H. C. OF A. 1932. RUHAMAH PROPERTY CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Appeal allowed. Declare that the amount of the taxable income assessed should be reduced by £1,456 0s. 8d. Assessment discharged and remitted to the Commissioner for re-assessment consistently with this declaration. Commissioner to pay the costs of this appeal.

Solicitors for the appellant, *W. H. Wilson & Hemming*, Brisbane, by *Russell & Russell.*

Solicitor for the respondent, *W. H. Sharwood*, Commonwealth Crown Solicitor.

J. B.

Appr *Newton* v *Federal Commissioner of Taxation* (1958) 98 CLR 1

Discd *Taxation, Federal Commissioner of* v *Newton* (1957) 96 CLR 577

Appl *War Assets Pty Ltd* v *FCT* (1954) 91 CLR 53

Appl *DFCT* v *Evan Ltd* (1933) 49 CLR 480

[HIGH COURT OF AUSTRALIA.]

CLARKE . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1932. SYDNEY, *Aug* 31; *Sept.* 1, 15. Rich, Dixon and Evatt JJ.

Income Tax (Cth.)—Assessable income—Deductions—"Fine, premium or foregift"—Licensed premises—Assignment of lease—Grant of lease—Moneys paid and received therefor respectively—Grant of "tie" to brewers—Consequent diminished value of hotel—Detriment measurable in money—"Outgoings of capital"—Sum "paid"—Arrangement between taxpayer and others—Avoidance of liability to tax—Income Tax Assessment Act 1922-1925 (*No.* 37 *of* 1922—*No.* 28 *of* 1925), *secs.* 16 (*b*) (i.), (*d*), 23 (1) (*a*), 25 (*i*), 93 (*c*)*.

The taxpayer was informed by certain brewers that, subject to his acquiring from the tenant of a hotel owned by the brewers the residue of the tenant's term, the brewers would grant to the taxpayer a new lease for ten

*The *Income Tax Assessment Act* 1922-1925, provided, by sec. 16, that "The assessable income of any person shall include . . . (*b*) in the case of a member" or "shareholder . . . of a company which derives income from a source in Australia—(i.) dividends, bonuses or profits . . . credited, paid or distributed to the member or shareholder from any profit derived from any source by the company . . . Provided . . . that where a dividend or bonus is paid wholly and exclusively out of the profits arising from the sale of assets which were not acquired for the purpose of resale at a profit a member or shareholder shall not be liable to tax on that

years, the consideration therefor being (i.) payment at the commencement of the lease of a sum of £12,000; (ii.) reservation of a weekly rental of £42; and (iii.) a covenant by the taxpayer with the brewers operating to "tie" to the brewers for a period of twenty years another hotel owned by the taxpayer. The taxpayer accepted these terms. He purchased the residue of the tenant's term and was granted a ten years' lease as from the expiration of the previous lease. Although there were only a few days remaining of the previous term, there was attached to it, by reason of the brewers' practice, an expectation of renewal, and the amount paid by the taxpayer to the tenant was £7,500. Shortly after the commencement of his lease the taxpayer granted a sub-lease for a period of 4 years 7½ months. The sub-lease reserved a weekly rent of £42, but for granting it the sub-lessee paid the taxpayer a further consideration of £11,572, which amount the Commissioner, under sec. 16 (*d*) of the *Income Tax Assessment Act* 1922-1925, included in the taxpayer's assessable income as a premium in connection with a leasehold.

Held, as follows:—

(1) The sum of £11,572 was properly included in the taxpayer's assessable income under sec. 16 (*d*) of the *Income Tax Assessment Act* 1922-1925.

Dalrymple v. *Federal Commissioner of Taxation*, (1924) 34 C.L.R. 283, at pp. 287, 288, followed.

(2) The sums paid by the taxpayer to the brewers, and to the previous tenant, and also the money equivalent of the "tie," were outgoings of a capital nature and, therefore, not deductible, either in whole or in part, under sec. 23 (1) (*a*) of the *Income Tax Assessment Act* 1922-1925.

(3) The sum paid to the previous tenant was not a "fine, premium or foregift, or consideration in the nature of a fine, premium or foregift" within the meaning of the proviso to sec. 25 (*i*) of the Act, inasmuch as it was paid because of the tenant's expectation of renewal and not because the lessors exacted it or required it to be paid.

(4) The money equivalent of the "tie" was not a sum "paid" within the meaning of the proviso to sec. 25 (*i*), and no deduction was allowable in respect of it.

The owner in fee simple arranged to grant a lease of licensed premises at a rent in consideration of a large premium. He caused a company to be registered in which he was the sole beneficial shareholder. He then entered into an agreement with the intending tenant that the lease should be granted to

dividend or bonus . . . (*d*) money derived by way of royalty or bonuses, and premiums fines or foregifts or consideration in the nature of premiums fines or foregifts demanded and given in connection with leasehold estates." By sec. 23, that "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." By sec. 25, that "A deduction shall not, in any case, be made in respect of any of the following matters:— . . . (*i*) any wastage or depreciation of lease or in respect of

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the company reserving the rent and that the company should assign the lease to the tenant in consideration of the premium. This was done and the tenant paid into the owner's bank account an instalment of the premium. The company was then wound up, and in the liquidation the owner was debited with the instalment and credited as the only beneficial shareholder with a corresponding amount representing surplus assets.

