H. C. OF A. 1922-1923.

LUCY v. THE COMMONWEALTH.

questions in detail. Costs to be costs in the action. Action referred back for further trial and assessment of damages.

Solicitor for the plaintiff, *B. Benny*, Adelaide.

Solicitor for the defendant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

THOMAS . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

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PERTH, *Sept.* 17, 18, 21.

Knox C.J., Higgins and Starke JJ.

Income Tax—Assessment—Option to purchase property—Agreement for sale—Services in negotiating sale—Remuneration therefor — Shares in company — Value of shares — Share of profits arising from sale of property — Income from personal exertion—Proceeds from property—Income Tax Assessment Act 1915-1918 (*No.* 34 *of* 1915—*No.* 18 *of* 1918), *secs.* 3, 10.

Sec. 3 of the *Income Tax Assessment Act* 1915-1918 defines "income from personal exertion" or "income derived by any person from personal exertion" as "income derived from sources in Australia consisting of earnings, salary, wages, commission, fees, bonuses, pensions, superannuation allowances, retiring allowances and gratuities not paid in a lump sum, allowances received in the capacity of employee, and the proceeds of any business carried on by the taxpayer either alone or as a partner with any other person, and any income from any property where the income forms part of the emolument of any office or employment of profit held by the individual." Sec. 10 (1) provides that "subject to the provisions of this Act, income tax shall be levied and paid for each financial year upon the taxable income derived directly or indirectly by every taxpayer from sources within Australia during the period of twelve months ending on the thirtieth day of June preceding the financial year for which the tax is payable."

A, who was the holder of an option to purchase certain property, sold his rights under the option to the B company. In the course of negotiations for such sale to the B company it was agreed between A and C, who rendered certain services in negotiating for such sale, that C should receive one-fifth of A's profits on such sale. In satisfaction of C's one-fifth share, 7,000 £1 shares in the B company, part of the consideration for the sale, were transferred to C.

Held, that the value of the shares was not an enhancement of capital arising from a realization of property, but was income of C and was assessable as "income from personal exertion."

CASE STATED.

On the hearing of an appeal by Fred Russell Thomas from an assessment of him for Federal income tax for the year 1921-1922, *Starke* J. stated a case, which was substantially as follows, for the opinion of the Full Court :—

1. The Proprietary Coal Mines of Western Australia Ltd. was the registered proprietor of certain coal-mining leases granted pursuant to the provisions of the *Mining Act* 1904 (W.A.) and of certain machinery, stock and plant thereon. On the said leases the company carried on the business of mining for coal.

2. On 4th March 1920 the company gave to Thomas Davey Briggs an option to purchase the said leases, machinery, stock and plant for £75,000.

3. The appellant, Fred Russell Thomas, was a director of the Amalgamated Collieries of Western Australia Ltd., and he approached one Garland, the secretary of the Proprietary Coal Mines of Western Australia Ltd., with a view to acquire an option to purchase that company's leases ; but, on being informed that an option had been given to Briggs, he then negotiated with him to sell his option to Robert John Lynn and Walter Johnson, who were directors of the Amalgamated Collieries of Western Australia Ltd.

4. On 18th June 1920 Briggs agreed to sell all his rights under his option to Lynn and Johnson. But it was stipulated and agreed between Briggs, Garland and the appellant that, if this agreement of Briggs with Lynn and Johnson or any other agreement for sale were completed, then Briggs, Garland and the appellant should be entitled to any amount realized over the amount required to pay the Proprietary Coal Mines of Western Australia Ltd., in the proportions of

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two-fifths to Briggs, two-fifths to Garland and one-fifth to the appellant.

5. The agreement of 18th June 1920 was not completed, and an amended agreement was entered into.

6. Briggs acquired his option with a view to resale or disposal of it and of the leases, machinery, plant, &c., and the making of a profit; and both Garland and the appellant became interested in that option, in the manner hereinbefore appearing, and with a similar view.

7. By an agreement dated 2nd September 1920 Briggs agreed to sell to the Amalgamated Collieries of Western Australia Ltd. the coal-mining leases hereinbefore mentioned and the machinery, stock, plant, &c., upon the leases and all such other property as is comprised in the agreement and letters mentioned in the said agreement.

