[HIGH COURT OF AUSTRALIA.]

MARYBOROUGH NEWSPAPER COMPANY LIMITED . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1929.

BRISBANE, *June* 18, 19.

Rich J.

Income Tax (Cth.)—Assessment—Allowable deduction—Newspaper company—Retiring allowance to editor—Long service—Unwilling to retire except on allowance—New editor—Increase in circulation and profits—Outgoing—Money wholly and exclusively laid out or expended for the production of assessable income—Sale of shares—One document—Separate or interdependent transactions—Income Tax Assessment Act 1922-1925 (*No.* 37 *of* 1922—*No.* 28 *of* 1925), *secs.* 23 (1) (*a*), 25 (*e*).

The question whether money is "wholly and exclusively laid out or expended for the production of assessable income" within the meaning of sec. 25 (*e*) of the *Income Tax Assessment Act* 1922-1925 is a question of fact.

The editor of a newspaper was unwilling to retire except on an adequate allowance. The directors and shareholders considered that his retirement was in the interest of the newspaper, and by agreement with the company the editor retired on an allowance. After his retirement the shareholders purchased the shares held by the editor, and the two transactions were reduced to writing in one document. A new editor was appointed, an increase in circulation and profits resulting.

Held, that the allowance paid to the editor was an outgoing, wholly and exclusively laid out or expended for the production of the assessable income of the company, and that the two transactions, the fixing of the allowance and the sale of shares, were not interdependent.

APPEAL from the Federal Commissioner of Taxation.

The Maryborough Newspaper Co. Ltd. appealed to the High Court from the assessment of the Company by the Federal Commissioner of Taxation under the *Income Tax Assessment Act* 1922-1925,

in respect of a payment made by way of retiring allowance to a former editor, which the appellant claimed was an allowable deduction from its income for the year ending 30th June 1926. The appeal was heard by *Rich* J., in whose judgment the material facts are fully stated.

Real, for the appellant.

McGill, for the respondent.

RICH J. delivered the following judgment:—

This case turns upon a question of fact, as counsel admit, and I propose to deal with it at once while the facts are fresh in my mind, especially as counsel have put the matter so clearly before me. It is an appeal from an amended assessment for the financial year ended 30th June 1926 in respect of income derived during the financial year ended 30th June 1926. The subject of appeal is a deduction of £906 claimed by the taxpayer and disallowed by the Commissioner. This amount is one of ten annual sums which the taxpayer, a newspaper company, agreed to pay to its editor, who was also a director, upon his retirement from his editorship.

The legislation which governs the case is contained in the *Income Tax Assessment Act* 1922-1925, the relevant provisions of which are secs. 23 (1) (*a*) and 25 (*e*). Sec. 23 (1) (*a*) is as follows: "In calculating the taxable income of a taxpayer the total assessable income derived by the taxpayer from all sources in Australia shall be taken as a basis, and from it there shall be deducted—(*a*) all losses and outgoings (not being in the nature of losses and outgoings of capital) including commission, discount, travelling expenses, interest and expenses actually incurred in gaining or producing the assessable income." I take the decision to which Mr. *Real* has referred me, the decision in *Alliance Assurance Co.* v. *Federal Commissioner of Taxation* (1), decided on the Act of 1915-1918, to be applicable to this provision. According to that decision the words "actually incurred in gaining or producing the assessable income" attach themselves to the word "expenses" or to the words "commission,

(1) (1921) 29 C.L.R. 424.

H. C. OF A. 1929.

MARYBOROUGH NEWSPAPER CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Rich J.

discount, travelling expenses, interest and expenses," and not to the words "losses and outgoings." But this is of small importance, because sec. 25 (*e*) provides: "A deduction shall not, in any case, be made in respect of any of the following matters: . . . (*e*) money not wholly and exclusively laid out or expended for the production of assessable income." The application of this provision—which is based upon the English *Income Tax Act*—to retiring allowances to employees and others, has been expounded in English decisions more than once. In *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (1) it was held that the question as to whether a certain sum could be deducted from respondent's profits as being "money wholly and exclusively laid out or expended for" the production of assessable income for the purpose of respondent's business was a question of fact for the Commissioner. At p. 684 Mr. Justice *Scrutton*, as he then was, said: "It seems to me that the question whether money is wholly and exclusively laid out or expended for the purposes of a trade is a question of fact." In another case, *Hancock* v. *General Reversionary and Investment Co.* (2), dealing with the part of the case relating to Bumsted, *Lush* J. said: "It is no doubt a question of fact whether a retiring allowance, whatever form it takes, is an expense incurred for the purpose of earning profits." There is a later case, *Mitchell* v. *B. W. Noble Ltd.* (3), where the cases are reviewed. In other cases such as *Rowntree & Co.* v. *Curtis* (4), *British Insulated and Helsby Cables* v. *Atherton* (5), *Mallett* v. *Staveley Coal and Iron Co.* (6), where lump sums were paid, the further question arose as to whether these were a capital expenditure, although they had been paid out for the purpose of producing income and gain. No such question arose in this case. I had intended referring expressly to the words of the Lord Chancellor, Viscount *Cave*, in *British Insulated and Helsby Cables* v. *Atherton* (5), where his Lordship refers to the *Smith Case*, and says: "It was made clear in the above cited cases . . . that a sum of money expended, not of necessity and with a view to a direct and immediate benefit, . . . but voluntarily and on the grounds of commercial

(1) (1914) 3 K.B. 674.
(2) (1919) 1 K.B. 25, at p. 38.
(3) (1927) 1 K.B. 719.
(4) (1925) 1 K.B. 328, at p. 340.
(5) (1926) A.C. 205, at p. 212.
(6) (1928) 2 K.B. 405.

expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade."

