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IN THE

SUPREME COURT OF APPEALS OF VIRGINIA

AT RICHMOND

HELEN GRAY MOORE

v.

COMMONWEALTH OF VIRGINIA.

PETITION FOR REHEARING.

Appeals Press, Inc., Richmond, Va.

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PETITION FOR REHEARING.

Your petitioner, Helen Gray Moore, respectfully prays this Honorable Court to grant her a rehearing of the opinion and decision handed down in the above entitled cause on June 12, 1930, at Wytheville.

Your petitioner regrets that her position in connection with the above case was not made clearer to the Court than would appear to have been done from the aforesaid

opinion handed down on June 12, 1930, and she submits that the same appears to be based upon the application in different portions of the opinion of inconsistent principles and contrary to principles laid down in other cases dealing with the same subject matter, and is contrary to the clearly expressed intention of the Legislature as appears from a consideration of the provisions of the Act of 1910 dealing with inheritance taxes (Acts of 1910, pp. 229-30), and would seem necessary to give trouble both to the bench and bar in consideration of future questions involving the imposition of inheritance taxes.

It must be manifest to the most casual reader of the provisions of the Act of 1910 that that Act is not self-executing. The Act itself does not impose the tax, but simply authorizes and directs its imposition. The language is that an estate passing by will or descent "shall be subject to a tax." The Act then provides how the amount of the tax shall be ascertained by the tax officers of the Commonwealth, what officers shall make such ascertainment, against whom the tax shall be assessed and by whom the same shall be paid. The provisions of the Act of 1910 upon their face show that it was not contemplated or intended by the Legislature that the Act should be self-executing. The Act further provides that the amount of the tax shall be five percentum on every $100 of value of the estate passing by will or descent, and as is apparent from the provisions of the Act of 1910 itself and all the decisions of this Court heretofore dealing with the subject, it is held that the value of the estate is to be ascertained as of the time of the death of the previous owner, or the vesting of the estate passing, and not at the time of the possession or enjoyment of the estate. It would seem too plain to require either argument

or citation of authority that looking at the situation presented in this case as of the death of S. G. Atkins where a life estate was given to his sister, Laura A. Gregory, with a vested remainder therein to his niece, Helen Gray Moore (your petitioner), that this value consisted of two component parts, one the value of the life estate plus the value of the remainder. That this was the situation at the death of S. G. Atkins does not seem to be controverted.

And still the opinion herein complained of holds that the entire value of the estate as of the death of S. G. Atkins was taxable against and should be paid by the remainderman without determining what tax, if any, was assessable against and should be paid by the life tenant. Had it not been for the fact that the life tenant was a sister of the decedent and, therefore, within the accepted class, surely the value of her interest would have been assessable under the provisions of the Act of 1910, and if it had been so assessed and paid, then under the opinion herein complained of the remainderman would also have been charged with the entire value of the estate, thus unquestionably creating a case of double taxation which, under well settled and universally recognized principles, will never be resorted to except by plain legislative declaration. The language of the decision is that the estate that ultimately passes to the petitioner is subject to a tax under the provisions of the Act of 1910, but both under the clear provisions of that Act and under the previous decisions of this Court on the subject that value was to be determined as of the death of S. G. Atkins. So it is not the ultimate value of the estate or the value of the estate ultimately passing upon which the tax under the provisions of the Act of 1910 could be imposed, but it was the actual value of the estate then passing; and hence it is apparent that

the opinion herein complained of would unsettle, if not overrule, the previous decisions of this Court and the plain intent of the Act of 1910, and thus unsettle the principles which for nearly twenty years had been considered as settled by both the bench and bar of this State.

Stress is laid in the opinion upon the concluding provision of the Act of 1910 that "such estate shall be deemed paid or delivered at the end of the year from the decedent's death, unless and except so far as it may appear that the legatee or distributee has neither received such estate nor is then eititled to demand it." The effect of this language must be determined by the connection in which it is used. This language appears in sub-section (f) of the Act of 1910. That section prescribes a penalty upon a personal representative or beneficiary for failure to pay before the estate is paid or delivered over, the tax authorized by that Act, and then provides how that penalty is to be recoverable. And in order to definitely determine when the personal representative or beneficiary shall become liable to such penalty, the statute then proceeds with the above quoted language upon which stress is laid in the opinion. It is difficult to conceive how a reading of sub-section (f), which includes the above quoted language, could lead any one to the conclusion that the language quoted had any reference to the assessment of the tax, but only to the time when the penalty, for a failure to pay the tax, could be enforced.

The opinion complained of concludes from the language quoted that that language could only mean that the *portion* of S. G. Atkins' estate which was to be received by your petitioner was not to be taxed, that is, assessed with tax, within the year or at the time it became technically vested.