8. The agreement for sale mentioned in the last preceding paragraph was duly completed, and 7,000 fully paid up cumulative first preference shares of £1 each were allotted and issued to the appellant. The shareholders of the Amalgamated Collieries of Western Australia Ltd. passed a formal resolution approving of the transaction and of the allotment of the said shares to the appellant.

9. The Commissioner of Taxation assessed the appellant to income tax for the years 1921-1922 in respect of the value of the said 7,000 shares so allotted and issued to the appellant as aforesaid, and assessed such value as income from personal exertion. The said shares were estimated at a value of £7,000 in the said assessment, but the parties have now agreed to a lesser sum.

10. The appellant was dissatisfied with the said assessment and lodged an objection in writing against it, which was disallowed; and the appellant then requested the Commissioner to treat the objection as an appeal and forward it to this Court.

The questions asked were as follows:—

(1) Whether on the facts stated the value of the said 7,000 shares allotted and issued to the appellant is assessable to income tax under the *Income Tax Assessment Act* 1915-1918;

(2) If so, whether the said value is assessable as "income from personal exertion" or as "income from property."

Copies of the agreements and other documents referred to in the case were incorporated therein.

In the agreement of 2nd September 1920, mentioned in par. 7, the appellant agreed to accept the allotment of 7,000 fully paid up cumulative first preference shares of £1 each in the purchasing company in satisfaction of his share of the purchase price.

Dwyer, for the appellant. The shares represent the proceeds of the sale of the appellant's interest in the option of purchase; they are, therefore, an accretion to capital, and are not income. The value of the shares is not "income from personal exertion," nor "income derived by any person from personal exertion," within the meaning of those expressions in sec. 3 of the *Income Tax Assessment Act* 1915-1918. The transaction here was an isolated transaction; the profits in question arose from the transfer of property—the appellant was the holder of a one-fifth share in the option and has parted with it for 7,000 shares in the company. Those shares are not the "proceeds of any business carried on by the taxpayer." One transaction is not sufficient to constitute carrying on a business. That expression, like the word "income," connotes recurrence; so too does the word "earnings," which, when considered with the accompanying words, also seems to imply payment in money. Here the characteristic of recurrence is wanting. [Counsel referred to *Oxford Dictionary*, *sub* "Income"; *Blockey* v. *Federal Commissioner of Taxation* (1); *Melbourne Trust Ltd.* v. *Commissioner of Taxes* (*Vict.*) (2); *Commissioner of Taxes* (*Vict.*) v. *Melbourne Trust Ltd.* (3); *Californian Copper Syndicate* v. *Harris* (4); *Companies Act* 1893 (W.A.), sec. 7].

[HIGGINS J. referred to *Smith* v. *Anderson* (5).]

The appellant was, in effect, made a partner in the venture, and he has made a profit—a mere fortuitous profit—on a resale. Profits on resales are not taxable as income. (Cf. *Commissioner of Taxation*

(1) (1923) 31 C.L.R., 503.
(2) (1912) 15 C.L.R., 274, at p. 302.
(3) (1914) 18 C.L.R., 413, at p. 420.
(4) (1904) 5 Tax Cas., 159.
(5) (1880) 15 Ch. D., 247, at p. 277.

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(*W.A.*) v. *Newman* (1); *Hickman* v. *Federal Commissioner of Taxation* (2); *Commissioners of Taxation* (*N.S.W.*) v. *Mooney* (3).) If there is any doubt as to whether this is "income," that doubt should be resolved in favour of the taxpayer: words imposing liability should be clear and unambiguous (*Mooney* v. *Commissioners of Taxation* (*N.S.W.*) (4); *Maxwell on Statutes*, 5th ed., p. 463).

Stow, for the respondent. Briggs could not dispose of the property; the appellant disposed of it for him, and received the 7,000 shares as remuneration for his services; the value of the shares was, therefore, income from personal exertion.

Cur. adv. vult.

Sept. 21.

