[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF TAXES (QUEENSLAND) . . . . . APPELLANT;

AND

BURKE . . . . . RESPONDENT.

H. C. OF A. 1926.

BRISBANE, *June* 23, 29.

Knox C.J., Higgins, Gavan Duffy and Starke JJ.

Income Tax (Queensland)—Assessment—Income derived from personal exertion—Business of buying and selling land—Sales of land—Payment by instalments extending over several years—Profits arising from sale of real property—Income Tax Acts 1902-1923 (*Q.*) (*2 Edw. VII. No.* 10—14 *Geo. V. No.* 42), *secs.* 3, 14 (I.) (1).*

In the ordinary course of his business the taxpayer purchased land in Queensland from time to time and subdivided and sold portions thereof under contracts of sale providing for payment of the purchase-moneys by instalments extending over more than one year.

* Sec. 7 of the *Income Tax Acts* 1902-1923 (Q.) imposes income tax (*inter alia*) on all taxable income derived from personal exertion. By sec. 3 "income derived from personal exertion" is defined as "all income consisting of earnings . . . earned in or derived from Queensland, and all income arising or accruing from any business carried on in Queensland . . . : Without limiting the generality of the foregoing provision, the income subject to tax expressly includes all income referred to in . . . section fourteen of this Act." Sec. 14 (I.) of the *Income Tax Acts* 1902-1922 provides (*inter alia*) that in income derived from personal exertion is included "(1) all net gains or profits arising from the sale of any real property . . . whether or not arising or accruing from any business carried on by the taxpayer where such real property was purchased or acquired by him during the year in which the sale took place or the six years prior thereto, arrived at by deducting from the amount realized by the sale the expenses of sale and the cost to the vendor (less any amount for depreciation which the Commissioner considers just) of the property," &c. By sec. 7 of the *Income Tax Act of* 1923 the above words "whether or not arising or accruing from any business carried on by the taxpayer where such real property was purchased or acquired by him during the year in which the sale took place or the six years prior thereto" are repealed and the following words are inserted in lieu thereof: "(i.) in connection with any business carried on by the taxpayer; or (ii.) in all other cases where such real property was purchased or acquired by him during the year in which the sale took place in the six years prior thereto."

Held, that in assessing him to income tax under the *Income Tax Acts* 1902-1923 (Q.) the Commissioner of Taxes was justified in basing the assessment on the whole of the purchase-moneys payable under the contracts of sale made during the year of assessment.

Decision of the Supreme Court of Queensland (Full Court): *Burke* v. *Commissioner of Taxes*, (1926) S.R. (Q.) 31, reversed.

APPEAL from the Supreme Court of Queensland.

On the hearing of an appeal by Thomas Michael Burke against the assessment of income tax made by the Commissioner of Taxes (Q.) for the taxpayer's financial year ending June 1923, the Court of Review stated, for the opinion of the Full Court of the Supreme Court of Queensland, a case which was substantially as follows:—

1. The appellant, Thomas Michael Burke, carries on the business of dealing in real property at Brisbane and elsewhere in the State of Queensland.

2. In the course of such business the appellant purchases, subdivides and sells land in Queensland.

3. A large number of such sales by the appellant are concluded by contracts on terms providing for the payment of the purchase-money by the respective purchasers in the following manner: a small part of such purchase-money in cash and the remainder of the purchase-money, with interest at six per centum per annum, by a number of successive calendar monthly instalments varying in number from twenty-four to sixty.

4. In the ordinary course of such business the payment of the purchase-money is in some cases made by the instalments and at the times prescribed; in other cases default is made in payment of such instalments at the prescribed times, and payment of such instalments or of instalments of less than prescribed amounts is made during the appellant's financial years later than those prescribed by the relative contracts; while in still other cases the instalments or some of them prescribed by the relative contracts are never paid at all—the said contracts of sale, however, providing for such contingencies, and (*inter alia*) providing for the cancellation thereof and forfeiture of deposit money and instalments paid on failure of the purchaser to comply with any condition of such contract.

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5. During the appellant's financial year ended 30th June 1923 the appellant carried on the said business.