Please note that the opinion uses the language "portion of S. G. Atkins' estate to be received by your petitioner, while the tax assessed and required to be paid under the terms of the decision was the entire value of the estate, both the life estate and the remainder. The opinion then proceeds "it would have been impossible to assess the tax within a year from the decedent's death because neither the amount nor the beneficiary could then be determined." In view of the conceded fact that the estate taxable to your petitioner became vested in her upon the death of S. G. Atkins, and if she had died during the lifetime of the life tenant the person taking the estate would take under her, and not under the will of S. G. Atkins, and in view of the further fact that the value of the estate was clearly and easily determinable as of S. G. Atkins' death, thus leaving open only the question of how the value of that estate should be apportioned between the life tenant and the remainderman, it is difficult to perceive how the above quoted conclusion could be reached. That conclusion would be applicable in the case of a contingent estate only. The beneficiary, namely, your petitioner, was definitely ascertained and determined under the language of the will; the value of the estate was easily determinable while the statute made no provision as to the method to be pursued in dividing this value between the life tenant and the remainderman, and it was the duty of the court to separate those interests for taxation.

Take the case of the ordinary assessment of tax upon real estate. The tax is assessed as of the beginning of the year, though it is not payable until December first following. Should the owner die in the meantime between the assessment and the time of payment, nevertheless the person chargeable with the tax is ascertained, and if any

method for determining the value of the estate is prescribed by law, the amount of the tax is ascertained. The question of the assessment of the tax (which includes the determination of the person against whom the tax is to be charged and the amount of the tax chargeable) under our old theory of taxation precedes in point of time the payment of the tax. As was pointed out by Judge Whittle in the case of *Wellford* v. *Commonwealth,* these are two entirely separate and distinct matters, and the language of the Act of 1910 fixing the date when the estate shall be deemed paid or delivered has no reference to the assessment of the tax, but only to the time when payment of the tax assessed under the Act of 1910 could be required.

The opinion complained of then proceeds to consider the question of the repeal of the Act of 1910 by the Act of 1918, and quotes Section 6 of the Code of Virginia in that connection, which section provides that no new law shall be construed to repeal a former law as to any right accrued or claim arising before the new law takes effect, and from this provision concludes that the obligation of your petitioner to pay the tax under the Act of 1910 became fixed at the death of S. G. Atkins, and, therefore, that in accordance with the above quoted section of the Code the right of the Commonwealth to the inheritance tax authorized under the Act of 1910 was not affected by the repeal, if in fact that was such repeal, of the Act of 1910 by the Act of 1918. It is rather difficult to reconcile the conclusion of the Court mentioned in the last paragraph of this petition that it was impossible to assess the tax imposed by the Act of 1910 within a year from the decedent's death, because neither the amount nor the beneficiary could then be determined with the conclusion just

mentioned that the obligation of your petitioner under the Act of 1910 had become fixed before the passage of the Act of 1918 repealing, if such repeal was in fact accomplished, the Act of 1910.

In this connection the opinion leaves entirely out of view and makes no mention of the earnestly pressed argument on behalf of your petitioner, that if your petitioner was assessable with a tax under the provisions of the Act of 1910 and the right of the Commonwealth to that tax under the provisions of that Act then of necessity the failure to assess such tax was an omission on the part of the officers of the Commonwealth, and such omission could be cured only by the assessment of an omitted tax within three years from the date of such omission. It must be conceded on all hands either that the inheritance tax complained of in this case was either assessable under the Act of 1910 or it was not assessable. If it was assessable under the Act of 1910, as the opinion of the Court handed down on June 12th seems to determine, then it is a conceded fact that such tax was not so assessed. If not so assessed, it must be plain that it was the case of an omission. If it was a case of omission, then its assessment at a subsequent date could only be made in accordance with the provisions of the Code authorizing such assessment, that is, within three years.

If the tax herein complained of was not assessable under the Act of 1910, then if the decisions in the cases mean anything they must mean that such an inheritance tax could not be assessable under the subsequent inheritance tax unless passed by the Legislature but not in force at the time of S. G. Atkins' death. As above stated, this fea-

ture of the case of your petitioner is not dealt with in the opinion rendered on June 12th.

It will be observed that in this feature of the case it is immaterial whether the Act of 1918 repealed the Act of 1910 or not.

The opinion rendered on June 12th, after discussing the provisions of the Act of 1918 and citing and quoting from considerable authority to the point, reaches the conclusion "a construction leading to results so contrary to the avowed policy of the State, certainly should not be adopted upon doubtful language." If it be conceded by your petitioner that the above quoted rule is entirely sound, the question still remains whether the provisions of the Act of 1918 repealed "all acts and parts of acts inconsistent with this act and especially Section 44 of the Revenue Act," can be considered of doubtful import. In this connection the opinion repeats the same thought as being the conclusion of the Court in *Cavanaugh* v. *Patterson*, 41 Col. 158, as follows: "No new law shall be construed to repeal a former law as to rights acquired and obligations incurred under the former law." May we repeat again that this is rather begging the question, because if no tax could have been assessed against your petitioner under the Act of 1910, because neither the beneficiary nor the amount were then ascertainable, it is difficult to perceive how the Commonwealth could have acquired any rights against your petitioner or any obligations imposed upon your petitioner under the terms of that Act.