Held, that the owner, to avoid the application of sec. 16 (*d*) of the *Income Tax Assessment Act* 1922-1925, had interposed the company as a conduit for the assurance of the leasehold interest and as an imputed recipient of the premium, and that the course taken amounted to an arrangement having the purpose or effect of avoiding a liability to income tax and was void under sec. 93 (*c*), so that the instalment of the premium was rightly included in the owner's assessable income.

Quære, whether a distribution in a liquidation of profits in the guise of surplus assets is not within sec. 16 (*b*) (i.) of the *Income Tax Assessment Act* 1922-1925.

CASE STATED.

On the hearing of an appeal to the High Court by William Clarke from an assessment made upon him by the Federal Commissioner of Taxation under the *Income Tax Assessment Act* 1922-1925, in respect of income derived by him during the year ended 30th June 1925, a case, which was substantially as follows, was stated by *Evatt* J. for the opinion of the Full Court :—

(1) Questions arising upon the present appeal concern assessments upon the appellant under the *Income Tax Assessment Act* of 1922-1925 in respect of income derived by him during the year ended 30th June 1925. The appellant rendered a return of income derived by him during the year ended 30th June 1925 as being his income

any loss occasioned by the expiration of any lease : Provided that where it is proved to the satisfaction of the Commissioner that any taxpayer (being the lessee under a lease or the assignee or transferee of a lease) has paid any fine, premium or foregift, or consideration in the nature of a fine, premium or foregift for a lease, or a renewal of a lease, or an amount for the assignment or transfer of a lease of premises or machinery used for the production of income, the Commissioner may allow as a deduction, for the purpose of arriving at the income, the amount obtained by dividing the sum so paid by the number of years of the unexpired period of the lease at the date the amount was so paid, but so that the aggregate of the deductions so allowed shall not exceed the sum so paid." By sec. 93, that "Every contract, agreement, or arrangement . . . shall, so far as it has or purports to have the purpose or effect of in any way, directly or indirectly . . . (*c*) defeating, evading, or avoiding any duty or liability imposed on any person by this Act . . . be absolutely void, but without prejudice to its validity in any other respect or for any other purpose."

derived during the year 1924-1925. By notices of amended assessment dated 22nd October 1928 and 3rd July 1931, the appellant was assessed in respect of two sums of money alleged to be part of his assessable income derived during the year 1924-1925.

(*a*) The first was an amount of £8,651, part of a sum paid by one McDonough as part of a transaction relating to a hotel property called the Burwood Hotel.

(*b*) The second was an amount of £11,572 paid to the appellant by one Hackett in reference to a lease of a hotel property called the St. George Hotel, Belmore.

(2) In the month of April 1924 one Allen was the lessee of certain lands situated at Belmore, near Sydney. Upon these lands were erected licensed premises known as the St. George Hotel. A company known as Tooth & Co. Ltd., brewers, was the registered proprietor of an estate in fee simple in the lands, and its existing lease to Allen was due to expire on 17th April 1924.

(3) In the months of April and May 1924 and at all material times thereafter the appellant was the registered proprietor of an estate in fee simple of certain lands at Burwood, near Sydney, on which were erected licensed premises known as the Burwood Hotel. In this hotel the appellant conducted the business of a publican until 6th May 1924.

(4) The appellant was desirous of securing a lease of the St. George Hotel for a period of ten years commencing from the time of expiry of Allen's lease, and he entered into negotiations with Tooth & Co. Ltd. for such purpose.

(5) In carrying on its business, it was the practice of Tooth & Co. Ltd., well known in the hotel trade, not to refuse a renewal of a lease to any of its lessees, except in very special circumstances. These circumstances did not exist in the case of Allen. In its negotiations with the appellant, Tooth & Co. Ltd. acted upon the practice mentioned.

(6) As a result of the negotiations the appellant was informed by Tooth & Co. Ltd. in April 1924 that, subject to his acquiring from Allen the balance remaining of the term of Allen's lease, Tooth & Co. Ltd. would grant the appellant a ten years' lease of the St. George Hotel in consideration of his (*a*) paying a sum of £12,000

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to Tooth & Co. Ltd. at the commencement of the term of the lease; (*b*) paying a rental of £42 per week during the currency of the term, and (*c*) "tying" to Tooth & Co. Ltd. the trade over the Burwood Hotel for a period of twenty years reckoned from the commencement of the term.

(6A) The appellant granted the said "tie" of Burwood Hotel to Tooth & Co. Ltd. as part consideration for the grant of the said lease of the Belmore Hotel by Tooth & Co. Ltd. to the appellant. Neither the appellant in his return of income nor the Commissioner in his assessment herein mentioned, included any sum in respect of any value of the said tie as part of the assessable income of the appellant.

(7) The appellant accepted this offer and agreed to pay and did pay to Allen in April 1924 the sum of £7,500 for the few days' balance of Allen's term.

(8) The appellant also paid to Tooth & Co. Ltd. in April 1924 the agreed sum of £12,000 and became lessee of the St. George Hotel as from 17th April 1924, from which date also the "tie" over the trade of the Burwood Hotel commenced.