6. At the beginning of such financial year the appellant had on hand certain unsold land which he had purchased prior to the said year. The appellant did not in such financial year purchase any land.

7. During such financial year the appellant entered into contracts with purchasers for the sale by the appellant of a portion of the unsold lands referred to in par. 6 at prices aggregating a sum much in excess of the cost price thereof.

8. Of the total amounts of the purchase-moneys agreed to be paid by the several purchasers from the appellant of the lands referred to in par. 7 a portion only was received by the appellant during such financial year, the remainder thereof being payable in subsequent financial years in accordance with the practice set out in par. 3 hereof. The appellant during such financial year received instalments of purchase-money in respect of sales made during the preceding financial year ended 30th June 1922 and incurred expenses in connection with such instalments; but all the profit in respect of such sales was included in the taxable income attributable to the said preceding financial year, the Commissioner having assessed for that year in the same manner as for the financial year ended 30th June 1923, so that the instalments received in the last-mentioned financial year in respect of sales made in the preceding financial year were not included in the taxable income of the financial year ended 30th June 1923 but expenses of collection in respect of such instalments were allowed as a deduction in arriving at the taxable income for the last-mentioned financial year.

9. The appellant during the same period incurred expenses in connection with his land-selling business.

10. For the purposes of the *Income Tax Acts* 1902-1923 (Q.) the appellant made a return to the respondent, the Commissioner, for the appellant's financial year 1st July 1922 to 30th June 1923.

11. On 9th July 1924 the respondent assessed the appellant to income tax under the *Income Tax Acts* 1902-1923 for the appellant's financial year 1st July 1922 to 30th June 1923.

12. In assessing the appellant to income tax as aforesaid, the respondent treated the total amounts of the purchase-moneys agreed to be paid by the several purchasers from the appellant as aforesaid under the contracts referred to in par. 7 as the gross income of the appellant in the course of his said business for the purpose of assessing income tax, notwithstanding that the greater part of the said purchase-moneys was not received during such financial year and might not be received thereafter.

13. The assessment was made on the profits as disclosed in the profit and loss account for the appellant's financial year ended 30th June 1923 returned for assessment purposes under the said Acts by the appellant. (A copy of the appellant's said return and a copy of his profit and loss account were attached: this account was made up by debiting the value of the land unsold on 1st July 1922 and the expenses of the trading year, and by crediting the various sales made, the interest and other items received during the year and the value of land remaining unsold on 30th June 1923; and showed a net profit from the business of about £18,194, of which the taxpayer's share was £15,010.) In the profit and loss account for the previous year (the only other year of trading) as returned for assessment for that year the profits were arrived at on the same basis.

Appellant's objection to such assessment having been disallowed by the respondent and forwarded to the Court of Review for further consideration, that Court, at the request of the parties, stated the facts above mentioned and submitted the following questions of law for the determination of the Full Court of the Supreme Court:—

(1) Was the respondent right in basing the assessment on the whole of the purchase-moneys payable under the appellant's contracts of sales made during the appellant's financial year 1st July 1922 to 30th June 1923?

(2) If not, how or on what principle should the profits with respect to the whole of the sales of land during such financial year be ascertained for the purpose of assessment under the *Income Tax Acts*?

(3) Whether any (and what part) of the purchase-moneys in respect of sales made during the year ended 30th June

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1923, and whether not paid nor payable during such financial year, should be taken into account, and how?

(4) By whom should the costs of and incidental to this special case be paid?

The Supreme Court answered the first question in the negative, and in answer to the second question decided that "the cost of the land and the expenses of sale under each contract must be charged against or deducted from receipts before the amount of any profit can be considered": *Burke* v. *Commissioner of Taxes* (1).

From that decision the Commissioner of Taxes now appealed to the High Court.

