HIGH COURT OF AUSTRALIA

Morgan

Vs.

Deputy Federal Commissioner of Land Tax

(Griffith C.J., Barton and Isaacs JJ.)

19 December 1912

Griffith C. J.

This case raises for direct decision the question of the validity of sec. 39 of the *Land Tax Assessment Act*, a question which was incidentally raised in the case of *Osborne v. The Commonwealth*[1], but not decided. In that case I said that I did not encourage anyone to act on the assumption of invalidity.

Sec. 39 provides that all land owned by a company shall be deemed to be owned by the shareholders of the company as joint owners in the proportions of their interests in the paid up capital of the company, with the same consequences as to liability to taxation in respect of their respective interests as in other cases of joint ownership.

In *Osborne's Case*[2] it was held that the subject of taxation under sec. 39 is land. The objection now taken is that, assuming it to be land, the members of the company are not the owners of it, and that a law requiring persons not the owners of land to pay tax in respect of it is not, as to them, a law imposing land tax, and that sec. 39 is therefore obnoxious to the provisions of sec. 55 of the *Constitution*.

It was pointed out in the same case that Parliament had proceeded upon the assumption that the members of a company owning land are in substance the beneficial owners of the land in proportion to their interests in the paid up capital of the company, and the cases of *Smith v. Anderson*[3]; *Birch v. Cropper; In re Bridgewater Navigation Co., Ltd.*[4]; and *Randt Gold Mining Co. v. New Balkis Eersteling, Ltd.*[5], were referred to by the Court.

In my opinion, the Federal Parliament in selecting subjects of taxation is entitled to take things as it finds them *in rerum naturâ*, irrespective of any positive laws of the States prescribing rules to be observed with regard to the acquisition or devolution of formal title to property, or the institution of judicial proceedings with respect to it.

I think, therefore, that when Parliament has determined upon a subject matter of taxation it is entitled to enact that any person who has a beneficial interest in that subject matter—using the term "beneficial" in its widest sense—shall be liable to pay the tax.

Regarded in its essence, and apart from positive legislation, a joint stock company is an association of persons formed for the joint acquisition and enjoyment of certain rights. The differences between it and an ordinary partnership are only such as are prescribed by positive law. Usually one of the main objects of the formation of companies, as distinguished from partnerships, is to provide for the

alienability of the shares of individual members without destroying the identity of the association. Another is to obtain the status of a juristic personality. But these and similar matters are matters of detail, and have nothing to do with the essential notion of an association of persons formed for the joint acquisition and enjoyment of property.

There can be no doubt that in the nature of things, apart from technical questions of nomenclature and conventional legislative rules, the members of a company owning land are the beneficial owners of it.

In my judgment this consideration is sufficient to dispose of the case. The Federal Parliament was entitled to treat the members of a company as the persons beneficially interested in the land owned by it, and to impose on them the liability to pay the tax made payable in respect of it.

The circumstance that in some cases the company itself escapes from liability by reason of the value of its land not exceeding £5,000 is, I think, irrelevant to the question whether its members may be made liable to tax in respect of their interests in the land.

The first question must therefore be answered in the affirmative as to the whole amount, and the second in the negative.

Barton J.

I am of the same opinion, and think it unnecessary to add much. The validity of sec. 39 of the *Land Tax Assessment Act* is attacked on the ground that it is a violation of sec. 55 of the *Constitution*, which provides that "laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect," and that "laws imposing taxation ... shall deal with one subject of taxation only." Sec. 39 of the *Land Tax Assessment Act* provides that: [His Honor read the section.] By sec. 3 "owner," in relation to land, "includes every person who by virtue of this Act is deemed to be the owner," and "owned" has a meaning corresponding with that of "owner." Sec. 38 provides in its first three paragraphs as follows: [His Honor read pars. (1), (2) and (3).] Those are the main provisions of sec. 38. It is said that, unless a person who is sought to be assessed under this Act can be said to own land in the sense of having a title in one of the recognized "channels" of title—if I may use that word—the taxation as regards him is either not land tax or is not a tax at all—that it is either an impost having no relation to land, or is an exaction not deserving to be called an impost. In the one view, it is argued, the Act deals with more than one subject of taxation; in the other, it deals with something more than the imposition of taxation. In the one case, the Act is said to be void; in the other, the provisions that do not deal with taxation in the true sense are of no effect. The argument is ingenious, but I do not think the matter can be dealt with in that way.

It is true, as Mr. *Knox* urged, that the legislature cannot impose a land tax upon any person who has not an interest in land, but it seems to me that any interest that is in any real sense beneficial is a sufficient interest for the purpose. I agree with Mr. *Flannery* that in applying sec. 55 of the *Constitution* to an Act purporting to tax land, this is the true limitation upon the Federal Parliament. The interest must be in truth beneficial. If the person made chargeable participates in a profitable use of the land, or would reap a benefit by its use or sale, that appears to me to be sufficient to support the tax. For an objector to succeed, he must show that in his case the impost is not relevant to land taxation, or that it is not taxation upon land but some other kind of tax. I do not think that either of these things has been shown. I am of opinion that the objector here is taxed in respect of a

benefit accruing to him from land in a special sense, arising from the fact that the company, which is an artificial entity, consists of a number of persons who in truth and in substance own the land and are entitled, in the event of the liquidation of the company, to have the benefit of the value of the land individually. I am of opinion, therefore, that the objection fails, and that the questions must be answered as proposed by the Chief Justice.