(8A) In accordance with the agreement mentioned in pars. 6 and 7, (*a*) a covenant was entered into between the appellant and Tooth & Co. Ltd., which embodied and recorded the "tie" over the trade carried on in the Burwood Hotel; and (*b*) a caveat was duly filed by Tooth & Co. Ltd. forbidding registration of any dealings with such hotel in derogation of the covenant. The existence and continuance of the "tie" operated to diminish to an appreciable extent the value of the hotel to any person (except Tooth & Co. Ltd.) having estate or interest therein, and the detriment suffered by the appellant in giving such "tie" was and is measurable in money.

(9) In or about the month of September 1924, the appellant, in consideration of the sum of £11,572 paid to him by one William Hackett, leased the St. George Hotel to Hackett for a period commencing on 1st September 1924, and ending on 17th April 1929. The rental reserved by the lease was £42 per week.

(10) The appellant received the said sum of £11,572 from Hackett in the month of September 1924, and the whole of such sum was included in his assessable income derived during the year ending 30th June 1925.

(11) The appellant caused to be formed under the New South Wales *Companies Act* a company limited by shares called "The Burwood Hotel Limited," and hereinafter called "the Company." The Company was incorporated on 6th May 1924. Its objects as stated in the memorandum of association included the acquisition and taking over as a going concern all or any of the assets and liabilities of the Burwood Hotel, and the carrying on of the business of licensed victuallers.

(12) The Company was registered with a capital of £30,000 divided into 30,000 shares of £1 each. The appellant and six other persons, all of whom were nominees of the appellant, signed the memorandum and articles of association, each agreeing to take one share. Apart from these original seven shares the only shares allotted were 2,000, which on or about 27th October 1924 were allotted to the appellant.

(13) The Company took over and conducted the business of hotel-keeper in the Burwood Hotel on 6th May 1924. The business was managed in exactly the same way by the appellant, with the assistance of his wife, as before the incorporation of the Company.

(14) By the articles of association the appellant became permanent governing director of the Company, and was invested with all powers, authorities and discretions to carry on the business of the Company. At all material times, the Company was entirely under his control and he exercised such control from time to time in the way which seemed to him best calculated to advance his own pecuniary and proprietary interests.

(15) One of the reasons which induced the appellant to form the Company was to prevent any breach on his part of sec. 41 of the New South Wales *Liquor Act*; another reason which induced him to form it was the probability of lessening thereby the burden of obligations imposed under Federal and State income taxation legislation.

(16) From 6th May 1924 to 24th February 1925 the Company occupied the hotel as a weekly tenant of the appellant at the rental of £20 per week. The licence of the hotel stood in the name of the appellant from 24th July 1923 until 19th February 1925.

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(17) In the month of October 1924 it was agreed between the appellant and one Plasto, that the appellant would grant or cause to be granted to Plasto, a five years' lease of the hotel for a cash payment of £20,000 and a weekly rental of £30 per week. It was part of such agreement (*a*) that Plasto should pay Clarke £20,000 for his 2,001 shares in the Company ; (*b*) that when the shares were transferred, the Company itself should be the lessee of the hotel for the agreed period of five years at the rental of £30 per week, and (*c*) that the details of the agreement should be arranged by the legal advisers of the appellant and Plasto.

(18) On or about 27th October 1924, and after the making of the said agreement between the appellant and Plasto, the Company and the appellant agreed that the hotel should be leased by Clarke to the Company for a period of five years as from a date to be agreed upon and at a rental of £30 per week.

(19) On 12th December 1924 a formal agreement was executed by and between the appellant and Plasto.

(20) In making the agreement referred to in par. 18 hereof both the appellant and the Company intended to enable the appellant to carry out the agreement with Plasto set out in pars. 17 and 19 hereof.

(21) Following the agreement with Plasto in October, and that between the appellant and the Company to grant a five years' lease of the hotel to the Company at a rental of £30 per week from a date to be agreed upon, steps were taken to prepare the lease, but delays occurred owing to the uncertainty of the date upon which Plasto would complete the purchase of the appellant's shares and thereby gain control of the Company ; and owing to the delay in securing the approval of the mortgagees whose consent to the proposed lease was required.

(22) On or about 15th December 1924 Plasto found that it was not possible for him to complete his agreement with the appellant. He then proposed to the appellant that one F. J. McDonough should be substituted for him in the transaction. To this the appellant agreed. A provisional agreement between Plasto and McDonough was signed and, on 15th December 1924, a formal agreement was entered into between them.

(23) No written agreement between the appellant and McDonough was signed in reference to the purchase by McDonough of the appellant's shares, but it was part of the arrangement between them that McDonough would complete Plasto's agreement, and preliminary steps were taken by the appellant and McDonough in order to secure the transfer of the hotel licence to McDonough as at some date in January 1925.

(24) Further delays occurred which prevented the completion of the lease of five years from the appellant to the Company. After the appellant's agreement to accept McDonough in place of Plasto, the lease was prepared so that it would commence from some date in January 1925 when it was proposed that the appellant's transaction with McDonough should be carried out.

