BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

Toronto 1966 Dec. 15-16

AND

BLODWEN EMILY WORSLEY, Administratrix of the Estate of Sidney William Worsley, ... RESPONDENT.

Estate tax—Death benefit payable under group accident insurance policy of employer—Whether subject to estate tax—Whether policy "life insurance"—Contingent right of insured to designate beneficiary—Not equivalent to death benefit—Estate Tax Act, S. of C. 1958, c. 29, ss. 3(1)(a), (4a,) (m)—Insurance Act, R S.O. 1960, c. 190, s. 244.

Deceased's employer voluntarily insured his employees against accident under a group accident insurance policy with an insurance company for the year commencing April 4th 1963. The policy provided for payment of varying amounts for bodily injuries and in case of loss of life for payment to the employee's estate. Deceased died intestate on November 29th 1963 from an aircraft crash without having designated a beneficiary of the death benefit as he was entitled to do under s. 244 of the *Insurance Act*, R.S.O. 1960, c. 190, and the death benefit, *viz* $100,000, was accordingly paid to his estate.

Held, affirming the Tax Appeal Board ([1966] D.T.C. 63), the death benefit was not subject to estate tax.

1. The accident insurance policy was not "life insurance" within the meaning of s. 3(1)(4a) of the *Estate Tax Act*, S. of C. 1958, c. 29 as amended by 1960, c. 29, s. 1. Nor was it "a policy of insurance effected on the life of the deceased" within the meaning of s. 3(1) (*m*) of the *Estate Tax Act*. Both quoted expressions, though enacted at different times, indicate the same general class of insurance coverage and neither embraces death benefits under an accident insurance policy.

2. The death benefit was not "property of which the deceased was competent to dispose immediately prior to his death" within the meaning of s. 3(1)(*a*) of the *Estate Tax Act* as extended by s. 3(2) (*a*) and s. 58 (1)(*i*). Deceased's right under s. 244 of the Ontario *Insurance Act* to designate a beneficiary of the death benefit was a contingent right to dispose of property prior to his death but that right was a different right (and of much less value) from the right of deceased's estate to be paid $100,000 on his death, which deceased could not have disposed of before he died.

Attorney-General v. Robinson [1901] 2 I.R.Q.B. at pp. 89, 90 approved; *Attorney-General v. Quixley* [1929] L.J.K.B. at 315 distinguished.

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APPEAL from Tax Appeal Board.

M. A. Mogan and *T. Z. Boles* for appellant.

N. E. Phipps, Q.C. and *A. O. Hendrie* for respondent.

JACKETT P. (Orally):—This is an appeal from a decision of the Tax Appeal Board allowing the respondent's appeal from an assessment under the *Estate Tax Act*, chapter 29 of the Statutes of Canada 1958, as amended. The sole question raised by the appeal is whether a sum of $100,000 paid to the respondent as Administratrix of the estate of Sidney William Worsley (hereinafter referred to as "the deceased") under a group accident insurance policy, provided by the deceased's employer, should be included in computing the aggregate net value of the property passing on the death of the deceased for the purpose of the *Estate Tax Act*.

For the purposes of the appeal to this Court, the facts were established by a written agreement of counsel filed in advance of the hearing. Attached as an exhibit to that agreement is a copy of the group accident insurance policy in question.

The group accident insurance policy was a contract between the employer and an insurance company. Neither the deceased nor any of his fellow employees who happened to be named in the policy was a party to the contract. The employer decided to obtain the policy because "it might have had a moral obligation to an employee's estate or next of kin if something happened to the employee while travelling". It was no part of the deceased's contract of employment that such insurance should be provided and the deceased neither directly nor indirectly paid any part of the premium, which was paid entirely by the employer.

The policy was, according to its terms, to be in force from April 4, 1963 to April 4, 1964. By the policy, the insurance company agreed to pay, in the event of bodily injury caused to one of the employees named therein "by an accident occurring while this policy is in force", varying amounts determined in a manner set out in the policy. The policy provided that "in the event of loss of life of an insured person" the indemnity was to be payable to the estate of the insured person and that all other indemnities were to be payable to the insured person.

