HUTCHISON, ROBERT BRUCE

v.

CORPORATION OF THE DISTRICT OF SAANICH

Supreme Court of B.C. (437/75)

Before: MR. JUSTICE R.A. WOOTTON

Victoria, July 11, 1975

Mr. P.W. Klassen, for the appellant.
Mr. B.R.D. Smith, for the Respondent

Reasons for Judgment

The question here for decision is whether or not certain lands owned by the Hutchison family are lands used for residential purposes.

The respondent after the passing of section 37A of the *Assessment Equalization Act*, R.S.B.C. 1960, c. 18, as amended, assessed certain lands of the family as lands not held for residential purposes.

The lands held have been so held for upwards of forty years. There are three parcels which the appellant claims are held and have been held for residential purposes. They are:

1. Lot "A", Section 65, Victoria District, Plan 3086.
2. Lot 1, Section 65, Victoria District, Plan 3103.
3. Lot 3, Section 65, Victoria District, Plan 7621.

Lot 1, Plan 3103, is the lot containing the residence. In that residence the father of the appellant resides with his sister and her sons. As to that lot there can be no doubt that it is held for residential purposes. No question was raised concerning that lot. As to Lot 3, Plan 7621, this lot was classified by the respondent as being not held for residential purposes. The appellant has succeeded on his appeal with reference to that lot. This leaves Lot "A", Section 65, Victoria District, Plan 3086, to be dealt with here.

I refer to the stated case, which raises the questions for my determination concerning the said Lot "A". This says:

"CASE

4. The land under assessment is Lot 'A', Section 65, Victoria District, Plan 3086 and is unoccupied land.

5. Lot 'A', Section 65, Victoria District, Plan 3086 and Lot 1, of Section 65, Victoria District, Plan 7621 are registered in the names of John C. Cowan and the Appellant as trustees of an undivided one-third interest for the Appellant and an undivided two-thirds interest for the Appellant's sister,

Joan Edith Meek. Lot 1 of Section 65, Victoria District, Plan 3103 is registered in the name of the Appellant's father, William Bruce Hutchison, and the Appellant and John C. Cowan as executors of the estate of the Appellant's mother, Dorothy K. Hutchison.

6. The parcel in question, coupled with Lot 3 aforesaid and Lot 1 of Section 65, Victoria District, Plan 3103, upon which a residential dwelling house is situate and occupied by the Appellant's father and sister and two young sons, has been in the Appellant's family for a period in excess of forty years. In years past, a nursery operation was conducted by the Appellant's grandfather from the Parcel 'A' aforesaid but for more than ten years there has been no activity of any kind upon it although some ornamental trees do remain. The parcel is used for the express purpose of providing privacy and solitude for the adjoining lot upon which the residential dwelling house is situate. No other use has been made of the land and no other use was alleged or proved by the Crown.

7. The majority of the Board found that there was no activity of any nature upon the parcel and that the parcel had remained vacant during 1973.

8. The majority of the Board confirmed the assessment in relation to Lot 'A' and did not accept the Appellant's contention that the parcel was used for residential purposes within the meaning of that term in Section 37A of the *Assessment Equalization Act*.

9. Pursuant to Section 67 of the *Assessment Act* aforesaid, the Assessment Appeal Board submits this stated case and humbly requests the opinion of this Honourable Court on the following questions of law:-

> (a) Did the majority of the Board err in holding that Parcel 'A' was not being used for residential purposes within the meaning of Section 37A (1) of the *Assessment Equalization Act* in the light of the Board's finding on the evidence that the parcel had remained vacant and there was no activity of any nature upon the parcel during 1973.
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> (b) Did the majority of the Board err in holding that Lot 'A' was not being used for residential purposes and as such was not entitled to the benefit of the provisions of Section 37A (1) of the *Assessment Equalization Act*."

Mr. Klassen urged upon me that the whole of the lands held in the manner aforesaid are in fact lands held for residential purposes. As to Parcel "A", it was his contention, as the statement of the case indicates, that this parcel "is used for the express purpose of providing privacy and solitude for the adjoining lot upon which the residential dwelling house is situate. No other use has been made of the land and no other use was alleged or proved by the Crown." My decision must be upon a point of law.