Woolcock, for the appellant. The taxpayer is liable to income tax on the whole of £15,010; he carried on the business of buying and selling land and derived income from personal exertion in that business, and falls within sec. 3 of the *Income Tax Acts* 1902-1922. The statute makes no distinction between different classes of business. Income is the balance of gain over loss (*In re Income Tax Act of* 1902 [*No.* 2] (2); *In re Spanish Prospecting Co.* (3)). The Commissioner rightly assessed this taxpayer in the same way as an ordinary trader in goods; the contracts made by him and the obligations of purchasers thereunder are tangible assets arising from his business exertions, and are realizable assets; the obligations to pay instalments create debts due to the business, and the taxpayer is liable under sec. 7, sub-sec. 1, by reason of the definition of "income" in sec. 3, quite irrespective of sec. 14. Further, he is liable under sec. 14 (I.) (1); for "realized" is not equivalent in meaning to "received": the purchase price payable under each contract of sale is "the amount realized" by the sale of each portion of real property. The taxpayer has himself shown his profits from his business by his profit and loss account; that was adopted as correct for the purposes of assessment of income tax by the Commissioner, and it has not been contended in the case that that method of estimating profits was not right in the circumstances. [Counsel also referred to *Commissioner of Income Tax (Q.)* v. *Bank of New*

(1) (1926) S.R. (Q.) 31. (2) (1904) S.R. (Q.) 70, at p. 77.
(3) (1911) 1 Ch. 92, at p. 98.

South Wales (1); *New York Life Insurance Co.* v. *Styles* (2); *Lawless* v. *Sullivan* (3); *Re Income Tax Acts* 1902-1907 (4); *O'Connor* v. *Commissioner of Taxes* (5); *Federal Commissioner of Land Tax* v. *Duncan* (6); *In re Income Tax Acts* (*The Quat Quatta Co.'s Case*) (7).]

Stumm K.C. (with him *Real*), for the respondent. The taxpayer is liable to assessment to income tax only on the amounts received in the year after deducting the expenses of business; he is not taxable on amounts expected to be paid which may never be paid; he is liable on the profits arising from the sales of land arrived at by deducting from the amount realized by the sale, the expenses of sale and the original cost of the land (sec. 14 (I.) (1). Sec. 14 is a particular provision applicable to this case, and the general provision of sec. 3 in the definition of " income derived from personal exertion " does not apply. Hence the difference between what he has actually received and his actual capital expenditure is the basis of profit on the taxpayer's land-selling transactions. The Act deals with profits in fact, not with fictional profits. The taxpayer is liable to tax on profits realized, and no profits are realized until he had received his capital outlay on the purchase of land he subsequently sold and his expenses of subdivision, sale and collection. [Counsel referred to *In re Oxford Benefit Building and Investment Society* (8); *Webb* v. *Australian Deposit and Mortgage Bank Ltd.* (9); *Secretary of State in Council of India* v. *Scoble* (10); *Federal Commissioner of Land Tax* v. *Duncan* (6); *Commissioners of Taxation* v. *Mooney* (11); *Tennant* v. *Smith* (12).]

Cur. adv. vult.

June 29.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. In our opinion the judgment of the Supreme Court should be discharged and the first question stated by the case answered in the affirmative. The respondent carried on the business of dealing in real property at

(1) (1913) 16 C.L.R. 504.
(2) (1889) 14 App. Cas. 381, at p. 409.
(3) (1881) 6 App. Cas. 373.
(4) (1912) Q.W.N. 3.
(5) (1918) Q.W.N. 23.
(6) (1915) 19 C.L.R. 551.
(7) (1907) V.L.R. 54; 28 A.L.T. 100.
(8) (1886) 35 Ch. D. 502.
(9) (1910) 11 C.L.R. 223, at p. 237.
(10) (1903) A.C. 299, at p. 302.
(11) (1907) A.C. 342.
(12) (1892) A.C. 150, at p. 164.

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Brisbane and elsewhere in the State of Queensland. He made up the profit and loss account of that business for the year ending on 30th June 1923, and showed in round figures a net profit of £18,194, of which his share amounted to £15,010. That account debited the value of land unsold on 1st July 1922 and the expenses of the trading year, and credited various sales, interest and other items received during the trading year, and the value of land remaining unsold on 30th June 1923.

