even though that property be situate outside the jurisdiction.
>
> In this case, however, the duty is levied on or in respect of property which is not nor ever was property belonging to the deceased whose domicile in New South Wales is regarded as the touchstone of liability. The case may be exemplified as being one in which the duty is levied on or in respect of the property of 'A' because of the domicile in the jurisdiction of 'B'. In our opinion the suggested nexus is completely irrelevant, and, consequently, in so far

as s. 102 (2A) purports to extend the operation of par. (g) it is, we think, invalid".

If the whole of the passage quoted is taken literally, it may be said that domicile can never be validly made "the touchstone of liability" in respect of property which is not and never was "property belonging to the deceased". But, in my opinion, such a statement would go too far unless the qualification is made that, for death duty purposes, it may sometimes be proper to treat property which a person does not actually own as being property "belonging to" that person. I feel little doubt that for such purposes personal property over which a domiciled person has a completely general power of appointment can validly be treated by the Parliament of the State in the same way as personal property which he actually owns and, therefore, can be brought to duty, although the deceased never was the actual owner of it. In Commissioner of Stamp Duties -v- Stephen (1904 A.C. 137 at 140) Their Lordships, after stating that the distinction between a person's own property and property which is not his own but which he can dispose of in any way he pleases by virtue of a power conferred on him is well established, went on to say:-

> "Notwithstanding, therefore, the difference between a person's own property and property which he can dispose of as he pleases and does dispose of, although it is not his own, the distinction is one which the Legislature can hardly be expected to recognise when imposing probate or other duties payable on the death of a person who has exercised his power of disposition. Accordingly, modern Acts imposing such duties are almost always if not always, so framed as to include both classes of property; and this is reasonable and just".

The view which I have stated is not at variance with Johnson's case. In the Privy

Council, Their Lordships, who decided that the Supreme Court had reached the right conclusion, cited part, but not all, of the passage from its judgment which I have set out above. In my opinion, we are not bound by Johnson's case to decide this appeal in favour of the appellants. The provisions of paragraph (g) are different in kind from the other paragraphs of that subsection which create categories of notional estate. Paragraph (g) operates on the death of a person upon whose death there is a cesser of a limited interest in property and it operates to the extent to which a benefit accrues or arises by that cesser and it brings that property into the dutiable estate of that person. But the property so brought into the estate is segregated and a separate assessment is made in respect of it. The duty thus separately assessed is made payable out of the "non-aggregated" property and by the person in whom that property is vested. See sections 105A and 114A. The imposition of this duty seems to me to be different in character from the imposition of duty upon property on the footing that it was owned by the deceased or on the footing that the property itself or other assets expended for the benefit of others in its acquisition would have been owned by the deceased and would have augmented his estate, but for the manner in which he has chosen to arrange his affairs for the benefit of others and so as to diminish the amount of his estate at the date of his death. He may diminish his own actual estate by such methods as making gifts inter vivos, by paying insurance premiums or purchasing annuities. The policy of death duty statutes, both here and elsewhere, has been that such measures are to be prevented (to the extent enacted) from reducing the amount of duty to which his estate will be subject. Then the Act goes a step further and seeks to exact duty upon property which would have formed part of the actual estate, if the deceased had chosen to exercise for his own benefit a power to make property his own, where that property is not in his actual estate because he has chosen to exercise the power for the benefit of

others or not to exercise it at all. The character of such property in regard to the relationship between it and the deceased person may, I think, be regarded for death duty purposes as being much more akin to that of property of the deceased and of property which was his own but has been transferred to others, than is that of the property described in paragraph (g). I am of opinion that the reasons for which it has been denied that the domicile of the deceased is relevant to property described by paragraph (g) do not require that the domicile should also be regarded as irrelevant in relation to property over which the deceased has had a power of appointment which enabled him to make it his own or to direct by his will how it is to devolve.

.....

