

(1957) 03 CAL CK 0001

Calcutta High Court

Case No: None

INLAND REVENUE
COMMISSIONERS

APPELLANT

Vs

BUCHANAN.

RESPONDENT

Date of Decision: March 13, 1957

Acts Referred:

- Finance Act, 1936 - Section 21

Citation: (1958) 34 ITR 173

Hon'ble Judges: Lord Goddard, C.J; Goddard, C.J; Sellers, J; Jenkins, J

Bench: Full Bench

Judgement

LORD GODDARD C.J. - This is an appeal from a judgment of Vaisey J., who dismissed an appeal from a decision of the special commissioners given in favour of the taxpayer, Major Buchanan, though on a different ground. The question that is raised is whether Major Buchanan, who was then the husband of Lady Dufferin, is liable to surtax as her husband (her income, of course, being aggregated with his for surtax purposes) and whether, he being, as I say, liable to surtax, there must be brought into the computation sums of money, which were paid to the children of Lady Dufferin by her first marriage, by reason of the conditions of section 21 of the Finance Act, 1936.

[His Lordship stated the facts and continued :] Now, section 21 of the Finance Act of 1936-which was passed, as is well known, because parents were entering into covenants with trustees to apply a certain sum of money for the benefit of their children and that was a way of tax avoidance of which Parliament did not approve -provides that : "(I) Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year

and not as the income of any other person." By subsection (9) of that section it is provided that : "the expression settlement includes any disposition, trust, covenant, agreement, arrangement or transfer of assets."

Now, perhaps I ought to say, in order to mention and get rid of it, that the Finance Act of 1943 made special provision by section 20 with regard to settlements where there was more than one settlor, and the special commissioners decided this case in favour to the taxpayer by having recourse to that Act of 1943 and holding that the income in this case originated from Lord Iveagh. They regarded Lord Iveagh and his grand-daughter, Lady Dufferin, as both of them being settlors. Therefore, the special commissioners thought that the provisions of the Finance Act, 1943 (which I do not intend to go into in any detail), applied and, as the income derived from Lord Iveagh will, they said that Lord Iveagh was the settlor and not Lady Dufferin. Vaisey J. did not take that view, and I cannot take that view, because I do not think for a moment that a will of a testator comes within section 20 at all; it is not a settlement to which the Act applies, and I think that that is a sufficient answer and gets rid of any argument based on the Finance Act, 1943.

Section 21 (9) provides that "the expression settlement includes any disposition, trust, covenant, agreement, arrangement or transfer of assets." and Mr. Russell has argued very strenuously that a surrender is not a disposition. I should have great difficulty in holding that : I think it clearly is a disposition. A person can dispose of his interest in a fund or in a chattel or in anything else in a variety of ways, but if, having an interest in a fund, although the interest may not then be in possession, he surrenders that interest, it seems to me that he disposes of that interest. Still more is it clear in my mind that if he surrenders the interest the persons next entitled to that interest or to the income under the interest become thereby advanced.

In my opinion, when Lady Dufferin executed the surrender in question she did dispose of her interest under her grandfather's will, and she could only dispose of it to her children as otherwise she would have forfeited the interest altogether and then it would have become subject to various trusts under which, no. doubt, the trustees might have applied it in favour of the children, but they would not have been obliged to do so. She exercised the power which the will had given her to surrender in favour of her children and, therefore, I think she disposed of the interest to her children.

Under those circumstances, looking at the clear words of section 21, it seems to me that it is in consequence of that disposition that income is paid for the benefit of the children of the settlor, because, if a disposition is a settlement, the person who disposes is, of course, the settlor and, therefore, the income is being paid for the benefit of her children. It seems to me, therefore, that the section entirely covers the facts of the case.

The terms of Lord Iveagh will have been canvassed by counsel on both sides with great care, but what we are concerned with here is not so much the terms of Lord Iveagh will as the terms of the section which was passed long after Lord Iveagh will was made, but which was designed to catch this particular class of transaction under which a parent, by means of some form of settlement, settled money upon his children the income of which he or she otherwise would have had and which would, therefore, have increased the parents liability to surtax. It was for that very purpose that this transaction which we are now considering was carried out, and I think it is one that is obviously caught by the section.

For these reasons I am of the opinion that we should allow this appeal.

JENKINS L.J. I agree. Mr. Russell has persuasively argued that Lady Dufferin had no disposable interest under her grand-fathers will : she had no more than a protected life interest which might be brought to an end in a variety of ways : she might assign or charge it or attempt so to do or she might go bankrupt. In those cases, and, no doubt, in others, the ensuing forfeiture would give rise to a discretionary trust for a variety of persons including her children.