The following written judgments were delivered:—

KNOX C.J. The appellant was assessed to income tax for the year 1921-1922 in respect of £7,000 alleged to be the value of 7,000 shares in the Amalgamated Collieries of Western Australia Ltd., received by him in the circumstances stated in the special case. The questions for the decision of this Court are (1) whether on the facts stated the value of the said 7,000 shares allotted and issued to the appellant is assessable to income tax under the *Income Tax Act* 1915-1918; (2) if so, whether the said value is assessable as "income from personal exertion" or as "income from property."

By sec. 10 of the *Income Tax Assessment Act* 1915-1918 income tax is chargeable on the taxable income derived directly or indirectly by any taxpayer from sources within Australia. The Act contains no definition of "income," but by sec. 3 "income from personal exertion" is defined as meaning "income derived from sources in Australia consisting of earnings, salary, wages, commission, fees, bonuses, pensions, superannuation allowances, retiring allowances and gratuities not paid in a lump sum, allowances received in the capacity of employee, and the proceeds of any business carried on by the taxpayer either alone or as a partner with any other person, and any income from any property where the income forms part of the

(1) (1921) 29 C.L.R., 484.
(2) (1922) 31 C.L.R., 232.
(3) (1907) 4 C.L.R., 1439, at p. 1445.
(4) (1905) 3 C.L.R., 221, at p. 229; (1907) 4 C.L.R., 1439.

emoluments of any office or employment of profit held by the individual" and "income derived from property" as meaning "all income derived from sources in Australia and not derived from personal exertion."

It is not suggested on behalf of the appellant that the shares in question were received by him as a gift; but it is said that they represent the proceeds of sale of his interest in the option of purchase given by the Proprietary Coal Mines of Western Australia Ltd. to Thomas Davey Briggs, and must, therefore, be treated as an accretion to capital and not as income. It appears from the special case that the appellant, on being informed that this option had been given to Briggs, negotiated with him to sell his option to Lynn and Johnson. These negotiations resulted in the agreement of 18th June 1920, whereby Briggs agreed to sell to Lynn and Johnson all his rights under the option, for the sum of £110,000. The appellant, although a party to that agreement, was neither a vendor nor a purchaser under it, and apparently was joined as a party only because the purchase-money was by the terms of the agreement to pass through an account in the joint names of himself and another person. On the same day Briggs signed a document, in the form of a letter addressed to the appellant, acknowledging that if the agreement for sale of the option to Lynn and Johnson were completed the appellant would be entitled to receive £7,000 of the balance payable to Briggs over and above the amount payable to the Proprietary Coal Mines. The balance so payable if this agreement had been carried out would have been £35,000, of which £7,000 would have been one-fifth. The consideration for the promise to pay this sum of £7,000 is not stated, but it is not suggested that there was any consideration moving from the appellant except his services in negotiating the agreement of 18th June for the sale of the option to Lynn and Johnson. Up to this point there is nothing, either in the documents or in the facts stated, to suggest that the appellant had any proprietary interest in the option. It appears from the case stated that at some time, not specified, an agreement was made between Briggs, the appellant, and one Garland that, if the agreement for sale of 18th June or any other agreement for sale were completed, Briggs, Garland and the appellant should be entitled to any amount realized over the amount

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required to pay the Proprietary Coal Mines in the proportion of two-fifths to Briggs, two-fifths to Garland and one-fifth to the appellant. The effect of this agreement as between the appellant and Briggs was no more than to substitute for the sale to Lynn and Johnson any sale that might be completed and to substitute for the sum of £7,000 a one-fifth share of the surplus proceeds of sale. There is nothing in it to show that the appellant's position in the transaction was to be altered from that of negotiator of a sale to that of part proprietor of the option. Eventually, on 2nd September 1920, a sale to the Amalgamated Collieries of Western Australia Ltd. was arranged at the price of £110,000 payable as to £100,000 in cash and as to £10,000 by the allotment to Briggs of 3,000 and to the appellant of 7,000 fully paid up cumulative preference shares of £1 each in the Company. It is on the face value of these 7,000 shares that the appellant has been assessed to income tax. The agreement for sale, to which the appellant was a party, contains a recital that the appellant was entitled to a one-fifth share in the option given to Briggs, but, so far as appears from the special case the only agreement between Briggs and the appellant was that the appellant was to receive one-fifth of the profit made on the sale of the option. Garland was not a party to the agreement of 2nd September.