Isaacs J. read the following judgment:—

The point relied on by the appellant is that he is not the owner of the land taxed, and that the Commonwealth Parliament cannot, for the purposes of taxation, treat him as owner. As a corollary, it is added, the attempt to make him liable as if he were owner is, in reality, a tax upon him in respect of something quite different from land, namely, in respect of shares in a company, and therefore obnoxious to sec. 55 of the *Constitution*. If the argument is sound that two subjects of tax are dealt with in one Act, a most serious question presents itself as to whether the whole Act is not void. But I take it to have been decided by the whole Court in *Osborne's Case*[6] that the Act does not deal with any other subject of taxation than land; and, if that were not then definitely decided, I have no hesitation in expressing that opinion finally now. Either the first point is valid, or the appeal must fail.

Now, it is said for the appellant that the Commonwealth Parliament must take things as it finds them, according to State law, and tax or not tax them accordingly. But at least the Commonwealth Parliament, deriving its powers direct from the Imperial Parliament, cannot be limited by any artificial creations or restrictions which the varying policies of State legislatures may devise. Natural facts, and actual business facts, are certainly as much real existing circumstances in the life of the people of the Commonwealth as any theoretical legal conception brought into existence by a State Statute. And there is no warrant for compelling the Commonwealth Parliament to ignore the substance of things as they exist and operate, and follow the metaphysical attributes which are attached to them for local purposes.

Applying those observations to the present case, it has been already pointed out in *Osborne's Case*[7] that the fundamental conception of a trading corporation is the personal interest of the members in the property and affairs of the corporate body. I may repeat a few words of what I there stated. I said[8]:—"The incorporation of a company is not a fiction of course; it is a statutory fact, but while it remains a fact for all the purposes for which it was designed, it does not annihilate, but on the contrary is in aid of, the ultimate truth which underlies the matter, namely, the beneficial ownership of those who for the moment compose the company. Incorporation gives a special character and status to the partnership, and surrounds it with certain legal attributes and conditions, but it does not destroy it." I went on to quote the words of *James* L.J. in *Smith v. Anderson*[9] and Lord *Halsbury* L.C. in *Randt Gold Mining Co. v. New Balkis Eersteling, Ltd.*[10], as well as those of Lord *Macnaghten* in *Birch v. Cropper*[11] previously cited. I might have added the observations of Lord *Herschell* in the latter case[12] as to "the articles of association which form the contract of partnership." In *Osborne's Case*[13] I said:—"The essence of the matter is the partnership, or in other words the co-partnership of property and enterprise by the persons forming the partnership. The shareholders then—subject to liabilities and to securities for creditors provided by Statute—are the real and only masters of the property under the general law of the land, and the Commonwealth legislature may properly lay hold of this essential concept, and disregarding circumstances that though not fictitious are certainly factitious, make it the foundation or the guarantee of the tax imposed by it upon the property itself."

I adhere to what I then said, and will add one further consideration. Even the State law itself does not overlook this fundamental truth, but acts upon it by a provision which I believe is general in all the Companies Acts. It is this: a company may wind up voluntarily under certain circumstances including the wish of its own members expressed by way of special resolution. One of the consequences of the voluntary winding up is thus stated in section 134 (a) of the *New South Wales Companies Act 1899* (No. 40):—"The property of the company shall be applied in satisfaction of its liabilities pari passu, and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company." In other words, once the artificial purpose of the statutory abstraction is served the real proprietors divide their net property according to their actual interests in it. If that radical conception be preserved even in State law, it is additionally difficult to see why the Commonwealth Parliament is debarred from recognizing it.

I agree that the questions should be answered as proposed by the learned Chief Justice.

Questions answered accordingly.

Solicitors, for the appellant, Minter, Simpson & Co.

Solicitor, for the respondent, C. Powers, Crown Solicitor for the Commonwealth.

[1] [1911] HCA 19; 12 C.L.R., 321.

[2] [1911] HCA 19; 12 C.L.R., 321.

[3] 15 Ch. D., 247.

[4] 14 App. Cas., 525.

[5] (1903) 1 K.B., 461.

[6] [1911] HCA 19; 12 C.L.R., 321.

[7] [1911] HCA 19; 12 C.L.R., 321.

[8] [1911] HCA 19; 12 C.L.R., 321, at p. 365.

[9] 15 Ch. D., 247, at p. 273.

[10] (1903) 1 K.B., 461, at p. 465.

[11] 14 App. Cas., 525, at p. 543.

[12] 14 App. Cas., 525, at p. 532.

[13] [1911] HCA 19; 12 C.L.R., 321, at p. 366.

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