I have already indicated above some more particular considerations to be taken into account when the challenge relates to a death duty enactment and the criterion of dutiability selected, in relation to personal property situated elsewhere, is the domicile of the deceased in New South Wales. In the present case, so far as the Commissioner relies on paragraph (a), there are some particular points relating to its construction to which I must refer later. Subject to those matters, the conclusion which I have reached is that that paragraph, as extended by subsection (2A), is within power. Paragraph (a) postulates that the deceased had disposed of the property in question either by his will or by a settlement containing a trust to take effect after his death and it may operate where that will or settlement has been made in the exercise of any "general power of appointment". Because of the definition in s. 100, it extends to cases in which the power is not in the ordinary sense a general power but it is limited to cases where the power is such that it was open to the deceased, if he wished to do so, to make the property his own or to transmit it by his will as if it were his own.

This is, I think, sufficient to enable the Legislature to impose death duty as if it were his own. Although the provision may extend in some cases to powers which are such that section 23 (3) and section 46B of the Wills, Probate and Administration Act would not operate upon the property, the important thing is that, although the deceased could have appointed the property to himself or to his executors and administrators, in which event it would have formed part of his actual estate, he has disposed of it in some other way. I think that, in relation to such property, if it is personal property situated abroad, there is a sufficient relationship between it and the domicile in New South Wales of the person who has that power over it to make competent the levying of death duty on it in the estate of that person.

In Grey -v- Federal Commissioner of Taxation (62 C.L.R. 49 at 59) Rich J. said:-

> "In order to prevent resort to gifts and dispositions inter vivos on the part of men of property who manifest more benevolence to their offspring or other claimants on their bounty than interest in the budgets of their country some provision is almost invariably included in such Acts whereby property, the subject of the gift is treated as comprehended in the deceased's estate: Cf. Horsfall -v- Commissioner of Taxes (Vict.) (24 C.L.R. 422 at 441). Further, as a general power of appointment enables the donee of the power to dispose of property as if it were his own, it is usual to levy duty upon property subject to such power as if it were part of the estate passing upon death".

At 63 Dixon J. said:-

> "It is quite clear why it was thought proper to include in the dutiable estate property over which a testator had exercised a general testamentary power of

appointment. It is because the donee of a general power of appointment has a right of disposition which is in many respects the equivalent of property. The power enables him to appoint to himself or his executors. It enables him to devise or bequeath the property subject to the power as freely and effectually as if it were his own. That property becomes subject to his debts as if it were his own estate. He may release the power instead of exercising it. Further, all these things he may do for valuable consideration. A general power immediately arising, therefore, has many practical results which ordinarily flow from the ownership of property".

It may be acknowledged that those observations may not be wholly applicable to all of the powers to which section 100 refers. Nevertheless, I think that they support the assimilation of legislation imposing duty on personal property abroad, owned by a deceased domiciled here, to legislation imposing duty on property with which that person could have dealt, so as to make it belong to himself or to his estate, where he has actually exercised his power and had disposed of the property in favour of someone else."

16. The respondent Commissioner also submits that s. 102 (2)(j) as extended by s. 102 (2A) validly brings to duty the property the subject of this appeal.

17. The respondent Commissioner humbly submits that the present appeal should be dismissed with costs for the following amongst other

R E A S O N S

1. BECAUSE s. 102 (2)(a) as extended by s. 102 (2A) of the Stamp Duties Act, 1920-1966, validly brings to duty the property the subject of this appeal;

2. BECAUSE the decision of the Supreme Court of New South Wales (Court of Appeal) in the present case and the reasons given therefore are correct;

3. BECAUSE s. 102 (2)(j), as extended by s. 102 (2A) of the Stamp Duties Act, 1920-1966, validly brings to duty the property the subject of this appeal.

H.A. SNELLING, Q.C.

Solicitor General 10

G.D. NEEDHAM, Q.C.

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O N A P P E A L

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C A S E

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