The provision in the policy that "in the event of loss of life of an insured person" the indemnity was payable to his estate must be read with subsection (1) and subsection (3) of section 244 of the *Insurance Act*, R.S.O. 1960, chapter 190, which reads as follows:

> 244. (1) Where insurance money is payable upon death by accident, the insured, or, in the case of group accident insurance, the person insured, may designate in writing a beneficiary to receive the insurance money or part thereof and may alter or revoke in writing any prior designation.
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> . . .
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> (3) A beneficiary designated under subsection 1 may upon the death of the person insured enforce for his own benefit the payment of insurance money payable to him and payment to the beneficiary discharges the insurer, but the insurer may set up any defence that it could have set up against the insured, or the person insured in the case of group accident insurance, or the personal representative of either of them.

Counsel for each of the parties took the position in this Court that this section applies to the policy under consideration; that, under this statutory provision, the deceased could have, during his life, designated a beneficiary to receive the death benefit under the policy; and that, if he had done so, such beneficiary would have been entitled, after the death of the deceased, to enforce payment of it. In fact, the deceased did not designate a beneficiary.

The deceased died intestate on or about November 29, 1963, as a result of an aircraft crash, and the sum of $100,000 thereupon became payable to his estate under the policy. The appellant included this amount in computing the aggregate net value of the property passing on the death of the deceased and, as a result, assessed the estate for $5,638.31 estate tax when, otherwise, no estate tax would have been payable.

Before the Tax Appeal Board, the assessment was supported on the ground that the amount of $100,000 was properly included in the computation of the aggregate net value of property passing on the death of the deceased by virtue of the following provisions of the *Estate Tax Act*, as amended by section 1 of chapter 29 of the Statutes of 1960:

> 3. (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,
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> . . .

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(*k*) any superannuation, pension or death benefit payable or granted

(i) out of or under any fund or plan established for the payment of superannuation, pension or death benefits to recipients,

. . .

on or after the death of the deceased in respect of such death;

(4a) For the purposes of paragraph (*k*) of subsection (1), any amount payable in respect of the death of a person under a policy of insurance (other than a policy of insurance owned as described in paragraph (*m*) of subsection (1)) under which any life insurance was effected on the life of that person in respect of, in the course of or by virtue of his office or employment or former office or employment as an employee of any other person, except any part of that amount that was payable under the policy to that other person, shall be deemed to be a death benefit payable in respect of the death of that person out of or under a fund or plan established for the payment of death benefits to recipients.

The appellant's contention before the Board was that the group accident policy in question was, in so far as it provided for a death benefit, " a policy of insurance . . . under which. . .life insurance was effected on the life of that person . . . by virtue of his. . .employment" and that the $100,000 payable thereunder was therefore deemed, by subsection (4a), for the purposes of paragraph (*k*) of subsection (1), to be "a death benefit payable in respect of the death of that person out of or under a fund or plan established for the payment of death benefits to recipients" so that that amount was, by the introductory words of subsection (1) of section 3 read with paragraph (*k*) thereof, required to be included in computing the aggregate net value of the property passing on the death of the deceased.

It will be seen that this contention is entirely dependent upon the group accident policy in question being a policy of insurance under which "life insurance" was effected on the deceased's life within the meaning of those words in subsection (4a) of section 3 of the *Estate Tax Act*. The Tax Appeal Board held that a contract for a death benefit in an accident insurance policy is not "life insurance". Mr. Fordham delivered reasons for this conclusion with which I agree and no good purpose would be served by re-stating such reasons. I merely add to what he has said that, in my view, in the absence of any contrary indication, it is proper to assume that, when Parliament uses words by which it refers to a class of insurance coverage in a taxing statute, it is using the words in the same sense as it uses those words in legislation enacted by Parliament for the purpose of regulating insurance companies; and that, in my view, it

seems clear that, in the *Foreign Insurance Companies Act*, R.S.C. 1952, chapter 125 (see, for example, section 37), and the *Canadian and British Insurance Companies Act*, R.S.C. 1952, chapter 31 (see, for example, section 81), there is a contrast between "life insurance" and "insurance against death as a result of accident" even where the latter is included in a policy of "life insurance". (Neither statute appears to have any special definition of either class of business.)