As I said just now, no question arose in this case—there is no contest in this case—between capital and income. All the cases emphasize the necessity of determining as a matter of fact, what the purpose of the expenditure was, and whether it was made wholly and exclusively for the production of assessable income.

In this case, the editor had been in the employment of the Company for some forty years. Although his age was not very advanced, he had reached a stage at which he thought it right to hint at retirement. He held 3,550 shares, and his wife and son 100 shares each—the total issued capital of the Company being 10,000 shares. He was also a director of the Company. He received an annual remuneration of £1,270. Of this, £468 appears to have been ascribed to his position as editor and £802 to his position as director. The other directors and the shareholders of the Company considered that his retirement from the editorship was in the interest of the newspapers conducted by the Company. But he desired to have his financial position secured before consenting to resign. Mr. Andrew Dunn, chairman and managing director of the Company, offered to pay him the sum of £906 for ten years if he would retire, and also offered to take over his shares if he desired to sell them. The £906 was arrived at by adding £2 per week, or £104 per annum, to the £802 which, up to then, had been paid to him as director's remuneration. The editor, as I find, at first would not sell his shares, but he decided to accept the proposal for his retirment from the editorship. The result was that he was to be paid £906 for ten years, whether he remained a director or not and whether he remained a shareholder or not, but save for acting as a director he was to retire from the service of the Company. This arrangement was made at the end of January 1924. Towards the end of March the ex-editor revised his view as to the sale of the shares and agreed to sell them for the price which had been suggested, namely, £2 a share, payment of which was deferred for ten years, the price carrying five per cent in the meantime. In May 1924 the solicitors for the ex-editor drew up an agreement

H. C. OF A. 1929.

MARYBOROUGH NEWSPAPER CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Rich J.

embodying these transactions, and this was executed and dated 6th May 1924. I can well imagine that the Commissioner, if he had only this document before him, might suppose that the fixing of the retiring allowance and the sale of shares were interdependent, as Mr. *McGill* has strongly argued. But the transactions were in fact, separate and distinct. The retirement from the position of editor was concluded before the sale of shares was finally arranged. Moreover, as Mr. *Real* has pointed out, the transaction as to retirement was one made between the ex-editor and the Company, and that as to the sale of shares was between him and certain shareholders, to which, of course, the Company was not, and could not be, a party, because it could not purchase its own shares. I have had the advantage of seeing and hearing the witnesses, and I find in fact, that these transactions were not, as has been suggested, interdependent. A meeting of shareholders was held on 14th June 1924, at which it was resolved that the retiring allowance of £906 per annum for ten years from April 1924 be paid to the editor. A new editor was appointed of the newspapers, the circulation of which increased with a consequent improvement of the profits of the Company. I had the advantage of seeing and hearing the ex-editor in the witness-box, and, having regard also to the evidence of the managing director, I think the position in 1924 was that the ex-editor thought that he had served the Company as long as he usefully could but was unwilling to retire save upon an adequate allowance, and that the directors realized that it was important for the Company's business to facilitate his retirement upon fair terms, in order to obtain the advantage of new and younger talent. In my opinion they were not actuated, in giving the allowance, by any other motive than by a desire to better the business of the Company, and thus earn more profits. It may have been possible for them to adopt ruthless measures, but they doubtless realized that the unfair treatment of an editor who had long been in their service and who was a fellow-director and was held in high esteem in the community in which the newspapers circulated would be the worst means of increasing the papers' circulation and the best means of deterring suitable persons from aspiring to the editorship so rendered vacant. It is generally recognized that such payments

ensure loyalty and efficiency in the service of undertakings, and enable a company to supersede a servant whose usefulness is diminishing by one whose usefulness is increasing, without an unconscientious use of powers of dismissal which would destroy the confidence of employees and suitable candidates for service with the Company. No doubt these considerations were not expressly canvassed by the directors, but they are instinctively felt by business men in such situations. At any rate, I am satisfied that no other purpose than the production of more income prompted the agreement to pay the retiring allowance. In saying this, I have not overlooked the fact which was brought to my mind by what Mr. *McGill* said, that a term of ten years was fixed. Why this was done was not explained by the witnesses, but it may well have been thought advantageous to the Company to fix a definite period rather than pay a sum for the uncertain duration of the ex-editor's life. At all events, it affords no ground for discrediting the oral evidence. It should be added that during the ex-editor's life the Company expected to receive many incidental services from him, and these he undertook to give. For these reasons, I find that this sum was an outgoing in the year ended 30th June 1925, wholly and exclusively laid out or expended for the production of assessable income of the Company.

The appeal must be allowed and the assessment adjusted accordingly. As to costs, the usual rule must be followed—*Væ victis*—the defeated party must pay the costs.

The Commissioner has ample power under sec. 97 of obtaining information and evidence, and if his suspicions were aroused by this document to which reference was made, he could have obtained the evidence that was forthcoming to me, and satisfied himself on this point.

Appeal allowed, with costs.

Solicitors for the appellant, *Nicol Robinson & Fox.*

Solicitor for the respondent, *W. H. Sharwood,* Crown Solicitor for the Commonwealth, by *Chambers, McNab & Co.*

B. J. J.