Some, if not all, of such sales were made on terms, and the purchase-money was payable by monthly instalments over periods ranging from two to five years; but the point to be observed is that the respondent for the purposes of his business treated the net profit shown in the account as earned and derived in the trading year ending on 30th June 1923. He dealt with it as a divisible profit of that year, and the Commissioner was quite justified, in our opinion, in dealing with it in the same fashion.

There is nothing in the case which shows that the respondent was in error in so ascertaining his profit and treating it as realized in the year of his trading to which he attributed it. If the sums still unpaid under contracts of sale are treated as part of the amount realized by the sale, the profit or income of the trading year must be the same, whether calculated under the provisions of sec. 3, prescribing that income from personal exertion shall include income arising or accruing from any business carried on in Queensland, or according to the formula prescribed in sec. 14, as amended by sec. 7 of the Act of 1923 (14 Geo. V. No. 42). It is therefore unnecessary to consider the relation of the provisions of sec. 3 to those of sec. 14 as amended, or to define the class of cases that fall within sec. 14, or to determine whether the formula prescribed in sec. 14 proceeds on the same principle as would be applied in ascertaining income arising or accruing from businesses under sec. 3, or how that formula should be applied if land were subdivided and sold in allotments at various times and on extended terms.

The questions stated by the case are answered as follows:— (1) Yes. (2) and (3) Unnecessary to answer. (4) By Thomas Michael Burke.

HIGGINS J. I am of opinion that the first question must be answered in the affirmative. We have not before us any of the numerous contracts of sale, and my conclusion is founded on the mere facts stated.

I am glad to find myself in concurrence with my learned colleagues in this opinion; but, personally, I do not feel myself justified in basing my opinion on the form of the profit and loss account for the year 1922-23 furnished by the taxpayer as explaining his return of income for the year. I assume this account to include *all* the instalments payable, in that year or afterwards, for sales made in that year; but if the taxpayer made a mistake in charging himself for the year with all the instalments, I cannot find anything in the Act that estops or precludes him from showing that, as a matter of law, they ought not to have been so charged. The question asked of the Court is, expressly, one of law—was the Commissioner right in basing his assessment on the *whole* of the purchase-money so payable? There is no appeal from the Commissioner from his findings generally; we are not asked whether the Commissioner was justified in his conclusion. The Commissioner has to make his assessment in accordance with the law "in such manner as *may* be necessary"; he can ask for a new or further and fuller return of the income (sec. 46); he can examine the taxpayer orally (sec. 48); he can even require the taxpayer to alter his method of keeping his books (sec. 48); but he is not put by the Legislature under a duty to take advantage of any blunder of the taxpayer operating to the taxpayer's prejudice.

Even if sec. 14 of the Act 1902-1922, as amended by sec. 7 of the Act 1923 (14 Geo. V. No. 42), is to be treated as an exception to the definition of "income derived from personal exertion" in sec. 3—even if it is to be treated (contrary to my view) as a separate and complete code as to profits from the sale of any real property—I do not think that the taxpayer's contention is right. I do not think that under the scheme of this Act, with all its contortionist amendments, the amounts payable in instalments in subsequent financial years under the several contracts of sale are not to be treated as income until they have been actually received. Not only did the taxpayer include the amounts of the sales in his own return of his

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earnings for the year 1922-23, for the purpose of assessment, but the scheme of the Act required him to do so. If he regarded any of the debts as bad or doubtful, his remedy was under sec. 17 (ii.); and if any amount were received on account of the bad or doubtful debts it was to be credited in income in the year of receipt and not to be subject to income tax. Similarly, if a sale be cancelled an allowance may be made to the taxpayer in the year in which the cancellation takes place, or a refund made of the tax overcharge (proviso to sec. 14 (I.) (1)). But, in the year of assessment, the year following the year of earning, "all net gains or profits arising from the sale of any real property . . . in connection with any business carried on by the taxpayer; *or* . . . in all other cases where such real property was purchased or acquired by him during the year in which the sale took place or the six years prior thereto, arrived at by deducting from the amount realized by the sale the expenses of sale and the cost to the vendor . . . of the property," are expressly included in the income liable to tax (sec. 14 (I). (1) as amended in 1923). This subtraction sum must obviously be done at one time; and the only time appropriate is the time of the assessment made of the earnings in the year of the contract. One asset—the purchase-money—has to be substituted for the former asset—the land.