On the facts stated, I think it is impossible to hold that the appellant was a part-owner of the option granted to Briggs. The appellant repudiates the suggestion that the 7,000 shares were a gift; and in my opinion the proper conclusion on the facts stated is that they represented a payment to him for services rendered in bringing about the sale of the option. In truth, they represent commission on the sale paid to the appellant by way of remuneration for his services. In this view, the value of the shares is clearly "earnings," "commission," or a "fee" derived by the appellant from a source in Australia, and so income from personal exertion within the definition contained in sec. 3 of the Act.

On the interesting question whether profit made on the sale or conversion of property by a person not carrying on business as a dealer in that class of property is income liable to taxation, it is not necessary for me to express an opinion.

The questions should be answered: (1) Yes; (2) As income from personal exertion.

The costs will be costs in the appeal.

HIGGINS J. The position is that one Briggs acquired for value an option to purchase from the Proprietary Company certain mining leases, with machinery, stock and plant, for £75,000. Briggs agreed to sell to Lynn and Johnson or to any person nominated by them all his rights under the option for £110,000—or, rather, according to the agreement as varied, for £100,000 in cash and 10,000 first preference shares paid up to £1 each. According to par. 4 of the case as stated, it was "agreed between Briggs, Garland and the appellant, Thomas, that, if this agreement of Briggs with Lynn and Johnson or any other agreement for sale were completed, then Briggs, Garland and the appellant should be entitled to any amount realized over the amount required to pay the Proprietary Coal Mines of Western Australia Ltd. in the proportions of two-fifths to Briggs, two-fifths to Garland and one-fifth to the appellant." The sale has been completed to the Amalgamated Collieries of Western Australia Ltd.; and the appellant has received, as his share of the difference between £75,000 and £110,000, 7,000 of the shares—treated as equivalent to one-fifth of that difference. The questions are: (1) Is the value of the 7,000 shares assessable to income tax under the Federal *Income Tax Assessment Act* 1915-1918; and (2) if so, is the value assessable as "income from personal exertion," or as "income from property"?

The appellant, as well as Lynn and Johnson, was a director of the Amalgamated Collieries Company; but it is stated that the shareholders in that company passed a resolution approving of the transaction and of the allotment of the shares to the appellant; and we need not concern ourselves in this case with the conflict between the appellant's interest and his duty.

It does not appear expressly in the case, as stated, what Thomas did to entitle him to the 7,000 shares. But it appears that they came to him as the result of his agreement with Briggs and Garland. The word "agreement" connotes, under English law, some consideration; the shares were not a gift. We are not entitled to draw

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inferences of fact in a case stated under sec. 38; and, speaking for myself personally, I might have difficulty in saying that the true relation of the appellant to Briggs was sufficiently defined. But Mr. *Dwyer* has admitted that Briggs himself could not dispose of the option, but disposed of it with the aid of Thomas, and for that aid gave Thomas 7,000 of the shares.

Under these circumstances, I am of opinion that the value of the shares is assessable to income tax as income from personal exertion.

I quite concur with the appellant in his contention that the shares cannot be treated as the "proceeds of any business carried on by the taxpayer," within the meaning of these words as they appear in the definition of "income from personal exertion" in sec. 3. There is nothing in the case stated to show that Thomas "carried on any business" as mining speculator or broker or agent, or otherwise than as a solicitor. In the recent case of *Mount Morgan Gold Mining Co.* v. *Commissioner of Income Tax* (Q.) (1), under the Queensland *Income Tax Act*, I stated my views on the meaning of "carrying on business" at some length. I thought that the words connote something habitual, something continuous, generally some continuity of establishment.