In this Court, the appellant put forward two alternative bases as support for the assessment. His first alternative was that the assessment could be supported under paragraph (*m*) of subsection (1) of section 3 of the *Estate Tax Act*. His second alternative was that it could be maintained under paragraph (*a*) of that subsection. Neither of these contentions was put before the Tax Appeal Board.

I shall deal first with the appellant's contention based on paragraph (*m*) of subsection (1) of section 3 of the *Estate Tax Act*.

This contention depended upon reading paragraph (*m*) with subsection (5) of section 3. It is not necessary to quote these provisions as the contention depends entirely upon the submission that the words in paragraph (*m*), "a policy of insurance effected on the life of the deceased", are sufficiently wide to include a death benefit payable under the group accident policy in issue here. The argument, as I understood it, was that, by using the words "life insurance" at the time that subsection (4a) of section 3 was enacted in 1960, Parliament showed that something wider had been intended by the words "policy of insurance effected on the life of the deceased" in paragraph (*m*) when that paragraph was enacted in 1958. In my view, even if the two provisions had been enacted at the same time, such a conclusion, based on a different arrangement of words, would not be justified. Both expressions, in my view, indicate the same general class of insurance coverage and neither is sufficient to embrace death benefits under an accident insurance policy. Parliament and provincial legislatures have recognized that life insurance and accident insurance are quite different categories of insurance coverage. In addition, when, as here, the two different arrangements of

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words are found to have been enacted by Parliament at different times, in my view, there is even less justification for drawing the conclusion that a reference to insurance on a life includes death benefits under an accident policy.[1]

I turn to the appellant's second alternative contention in this Court, which is based on paragraph (*a*) of subsection (1) of section 3. This contention is based upon reading paragraph (*a*) of subsection (1) of section 3 of the *Estate Tax Act* with paragraph (*a*) of subsection (2) of section 3 and paragraph (*i*) of subsection (1) of section 58. These provisions read as follows:

> 3. (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,
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> (*a*) all property of which the deceased was, immediately prior to his death, competent to dispose;
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> . . .
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> (2) For the purposes of this section,
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> (*a*) a person shall be deemed to have been competent to dispose of any property if he had such an estate or interest therein or such general power as would, if he were *sui juris*, have enabled him to dispose of that property;
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> . . .
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> 58. (1) In this Act,
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> . . .
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> (*i*) "general power" includes any power or authority enabling the donee or other holder thereof to appoint, appropriate or dispose of property as he sees fit, whether exercisable by instrument *inter vivos* or by will, or both, but does not include any power exercisable in a fiduciary capacity under a disposition not made by him, or exercisable as a mortgagee;
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> . . .

These provisions apply to support the assessment, if they do support it, as follows:

1. By virtue of section 3(1)(*a*) there is to be included in the relevant computation the value of all property of which the deceased was, immediately prior to his death, competent to dispose.

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[1] There has been judicial recognition that such differences are inevitable where legislation has to be prepared and enacted under pressure to implement budget decisions. Legislative draftsmen, being human, such differences are also inevitable, although likely to be less frequent, even if reasonable time is available for preparation of legislative measures. In my view, nice comparisons of this kind are not a sound basis for legislative interpretation.

2. By virtue of section 3(2)(*a*) a person is deemed to have been competent to dispose of any property if he had such general power[1] as would have enabled him to dispose of the property.

Therefore, reading the two provisions together, the effect, in so far as it is relevant, may be stated as follows:

> There is to be included in the relevant computation the value of all property in respect of which, immediately prior to his death, the deceased had such general power as would have enabled him to dispose of that property.

3. By virtue of section 58(1)(*i*), "general power" includes any power or authority enabling the holder thereof "to appoint, appropriate or dispose of property as he sees fit". (I am omitting irrelevant limitations.)

Therefore, reading the three provisions together, the effect, in so far as it is relevant, may be stated as follows:

> There is to be included in the relevant computation the value of any property in respect of which, immediately prior to his death, the deceased had such a power or authority—that is, a power or authority that would have enabled him to appoint, appropriate or dispose of such property as he saw fit—"as would . . . have enabled him to dispose of that property".