The testator, says Mr. Russell, in dealing with the various cases of termination of life interest, dealt specially with one particular case that of providing for the persons entitled in remainder by means of a surrender; and he authorized a life tenant to make such a surrender provided that, in cases where this was done, the trusts should take effect as if the surrender or was dead. In those circumstances, says Mr. Russell, Lady Dufferin had no disposable interest; all she could do was to get rid of her protected life interest under the will in one or other of the ways marked out by the testator, in which case the property would pass in accordance with the trusts of the will. So, says Mr. Russell, that which is here relied on as a settlement was not in truth a disposition made by Lady Dufferin at all, it was a disposition made by the testators will, a prior provision in favour of Lady Dufferin having been eliminated.

Persuasive as that argument is, I find myself unable to accept it. It is true that Lady Dufferin's interest was a protected life interest, but she was left free as regards dealing with it in one particular way : that is to say, by way of surrender in favour of persons entitled in remainder. She was entitled to the income under the protective trust, and it was for her to decide at her will and pleasure whether she should retain that income or surrender it for the benefit of those interested in remainder, namely, her three infant children. She chose to take the latter course, and the result was that the income she would otherwise have been enjoying as life tenant from the moment when her life interest fell into possession went to the children and became payable or applicable to them or for their benefit. Accordingly, I am unable to accept that part of Mr. Russell's argument.

Then, says Mr. Russell, there cannot be a settlement within the meaning of section 21 of the Finance Act, 1936, of a life interest by means of a surrender. He says a

surrender of a life interest destroys the interest and there is nothing left of which settlement can be made; and it is an abuse of language to describe a life tenant surrendering his interest for the benefit of those entitled in remainder or reversion as a settlor, or the surrender, an extinction of his interest, as a settlement. If this matter depended on the ordinary use of language, I would attach great weight to that argument. I do not think that, in ordinary parlance, one would describe as a settlement a transaction consisting simply of a surrender of a limited interest. But we are not concerned here merely with the ordinary use of words; we have to find out whether the transaction carried out in this case was a settlement within the special and extremely wide meaning assigned to that expression by section 21 of the Act of 1936.

Looking at those provisions, one finds, in section 21(9)(b), that "the expression settlement includes any disposition, trust, covenant, agreement, arrangement or transfer of assets," and, in section 21(9)(c), that "the expression settlor, in relation to a settlement, includes any person by whom the settlement was made or entered into directly or indirectly." In my view, it is not open to doubt that a surrender is a disposition and therefore a settlement within that wide meaning.

With reference to Mr. Russell's argument that one cannot make a settlement of a life interest by surrendering and thereby destroying the interest, the section, it is to be observed, is not confined to cases where there is a settlement of a capital sum production income or a settlement by way of covenant by the settlor to pay an annual or other periodical sum; the section applies in general terms to any income and not necessarily to income arising from a settled asset.

I will read the words of subsection (I) of this section : "Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year and not as the income of any other person."

Applying this statutory provision to the present case, it appears to me that Lady Dufferin did make a settlement in that she made a disposition in the form of the surrender of her life interest. By virtue or in consequence of that disposition some income, that is to say, the income to which Lady Dufferin would have been entitled but for the surrender, was paid to or for the benefit of the children or the settlor, Lady Dufferin. Accordingly, in my opinion, the judges' decision in this case cannot stand. He came, in effect, to the conclusion that, on the language of this particular will, the only settlement in the case was the will itself, that this was the source from which the income was provided, and that Lady Dufferin's action in surrendering her life interest and bringing into effect the provisions of the will in remainder did not, in all the circumstances of this particular case, amount to a disposition within the

meaning of the Act.

I find myself unable to agree with that view, and I entirely concur with the judgment delivered by my Lord and the reasoning on which it is based. In these circumstances, I think that this appeal should be allowed.

SELLERS L.J. I agree that this appeal should be allowed for the reasons given by my Lord and Jenkins L. J.

Vaisey J. summarizes his decision in the case by saying that this is not a case which is brought within section 21 at all, as he thinks the income in question is provided not by the mother of these children but by Lord Iveagh who was their great grand-father. That is an acceptance of part of the submission which Mr. Russell so persuasively put before this court, but, if the surrender was (as both my Lords have held and as I agree) a settlement within the definition in the Finance Act, 1936, then section 21, in my judgment, does apply because it is in consequence of the settlement that the income was paid to or for the benefit of the children of the settlor in the year of assessment.

Appeal allowed.

Leave to appeal to the House of Lords granted.

Solicitors; Solicitor of Inland Revenue; Travers Smith, Braithwaite & Co.