(25) In January 1925 McDonough raised objections to completing the purchase of the appellant's shares and the appellant agreed to meet these objections. It was then arranged that the transaction securing to McDonough a five years' lease of the hotel would be carried out thus: (*a*) the Company to take a five years' lease from the appellant, from 1st July 1924 to 1st July 1929, at a rental of £30 per week (the commencing point of the lease between the appellant and the Company was thus fixed as at 1st July 1924); (*b*) the Company to transfer immediately the whole of its interest in such lease to McDonough for £20,000, and (*c*) the appellant to lease the hotel to McDonough at £30 per week from 1st July 1929 to such a date in 1930 as would make up to McDonough the balance of the agreed term of five years.

(26) In consenting to and making this altered arrangement, the appellant believed and intended that he would become liable to pay in the aggregate a less sum in respect of Federal income taxation than if he adopted the alternative course of (*a*) causing the rescission of the agreement between himself and the Company for a five years' lease of the hotel, (*b*) causing the termination of the Company's weekly tenancy of the hotel and (*c*) giving a five years' lease direct to McDonough for £20,000 and £30 per week.

(27) The adoption of such alternative course was entirely within the power of the appellant and would have fully met McDonough's

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wishes. The appellant deliberately refrained from it upon advice and in order to improve his position in relation both to Federal and State income taxation.

(28) On 19th February 1925 McDonough went into occupation and became the licensee of the Burwood Hotel. On 24th February 1925 the appellant leased the hotel to the Company for a period of five years as from 1st July 1924 and at a rental of £30 per week.

(29) On 25th February 1925 the Company and McDonough executed a written agreement whereby the Company agreed to sell its existing lease of the hotel to McDonough for £20,000 (£10,000 of which was payable not later than February 1925, and the balance of which was payable on or after 1st July 1925).

(30) The agreement mentioned in the last preceding paragraph was duly carried out, McDonough paying £10,000 thereunder in February 1925. The money was paid into the appellant's personal banking account, but in the Company's books it was treated as a sum payable to the Company. The account was subsequently adjusted and reconciled in the voluntary liquidation of the Company, which took place in December 1925.

(31) The transaction set out in par. 25 was duly carried out by McDonough, the Company and the appellant; and the balance of the £20,000 was paid to the Company by McDonough after 1st July 1925.

(32) The motive or object of the appellant in attaching conditions and terms to his agreements and arrangements with Plasto, McDonough and the Company, was to lessen the actual or probable burden upon him of State and Federal income taxation. At all material times the appellant was in receipt of a substantial income from property and personal exertion, not relating to the ownership of, or the business being conducted in, the Burwood Hotel.

(33) None of the described transactions to which the Company was a party were sham or fictitious transactions, and they were intended by the Company to be operative and effective. But they were entered into by the Company solely because their operation and effect would or might prove advantageous to the appellant, both generally, and from the point of view of State and Federal income taxation. The Company did not act as the agent of the

appellant in respect of such transactions: it acted on its own behalf and as a separate trading unit.

(34) The Commissioner treated the sum of £10,000 received by the taxpayer as mentioned in par. 30 (after making an allowance for furniture and for certain legal expenses properly chargeable) as answering the description of assessable income under the *Income Tax Assessment Act* 1922-1925, and included the sum of £8,651 in the appellant's assessable income for the year 1924-1925.

(35) The Commissioner claims that, if the whole sum of £8,651 is not properly included in the assessable income of the taxpayer for the year 1924-1925, there should be included in such income a part of such sum, measured by the ratio to a term of five years borne by the term of the lease granted by the appellant to McDonough to make up the five years' period (such term being 239 days).

(36) On 1st December 1928 the taxpayer lodged an objection against his assessment for the said year upon the grounds (*inter alia*) (2) that no allowance has been made in arriving at the profit on the lease of the St. George Hotel, Belmore, of the amount paid for obtaining possession of the hotel, and that the amount paid to Allen should be allowed as a deduction; (3) that the tax as assessed is excessive and contrary to law.

(37) In the same month the Commissioner pointed out in writing that ground 3 of the objection did not enlarge the scope of the other grounds specified in the objection. The taxpayer on 21st December 1928, after the period of 42 days mentioned in sec. 50 (1) of the *Income Tax Assessment Act* had expired, wrote to the Commissioner, stating that he desired the "tie" given over the Burwood Hotel and the premium paid to Tooth & Co. Ltd. for the lease, to be considered in relation to the assessment in respect of the amount received from Hackett for the lease of the St. George Hotel.

(38) Considerable correspondence between the taxpayer and the Commissioner took place. In the course of this correspondence the Commissioner became fully informed of the relevant facts in relation to the acquisition by the taxpayer of his lease in the St. George Hotel.

(39) The Commissioner, on 3rd July 1931, decided that the only deduction he would allow in relation to the amount of £11,572

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received from Hackett was a deduction under the proviso to sec. 25 (*i.*), and that the only payment by the taxpayer which could be considered under that proviso was the payment of £12,000 to Tooth & Co. Ltd. in April 1924. He accordingly allowed a deduction under such proviso of £1,212 and no more.

The questions stated for the opinion of the Full Court were as follows :—

(1) Was the whole or any part of the sum of £8,651 referred to in par. 34, properly included in the assessable income of the appellant derived during the year 1924-1925 ?

(2) Was the whole or any part of the sum of £11,572 referred to in par. 9 properly included in the assessable income of the appellant derived during the year 1924-1925 ?