It has been found as fact that Parcel "A" is held for the use expressed above. That purpose, in my respectful opinion, is a worthy one and is of the essence of residential qualification. How else will the owners prevent the development of their acreage with the resultant smaller subdivision of the land and the construction of buildings residential and perhaps otherwise that will back upon the dwelling house of the family? How otherwise will they prevent the sounds of traffic disturbing their right to quiet? The family Hutchison may well say, "We will hold our land for residential purposes comfortably and comforting to ourselves provided we comply with the law." I observe that from the plan made Exhibit 1 before me that the larger area about the lands in question is subdivided for residential purposes. There are many small holdings with dwellings thereon.

The interpretation of Section 37A is the matter of law that I must decide here. I address myself to Section 37A, which reads as follows:

> "37A. (1) Notwithstanding the provisions of section 37, the assessed value of land or improvements used for residential purposes or classified as farm land shall not be

> increased in any year by more than ten per centum of the assessed value of land or improvements used for residential purposes or classified as farm land in the preceding year unless the increase is attributable to a change in the physical characteristics of the land or the improvements, or to new construction or development thereto, thereon, or therein, or results from a reassessment ordered by the Commissioner under subsection (2) of section 9.
>
> (2) Where an assessment under section 37 results in an increase in the assessed value of land or improvements in excess of that permitted under subsection (1) of this section, the Assessor shall set down in his assessment roll the assessed value of the land or improvements in accordance with the limitation imposed by subsection (1) of this section."

Mr. Smith in his presentation urged that there had been no evidence of activity of any kind upon Lot "A" during the time in question. He urged also that there must be some activity indicating that the land was used for residential purposes. He suggested such items as the construction of badminton courts and other similar structures which may be similar to or auxiliaries to the domestic structures of the residence upon the lands or the extension of cultivation of the land. I am of the opinion that Section 37A as it presently reads is not to be interpreted in that fashion. In my respectful opinion, where the section says "used for residential purposes" the word "used" is not to be interpreted as requiring some activity. It has the meaning there of "treat" or of "treated". The Hutchison family treated this land for residential purposes for many years and when the amendment was passed enacting section 37A as it presently reads, that section did not make the land in question any less residential. Without apt words, in my respectful opinion, there should not be given to the word "used" that interpretation of activity suggested by Mr. Smith. On the contrary, as the application of the section created a different basis for taxation, the interpretation should be given which leans against the construction which imposes a burden on the subject and the intention of the Legislature to impose a tax must be clear. I refer to *Orr* v. *The City of Vancouver*, British Columbia Stated Cases, vol. 1, case No. 1, where Wilson, C.J.S.C. said at p. 11 of that decision:

> "The general principle applicable to the interpretation of taxing statutes is thus stated by Lord Penzance in *Pryce* v. *Monmouthshire Canal and Railway Companies* 4 A.C. 197 at 205:-
>
> 'But however this may be, on which I give no opinion I think the principle on which clauses such as those now in question have hitherto been construed in courts of justice is undoubted.
>
> That principle, my Lords, was stated very clearly in your Lordship's House in the case of *The Stockton Railway Company* v. *Barrett* 11 Cl. & F. 590 at page 607, by Lord Brougham as follows:-
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> > "It must be observed that 'in dubio' you are always to lean against the construction which imposes a burden on the subject; the intention of the legislature to impose a tax must be clear; it was so held in the case of *The Hull Docks Company* v. *Browne*, 2 B & Ad page 58 which both parties in this case relied on for other purposes, and which the Plaintiff in error especially cited in support of their view. 'These rates', said Lord Tenterden, 'are a tax upon the subject, and it is a sound general rule that a tax shall not be considered to be imposed (or at least not for the benefit of a subject) without a plain declaration of the intent of the legislature to impose it.' "

I therefore interpret "used" to mean "treated". That means treated by the owners for residential purposes in this case. I determine therefore that Lot "A" was used during the assessment year for

residential purposes within the meaning of the statute, in spite of the fact that there were no activities demonstrated.

In this connection I observe that it is activity upon land classified as held for residential purposes that will change its status. Section 37A says:

> ". . . unless the increase is attributable to a change in the physical characteristics of the land or the improvements, or to new construction or development thereto, thereon, or therein,. . ."

There was no such activity, as explained above.

I observe that some limit may be expected upon areas of land held for residential purposes, but the statute has not fixed any nor has it defined residential purposes. I am of the opinion that it is not unreasonable for a family to hold for residential purposes in the area in question the three parcels of land, including said Lot "A".

The Board has asked the guidance of the Court by presenting the questions quoted above. I deal with the questions raised:

(a) Yes.
(b) Yes.

The Board is advised accordingly.