It has been argued that the word "realized" means "received" in describing the subtrahend, "the amount *realized* by the sale" (sec. 14 (I.) (1)). I cannot agree with this contention. The word "realized" is capable of several meanings; but it is our duty to construe this untechnical word in its popular sense in such a context —*uti vulgus loquitur*; and to say of a land sale that £10,000 has been "realized" would surely be taken as meaning that £10,000 was the total purchase-money for all the allotments sold, not that the £10,000 had been received. In *Foster* v. *New Trinidad Lake Asphalt Co.* (1) the word "realized" is applied by *Byrne* J. even to an accretion to the estimated value of an item of capital assets. Even treating the word "realized" as opposed to "estimated," and as equivalent to "tangible for the purpose of division" (as in *In re Oxford Benefit Building and Investment Society* (2)), a definite instalment payable

(1) (1901) 1 Ch. 208, at p. 213. (2) (1886) 35 Ch. D. 502.

is not " estimated " in that sense, and it is " tangible "—a tangible gain—" for the purpose of division." The position is the same in substance as if the purchase-money were paid and the property conveyed, and the property were mortgaged to the vendor for the amount advanced by him (at interest) to enable the purchaser to make complete payment.

I see nothing to compel us to treat the Act as introducing a practice in accountancy which is contrary to the usual business methods.

It should also be noticed that where the Legislature intends instalments to be distributed among the several years, and each instalment to be included in the assessment for year of payment, it says so expressly (sec. 14 (II.) (2) proviso ; sec. 15 (1) (xvii.)). Such a provision is appropriate, of course, to the complex cases there referred to—as where a lessee receives a premium for granting a lease, and claims a deduction because he also had paid a premium for the lease which he holds. If the premium received is payable by instalments, the taxable amount is that paid in the year in respect of which the assessment is made. But in such cases there is no interest paid on the instalments—as here ; and the express provision as to such instalments tends strongly to the inference that no such provision is to be implied in other cases.

But I am of opinion also that sec. 14 (I.) (1) was not meant to introduce any complete and separate code for land-jobbing. I think that sec. 3, in its definition of " income derived from personal exertion," applies to this kind of business as well as to other kinds ; and that the income derived from such a business comes within the words " all income consisting of earnings . . . earned in or derived from Queensland, and all income arising or accruing from any business carried on in Queensland " ; and, as expressly there stated, the income subject to tax includes all income referred to in sec. 14, " without limiting the generality of " the provision in sec. 3. In sec. 14 the Legislature has said that income liable to tax should expressly include all net gains &c. as described in sec. 14 ; but this also is " without limiting the force or effect of any other provision of this Act." The only serious difficulty has been to find the exact object of sec. 14 (I.) (1). It certainly was meant to increase the kinds of income liable to tax ; but it does not appear to treat as income

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profit made by an isolated land sale, made by one who does not carry on the business of land selling. Looking, however, at the words which the amendment of 1923 repeals, I am inclined to think that the words repealed made the concurrence of two conditions necessary, and the new words made either of the conditions sufficient, in the alternative. In place of prescribing the inclusion of all profits from the sale of any real property—" whether or not arising . . . from any business carried on by the taxpayer where such real property was purchased or acquired by him during the year in which the sale took place or the six years prior thereto," the amendment separates the two conditions and the profits are taxable where either condition applies. The area of the tax is thus extended, but it is not to operate in any way as a limitation of the force or effect of sec. 3. Whatever is the real object of sec. 14 (I.) (1), we are forbidden by the Legislature to treat sec. 14 as reducing the rights of the Commissioner under sec. 3.

The appeal should be allowed.

Appeal allowed with costs.

Solicitors for the appellant, *H. J. Henchman*, Crown Solicitor for Queensland.

Solicitors for the respondent, *Hobbs, Curnow, Fleming & Caine.*

J. L. W.