(3) Should a deduction under sec. 23 (1) (*a*) of the *Income Tax Assessment Act* 1922-1925 be made from the assessable income of the appellant derived during the year 1924-1925 in relation to the appellant's receipt of the said sum of £11,572 because of the payments made, or detriment suffered, by the appellant in the acquisition by him of the ten years' lease from Tooth & Co. Ltd., namely, (*a*) the payment of the sum of £12,000 to Tooth & Co. Ltd., (*b*) the payment of £7,500 to Allen, and (*c*) the detriment suffered by the appellant by giving a " tie " over the trade of the Burwood Hotel ?

(4) In making the allowance under sec. 25 (*i.*) of the *Income Tax Assessment Act* 1922-1925, should the Commissioner have taken into consideration (*a*) the payment by the taxpayer of £7,500 to Allen and (*b*) the value of the detriment suffered by the appellant in giving a " tie " over the trade of the Burwood Hotel ?

(5) Is the appellant precluded by the form of his objection mentioned in par. 36 from setting up or relying upon any of the matters of law set out in questions 2, 3 (*a*), 3 (*c*) and 4 (*b*) ?

Bonney K.C. (with him *Spender*), for the appellant. The contention of the Commissioner is that the transaction concerning the item of

£8,651, or part thereof, is an arrangement which is affected by sec. 93 of the *Income Tax Assessment Act* 1922-1925.

[DIXON J. referred to *Jaques* v. *Federal Commissioner of Taxation* (1).]

Sec. 93 only applies where there is some antecedent ground of taxation apart from the transaction which is impeached. But for Plasto's agreement there would have been nothing. The parties agreed to enter into one transaction in a form which is not an illusory one. If that transaction is void, then the whole income is destroyed. The tax is a comprehensive one, it is not concerned with the sources of income other than, perhaps, income from property or personal income. Liability to pay " any " income tax means any income tax at all. It does not mean a " part " of income tax. " Avoids " refers to the avoiding of a duty or a liability imposed on any person by the Act, but it must be an existing duty or an existing liability, therefore sub-sec. (*c*) does not affect this transaction. Sub-sec. (*d*) is a drag-net provision which is of no greater effect than sub-sec. (*c*). The principles that should be applied are those enunciated in *Deputy Federal Commissioner of Taxation* v. *Purcell* (2). A person is entitled to so dispose of his property as to lighten his burden of taxation. Sec. 93 only applies to avoid a transaction or arrangement: it does not expressly render something taxable or free from taxation. Here there is no existing liability upon which the section can operate. What was assigned was an agreement only to purchase certain shares. Upon McDonough being unwilling to take the shares a new arrangement was arrived at. The appellant was then at liberty to enter into whatever kind of transaction he liked, and there is nothing in sec. 93 which can attach so as to compel him to rescind the agreement between himself and the Company (see *Jaques* v. *Federal Commissioner of Taxation* (1)). The attitude adopted by the appellant, as shown in par. 27, does not bring the matter within sec. 93. The grounds of objection are wide enough to include the views now put to the Court; therefore the Court has jurisdiction to give effect to them. The objection under sec. 16 (*d*) can only be raised under a general objection. It would not be practicable to set out in detail the sections and sub-sections under which deductions

(1) (1924) 34 C.L.R. 328. (2) (1921) 29 C.L.R. 464.

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are claimed. The Commissioner does not disclose under what sections he includes amounts in the assessment. The cases of *R.* v. *Ewing*; *Ex parte Gilchrist, Watt & Sanderson Ltd.* [(1922), reported in *Ratcliffe & McGrath's Income Tax Decisions* (1891-1927), p. 462], *Williams, Kent & Co.* v. *Federal Commissioner of Taxation* (1), and *Shaw* v. *Federal Commissioner of Taxation* (2), are not applicable, as a general objection had not been made in such cases. Sec. 16 (*d*) does not apply, as that sub-section refers only to moneys "demanded and given," that is, to an exaction and not to a consideration. The sub-section is dealt with in *Dalrymple* v. *Federal Commissioner of Taxation* (3), which shows that neither of the sums referred to in questions 1 and 2 should be regarded as taxable income; the items are not income in the ordinary sense of the word. The items referred to in question 3, being outgoings actually incurred in gaining or producing the assessable income, are deductible under sec. 23 (1) (*a*) of the Act. "Capital" or "income" means capital or income in the ordinary or business sense. As to what constitute outgoings of capital, see *Usher's Wiltshire Brewery Ltd.* v. *Bruce* (4) and *British Insulated and Helsby Cables Ltd.* v. *Atherton* (5). Where a leasehold property which has been acquired by the expenditure of capital is sold under circumstances which render the proceeds notional income, the provisions of sec. 23 (1) (*a*) apply, and not those of sec. 25 (*i*). The principle that any money spent and resulting in an asset is capital, does not apply to circulating capital (*British Insulated and Helsby Cables Ltd.* v. *Atherton* (6)). It is no objection that the items were incurred prior to the taxation year. Time of the outlay has nothing to do with the matter, the important consideration being the reason for the outlay (*Shaw* v. *Federal Commissioner of Taxation* (7); *Sun Insurance Office* v. *Clark* (8); *London Cemetery Co.* v. *Barnes* (9)). The stipulation in the lease as to the "tie" is a "fine" or benefit in the nature of a "fine" within the meaning of sec. 25 (*i*) (*Gardner & Co.* v. *Cone* (10)). The item of £7,500 referred to in par. 7 of the case stated was a payment imposed on the taxpayer by the brewery company.