But, according to the definition in sec. 3, "income from personal exertion" means also "income . . . consisting of earnings, salary, wages, commission, fees, bonuses, pensions, superannuation allowances, retiring allowances and gratuities not paid in a lump sum, allowances received in the capacity of employee." Why are not the 7,000 shares received by Thomas under his agreement with Briggs, in consideration of the aid given by Thomas, to be treated as "earnings of Thomas"? In the *Oxford Dictionary* the word "earnings" in the plural is said to be "the amount of money which a person acquires or becomes entitled to by his labour." The labour of Thomas is labour such as that of an estate agent or broker—the labour of a middleman; and for that service Briggs was willing to do what is called "share his commission" with Thomas—following a practice which, though often abused, is not always reprehensible. Mr. *Dwyer*, who has ably put the case for his client, urges that the word "earnings" must be read as coloured by the subsequent

(1) (1922-23) 33 C.L.R., 76.

associated words; and probably he is right. But what is the colour? What is the colour of "commission," of "fees," of "bonuses"? In this part of the definition we are not concerned with such words as "carry on any business"; there is no suggestion of continuity or repetition. If an average adjuster has retired from business, but consents to use his old skill for the purposes of a particular wreck, in consideration of £200, that sum ought, I should say, to appear in the assessment although it is a single transaction in the year. True, the associated words seem to point to income derived from employment, past or present; but there is employment here, of Thomas by Briggs. The payment is, as it were, by piece-work prices, not by weekly or periodical wages. This view is quite consistent with *Mooney's Case* (1); *Newman's Case* (2); *Hickman's Case* (3); and, as the Chief Justice has pointed out, it is favoured by the reasoning in the judgments in *Blockey's Case* (4).

In my opinion, question 1 should be answered in the affirmative; and question 2, As "income from personal exertion."

STARKE J. The case sets forth the facts upon which our decision must be based. The contention for the appellant was that he had a one-fifth share or interest in the option acquired by Briggs to purchase certain coal-mining leases, and machinery, stock and plant owned by the Proprietary Coal Mines of Western Australia Ltd. This option was exercised, and, by a subsequent sale of the leases, &c., a considerable advance was made upon the option price payable to the Proprietary Coal Mines of Western Australia Ltd. The gain so made, was, according to the appellant, an enlargement or enhancement of capital, arising from a realization of property, and not assessable to income tax. But the appellant had, in my opinion, no share or interest in the option or in the leases. All he had was an agreement to pay him in case of a sale of the option on the leases, &c., one-fifth share of the profits realized on such sale, and the necessary implication on the facts stated is that the share was to be paid in return for his services in assisting to dispose of the option on the leases, &c. It is quite immaterial, however, in my opinion, whether

(1) (1905) 3 C.L.R., at p. 229; (1907) 4 C.L.R., at p. 1445.
(2) (1921) 29 C.L.R., 484.
(3) (1922) 31 C.L.R., 232.
(4) (1923) 31 C.L.R., 503

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the appellant had a share or interest in the option or the leases, &c., or whether he was being paid for services rendered. For in either case he was properly assessed to income tax. If he had a share or interest in the option or in the leases, then it is clear, I think, that the money obtained by the disposal of the option or the leases, &c., was a gain made in the course of carrying on a scheme of profit-making. Par. 6 of the case makes this clear. Such a gain may not be the proceeds of a business carried on by the appellant, but it is an earning within the meaning of the Income Tax Assessment Acts (cf. *Californian Copper Syndicate* v. *Harris* (1); *Blockey v. Commissioner of Taxation* (2)). If, on the other hand, the sum received by the appellant was a payment for services rendered by him in disposing of the option or the leases, &c., it was equally an earning or a commission, or a fee, within the meaning of the Income Tax Assessment Acts.

A suggestion was made that the Income Tax Assessment Acts refer to money receipts, and not to things of money value which represent money's-worth. But that argument is met in *Tennant* v. *Smith* (3), and in other cases.

The questions stated ought to be answered as follows: (1) Yes; (2) As "income from personal exertion."

Questions answered accordingly.

Solicitors for the appellant, *Dwyer, Unmack & Thomas.*

Solicitor for the respondent, *Gordon H. Castle*, by *F. L. Stow*, Crown Solicitor for Western Australia.

(1) (1904) 5 Tax Cas., 159. (2) (1923) 31 C.L.R., 503.
(3) (1892) A.C., 150, at p. 156.