I emphasize the very clear requirement of the three provisions, when read together in this context, that the deceased must have had in respect of the very property the Minister is seeking to tax "immediately prior to his death" a power or authority of the kind defined in section 58(1)(*i*) that "would . . . have enabled him to dispose of that property".

As already indicated, by virtue of section 244 of the *Ontario Insurance Act*, the deceased did have the right, immediately prior to his death, to designate a beneficiary and, if he had done so, the effect would have been that the $100,000 indemnity that became payable after his accidental death would have been payable to the named beneficiary instead of to his estate. This, according to counsel for

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[1] Counsel for the appellant did not rely on the words "estate or interest" in section 3(2)(*a*).

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the appellant, was a power or authority to appoint or dispose of the contingent right to receive $100,000 on the accidental death of the deceased during the policy period. This contingent right to receive the $100,000 death benefit is referred to in paragraph 10 of the Notice of Appeal as "the deceased's interest in the policy of assurance" and as being "property which the deceased was immediately prior to his death competent to dispose".

I accept it that the contingent right to have $100,000 paid to his estate in the event of his accidental death during the period of a little over four months that remained in the policy period was a property right of which the deceased was, immediately prior to his death, competent to dispose. I do not accept it that that is the property the value of which the appellant included in computing the aggregate net value of the property passing on the death of the deceased. What the appellant so included was the $100,000 that became payable to the deceased's estate after his accidental death had in fact occurred during the policy period.

In my view,

(*a*) the deceased's contingent right, immediately prior to his death on November 29, 1963, to have $100,000 paid to his estate in the event of his accidental death before the end of the policy period, and

(*b*) the estate's right to be paid $100,000 (which arose immediately after his accidental death had, in fact, occurred during that period)

are quite different rights. See *Attorney-General v. Robinson*[1] per Palles, C.B. at pages 89 and 90, where he said: "The words 'accruing or arising' are used in contradistinction to 'passing'. They indicate, not the transfer upon death to another of something which the deceased or some other person had before or at the death, but the springing up, upon the death, and the then vesting in another, of property which previously had not been existing in any one. This is an exact description of money secured by a policy of insurance." The contingent right was in existence before his death; the deceased could have disposed of it; and its value as of the time in question would be very

[1] [1901] 2 I.R.Q.B.

difficult to determine, but, in the absence of very special circumstances, it must have been very small. The estate's right to be paid $100,000 was not in existence before the deceased's death; he could not therefore have disposed of it; and its value, when it arose, was $100,000.

I am conscious that, while the facts were quite different in *Attorney-General v. Quixley*,[1] a case on which the appellant relied, it is very difficult to reconcile my conclusion in this case with the reasoning of the Court of Appeal in that case. There is, however, a vital difference between section 3(1)(*a*) of the *Estate Tax Act*, which cannot be applied unless there was property of which the deceased was competent to dispose "immediately *prior* to his death" and the comparable provision under consideration in that case, which refers to property of which the deceased was competent to dispose "at the time of his death". I can understand the reasoning in that case on one view of the meaning of the latter words. I could not reach the result reached in that case by applying the unambiguous words "immediately prior to his death".

The assessment was based, as appears from paragraph 6 of the Notice of Appeal, on the assumption that the sum of $100,000 was a death benefit under paragraph (*k*) of subsection (1) of section 3 of the *Estate Tax Act*. It was "the sum of $100,000 payable by Continental (the insurance company) to the estate of the deceased" after the death of the deceased that the appellant included in the relevant computation when he assessed the estate. The contention based on section 3(1)(*a*) was put forward as an alternative basis for supporting the assessment on the basis that the value of some other property—that is, the contingent right —should have been included in the computation. Even if such an alternative might have been open to the appellant in this Court, it would have been essential to have pleaded and proved the value of the contingent right. (It seems doubtful that any substantial value could have been established for it.)

The appeal is dismissed with costs.

[1] [1929] L.J K.B. 315.