(1) (1926) 38 C.L.R. 256.
(2) (1920) 27 C.L.R. 340.
(3) (1924) 34 C.L.R. 283.
(4) (1915) A.C. 433, at p. 444.
(5) (1926) A.C. 205, at p. 212.
(6) (1926) A.C., at p. 221.
(7) (1920) 27 C.L.R., at p. 343.
(8) (1912) A.C. 443.
(9) (1917) 2 K.B. 496.
(10) (1928) Ch. 955.

[RICH J. referred to *Australian Mercantile Land and Finance Co.* v. *Federal Commissioner of Taxation* (1) and *Waite* v. *Jennings* (2).]

The nature of " premiums, fines or foregifts " was considered in *In re Income Tax Acts* (3), in which case *Dalrymple* v. *Federal Commissioner of Taxation* (4) was discussed.

[EVATT J. referred to *Hoare & Co.* v. *Collyer* (5), as to " premium."]

The section only applies to profit, and does not in any way affect capital.

Cohen, for the respondent. The agreement referred to in par. 17 is an arrangement within the meaning of sec. 93 of the *Income Tax Assessment Act* 1922-1925. Arrangement is something less than contract (*Jaques* v. *Federal Commissioner of Taxation* (6)). The fact that an arrangement is not a sham from one point of view does not make it a real transaction for all purposes. The Court should not give the section a wider interpretation than it was given in *Deputy Federal Commissioner of Taxation* v. *Purcell* (7) and *Jaques* v. *Federal Commissioner of Taxation* (8), which are the " high-water mark " cases in this respect. The transaction in question is a more devious one than that under consideration in *Deputy Federal Commissioner of Taxation* v. *Purcell*, and must, therefore, be regarded as a sham. As to what is a " sham " or a " real " transaction, see *Jacobs* v. *Commissioners of Inland Revenue* (9) and *Commissioners of Inland Revenue* v. *Sansom* (10). The fact that a one-man company was interposed between the taxpayer and the lessee of the hotel is not conclusive. To escape taxation the transaction must be real. Substance, not form, is the material consideration (*Nathan* v. *Federal Commissioner of Taxation* (11) ; *J. P. Sennitt & Son Pty. Ltd.* v. *Federal Commissioner of Taxation* (12), and *Inland Revenue Commissioners* v. *Westleigh Estates Co.* (13)). If it be a real transaction the reality is no reason for the non-application of the section (*Jaques* v.

(1) (1929) 42 C.L.R. 145.
(2) (1906) 2 K.B. 11.
(3) (1932) V.L.R. 102.
(4) (1924) 34 C.L.R. 283.
(5) (1932) A.C. 407.
(6) (1924) 34 C.L.R., at p. 359.
(7) (1921) 29 C.L.R. 464.
(8) (1924) 34 C.L.R. 328.
(9) (1925) 10 Tax Cas. 1.
(10) (1921) 2 K.B. 492 ; 8 Tax Cas. 20.
(11) (1918) 25 C.L.R. 183, at p. 190.
(12) (1932) 1 A.T.D. 387.
(13) (1924) 1 K.B. 390 ; 12 Tax Cas. 658.

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Federal Commissioner of Taxation (1)). The Company was formed for a specific purpose.

[DIXON J. referred to *Byron Hall Ltd.* v. *Hamilton* (2).]

There was no change here of real ownership (*Ruhamah Property Co.* v. *Federal Commissioner of Taxation* (3)). The fact that the date of the commencement of the lease had not been inserted therein made it unenforceable by virtue of the Statute of Frauds (*Tooth & Co.* v. *Bryen* [*No.* 2] (4)). Money received by an owner of land for a tenancy of the leasehold estate is a "premium, fine or foregift," within the meaning of sec. 16 (*d*), and, therefore, if all the other contracts and agreements are voided under sec. 93 the money received by the taxpayer as shown in par. 30 is a bonus or premium received by him, and taxable income. Sec. 16 (*d*) should be effectively construed and not construed in a narrow or restricted sense (*Harris* v. *Sydney Glass and Tile Co.* (5)). The agreement was entered into for the purpose of avoiding liability. The only deduction claimed under the objection is the amount paid to Allen; other claims for deductions do not come within the scope of the objections, and, therefore, cannot now be made. The alleged ground of objection that the assessment is excessive is not a ground except as regards quantum; most of the points argued are not covered by the notice of objection (*Williams, Kent & Co.* v. *Federal Commissioner of Taxation* (6); *Davies & Fehon Ltd.* v. *Federal Commissioner of Taxation* [(1926), reported in *Ratcliffe & McGrath's Income Tax Decisions* (1891-1927), p. 83]; *Thomas & Ross Ltd.* v. *Federal Commissioner of Taxation* [(1928), reported in *Ratcliffe and McGrath's Income Tax Decisions* (1928-1930), p. 78]; *Shaw* v. *Federal Commissioner of Taxation* (7); *R.* v. *Deputy-Federal Commissioner of Taxation* (*W.A.*); *Ex parte Copley* (8); and *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (9)). The Commissioner cannot, by correspondence, waive his objection (*Williams, Kent & Co.* v. *Federal Commissioner of Taxation*). Bonuses or premiums paid for new leases are taxable under sec. 16 (*d*) (*Dalrymple* v. *Federal Commissioner of Taxation* (10); *In re Income Tax Acts* (11); see also *Daniell*