The opinion handed down by the learned Chief Justice on June 12th quotes from Cooley on Taxation, 4th Ed., Sec. 538:

> "So the repeal of an inheritance tax statute

> will not affect the right of the state to impose the tax upon the estates of persons who died before the repeal became effective."

It does not seem to us that this at all answers the question involved in this case. The right of the State to have imposed the tax under the Act of 1910 would not be questioned if the assessment of such tax had been made within the time limited by the Omitted Tax Act. But when the statute itself fixes a limit of time within which such assessment can be made, then unless there is some invalidity in the Act making the limitation, then the right of the State to assess the tax ceases with the expiration of the time fixed in the statute. The limitation provided by the Virginia Omitted Tax Act has already been declared by this Court to be a valid legislative enactment. The conclusion, therefore, seems inexcusable that in this particular case whatever the right of the State in regard to the assessment of the tax might have been originally under the Act of 1910, that right ceased with the expiration of time limited in the Omitted Tax Act.

The opinion then announces that "Our conclusion is that the Act of 1918 did not nullify the Act of 1910 or displace either the vested right of the Commonwealth to the tax or the obligation of the plaintiff to pay it." The apparent inconsistency of this conclusion with the conclusion previously announced in the opinion that the tax in this case could not have been assessed under the Act of 1910, because neither the person assessable with the tax nor the amount of the tax could then be ascertained has already been pointed out. The question further arises whether or not the Commonwealth acquired any vested right to a tax which could have been assessed but did not

assess within the time limited by the statute. In addition to this, unless the Court is prepared to say that the right of the Commonwealth to assess the estate of persons dying during the time when the Act of 1910 was in force is unlimited and could as well be assessed one hundred years from now as it could have been in 1927 irrespective of the provisions of the Omitted Tax Act. Then the question arises when does the right of the Commonwealth to assess a tax under the Act of 1910 cease and what is the effect of the statute as to omitted taxes? It seems to us that the limitation contained in the Omitted Tax Act, which has been upheld and enforced by a solemn adjudication of this Court, would be written in sand and would be meaningless, if the conclusion apparently reached in the opinion rendered in this case is adhered to.

No inheritance tax could have been assessed under the Act subsequent to 1910, because all of those Acts operated prospectively, and if the tax in this case was assessable at all, it must have been assessed under the provisions of the Act of 1910.

It is further stated in the opinion that there is no question as to the proper amount of the tax in this case. This conclusion could only be true where there was a life estate following by a remainder, in the event that the Court reaches the conclusion that the life estate could be assessed and the tax upon the value of such life estate collected by the Commonwealth and then await the expiration of the life estate and assess the whole value of the estate to the remainderman as was done in this case. It has already been pointed out that this would constitute, as to the value of the life estate, double taxation. And further it seems clear from the provisions of the Act of 1910 that no such

method of taxation was intended. It seems clear from the provisions of the Act of 1910 that the Commonwealth intended to impose and collect only one inheritance tax, and that tax to be assessed upon the value of the estate as of the death of the decedent, and never intended or contemplated that any such double taxation could be imposed. So it seems clear that all the tax that could be imposed upon or collected from your petitioner was the value of the estate passing to her as of the time of the death of the decedent, which was, of course, the value of the entire estate less the value of the life estate given to Laura A. Gregory.

The opinion of the learned Chief Justice quotes with approval the rule laid down in *Heth* v. *Commonwealth*, 126 Va. 493, to the effect that the regularity of the original assessment is of little consequence. With this rule we have no fault to find; but the question is whether the State had a right to make any assessment of inheritance taxes at all after the expiration of twelve years from the time the estate passed to and vested in your petitioner; and if so, what should have been the amount of the tax when the Act of 1910 prescribed that the tax shall be computed upon the value of the estate then passing to your petitioner.

The opinion reaches the conclusion as follows, we quote:

> "It would have been impossible to assess the tax within a year from decedent's death, because neither the amount nor the beneficiary could then be determined. By manifest implication, the time for the assessment of the tax to which that part of the estate bequeathed to Helen G. Moore was subject was when, but not until the legatee, or in case of her previous death her distributees, became entitled to demand distribution. This time was post-

poned until the death of her mother in 1927, and her personal right to possession depended upon her own survival of her mother."

The above, we submit, resulted from the misconception of the true wording of the will of S. G. Atkins; it will be observed that the opinion (page 1 our copy) states that "in the event of the death of Helen G. Moore before reaching the age of twenty-five years or *before the death of the life tenant,* it was provided that said share of the estate should go to others." (Italics by us.) While it manifestly appears by reading the will itself, that Helen G. Moore was only required to arrive at the age of twenty-five and she was over twenty-five years of age at the death of S. G. Atkins in 1915, when his will took effect and her estate became a vested title of fee simple in remainder and was then subject to the tax.

And it seems that this erroneous view was followed through the opinion and was the basis of the decision, for it also refers to the estate ultimately passing to petitioner.

We, therefore, pray that this case be reheard, reviewed and that a judgment may be entered for your petitioner.

Respectfully submitted,

A. B. DICKINSON,
ALLEN G. COLLINS,
For Petitioner.