(1) (1924) 34 C.L.R., at p. 358.
(2) (1930) 45 C.L.R. 37.
(3) (1928) 41 C.L.R. 148.
(4) (1922) 22 S.R. (N.S.W.) 541.
(5) (1904) 2 C.L.R. 227, at p. 246.
(6) (1926) 38 C.L.R. 256.
(7) (1920) 27 C.L.R. 340.
(8) (1923) 30 A.L.R. 86.
(9) (1926) 38 C.L.R. 153.
(10) (1924) 34 C.L.R. 283.
(11) (1932) V.L.R. 102.

v. *Federal Commissioner of Taxation* (1)). The history of sec. 16 (*d*) shows that the word "bonus" is not to be interpreted as if it was used in collocation with "premium, fine or foregift." It is a word of variable meaning. As to what is a "bonus," see *Tooth & Co.* v. *Bryen* [*No.* 2] (2). Premiums are dealt with in *Tooth & Co.* v. *Licences Reduction Board* (3); *Encyclopædia of Forms and Precedents*, 2nd ed., vol. VIII., p. 315.

[EVATT J. referred to *Hoare & Co.* v. *Collyer* (4).

[DIXON J. referred to *J. C. Williamson's Tivoli Vaudeville Pty. Ltd.* v. *Federal Commissioner of Taxation* (5).]

The deduction of the amount paid to Allen is prohibited by sec. 25 (*i*) (*Australian Mercantile Land and Finance Co.* v. *Federal Commissioner of Taxation* (6)). The amount in respect of the "tie" was not paid in the current year, and is taxable. Annual payments received for parting with rights are income (*British Dyestuffs Corporation* (*Blackley*) *Ltd.* v. *Commissioners of Inland Revenue* (7)). A lump sum paid for the use of a privilege, e.g., the limitation of buying powers, spread over a number of years, is taxable (*Constantinesco* v. *The King* (8)). It is immaterial that it is an abstraction from the property (*Edmonds* v. *Eastwood* (9)). As to what is meant by "pay," "payment" and "paid" see *Upperton* v. *Ridley* (10) and *Hunter* v. *The King* (11). The case of *Gardner & Co.* v. *Cone* (12) is distinguishable, it being a decision upon the wider words of a different statute. Sec. 25A of the *Income Tax Assessment Act* 1922-1928 (inserted by sec. 14 of No. 46 of 1928) was designed to prevent lessees deducting upon sale of a property moneys spent thereon and deducted during the tenancy. The amount paid for the lease was capital expenditure and therefore not deductible (*J. C. Williamson's Tivoli Vaudeville Pty. Ltd.* v. *Federal Commissioner of Taxation* (13)). That a certain construction of a statute causes hardship is immaterial (*MacTaggart* v. *Strump* (14)). Sec. 23 (1) (*a*)

(1) (1928) 42 C.L.R. 296.
(2) (1922) 22 S.R. (N.S.W.), at p. 547.
(3) (1923) 23 S.R. (N.S.W.) 458.
(4) (1932) A.C. 407.
(5) (1929) 42 C.L.R. 452, at p. 470.
(6) (1929) 42 C.L.R. 145.
(7) (1923) 129 L.T. 538; (1924) 12 Tax Cas. 586 (C.A.).
(8) (1926) 42 T.L.R. 383, 685 (C.A.).
(9) (1858) 2 H. & N. 811; 157 E.R. 334.
(10) (1903) A.C. 281.
(11) (1904) A.C. 161.
(12) (1928) Ch. 955.
(13) (1929) 42 C.L.R., at p. 470, per *Isaacs* J.
(14) (1925) S.C. 599; (1925) S.L.T. 487; 10 Tax Cas. 17.

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does not authorize the deduction of moneys paid for leases (*Watney* v. *Musgrave* (1); *Mallett* v. *Staveley Coal and Iron Co.* (2)). This is especially so where the lease in question was acquired as an investment. Further, sec. 25 (*i*) is a proviso to sec. 23 (1) (*a*) and, even if the latter sub-section prima facie permitted such a deduction, the latter subsection permits only a partial deduction in each year.

Bonney K.C., in reply. What constitutes "payment" is shown in *R.* v. *Overseers of Belford* (3). As regards sec. 93, par. 33 of the case stated establishes that the transactions under consideration were not shams or fictitious. Parties are entitled to conduct their transactions in such a form as will tend to lessen the burden of taxation. The arrangement set out in par. 17 of the case stated is an entire arrangement and is inseverable.

Cur. adv. vult.

Sept. 15.

THE COURT delivered the following written judgment:—

The taxpayer complains of an assessment based upon the year of income ended 30th June 1925 in which the Commissioner included two sums of money as premiums or consideration in the nature of premiums demanded and received in connection with leasehold estates.

The taxpayer was owner in fee simple of licensed premises called the Burwood Hotel. In April 1924 he sought a lease of other licensed premises called the St. George Hotel. This hotel was owned by a company of brewers and occupied by a tenant under a lease expiring in that month. In carrying on their business it was the practice of the brewers not to refuse to renew the lease of a tenant except in very special circumstances. They acted upon this practice in their negotiations with the taxpayer who was informed that, subject to his acquiring from the tenant of the St. George Hotel the brief residue of his term, the brewers would grant to the taxpayer a new lease for ten years for the following consideration, namely, (i.) payment at the commencement of the lease of a sum of £12,000,

(1) (1880) 5 Ex. D. 241; 1 Tax Cas. 272.
(2) (1928) 2 K.B. 405.
(3) (1863) 3 B. & S. 662; 122 E.R. 248.

(ii.) reservation of a weekly rent of £42, (iii.) a covenant by the taxpayer with the brewers operating to "tie" the Burwood Hotel to the brewers for a period of twenty years. The taxpayer accepted these terms. To the previous tenant he paid the sum of £7,500 for the few remaining days of his lease. The "tie" which he created over his own hotel—the Burwood Hotel—was a detriment which diminished its value to an extent measurable in money. In the following September the taxpayer granted a sub-lease of the St. George Hotel for a period of four years and seven and a-half months, retaining a term of five years in the head lease expectant on the expiration of this sub-lease. The sub-lease reserved a weekly rent of £42, but for granting it the sub-lessee paid the taxpayer a further consideration of £11,572. This amount is the first of two sums which the Commissioner has included in the taxpayer's assessable income as premiums in connection with leaseholds. The provision upon which their inclusion depends is sec. 16 (*d*) of the *Income Tax Assessment Act* 1922-1925, which is as follows:—"The assessable income of any person shall include . . . (*d*) money derived by way of royalty or bonuses, and premiums fines or foregifts or consideration in the nature of premiums fines or foregifts demanded and given in connection with leasehold estates."

The taxpayer's first contention is that the provision does not extend to sums obtained by a lessor as part of the consideration for a grant of a new lease, but that it is confined to exactions after a lease has been granted and the relation of landlord and tenant has thus been established; as for instance the exaction of a fine upon consenting to an assignment. In support of this construction some expressions used by *Isaacs* J. (as he then was) in *Dalrymple* v. *Commissioner* (1) are relied upon. But it is by no means clear that they bear this meaning, and the better view appears to be that expressly stated in the judgment of *Knox* C.J., *Gavan Duffy* and *Starke* JJ. in the same case (2), that "The object . . . is to include in the income of a lessor all sums paid by a tenant other than the rent reserved by the lease, such as sums which are demanded on the renewal or surrender of a lease or on the giving of a new lease."

(1) (1924) 34 C.L.R., at p. 291.

(2) (1924) 34 C.L.R., at pp. 287, 288.

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Accordingly, the sum of £11,572 was properly included in the taxpayer's assessable income. This being so, the taxpayer's next contention is that an answerable deduction should be allowed in the assessment under sec. 23 (1) (*a*), which provides that from the assessable income there shall be deducted 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. He claims that at least a proportion of the sums paid to the brewers and to the previous tenant and of the money equivalent of the "tie" should be deducted under this provision, because they were outgoings in the acquisition of the head-lease without which the under-lease could not have been granted. It is a sufficient answer to this claim that the outgoings were of a capital nature. They represented the present price of the future enjoyment of an interest in land of long duration. It is quite true that the premium is an anticipated rent. That means, however, that what otherwise might have been part of the rent reserved has been capitalized. No doubt it is capital expended in the acquisition of an asset of a diminishing or wasting nature and therefore requiring in a proper account a provision for depreciation. But the annual loss which would so be provided for out of revenue would none the less be a loss of capital. (See *MacTaggart* v. *Strump* (1).) Further, sec. 25 (*i*) forbids, subject to a proviso, any deduction in respect of any wastage or depreciation of a lease or in respect of any loss occasioned by the expiration of any lease. It is upon the proviso to this enactment that the taxpayer must depend for his right to claim a deduction in respect of the consideration given for the head-lease. The material portions of this clause enable the Commissioner, when the taxpayer has paid a fine, premium or foregift or consideration in the nature of a fine premium or foregift for a lease, to allow, as a deduction for the purpose of arriving at the income, the amount obtained by dividing the sum so paid by the number of years of the unexpired period of the lease at the date of payment. The word "paid" and the expression "the sum so paid" create an insuperable obstacle to the taxpayer's claim to a deduction in respect of the detriment

(1) (1925) S.C. 599; 10 Tax Cas. 17.

measurable in money which the value of his fee simple in the St. George Hotel suffered through the covenant "tying" it to the brewers. In *J. C. Williamson's Tivoli Vaudeville Pty. Ltd.* v. *Federal Commissioner of Taxation* (1) observations were made as to the possibility of giving a wide meaning to this expression (see per *Rich* J., at p. 479, and per *Starke* J., at p. 480). But no reasonable latitude of interpretation could dispense with the need which arises from the terms of the proviso that a money sum should in some way be nominated or ascertained as the expression by the parties of the value given for or in connection with the lease. An unascertained loss in value resulting from a detriment incurred as part of the consideration for the lease supplies no "sum so paid" which could be divided by the unexpired term of the lease. The taxpayer's claim under the proviso to a deduction in respect of the sum of £7,500 paid to the former tenant must fail for another reason. This sum was paid to acquire the residue of the tenant's term, brief as it was. It was not paid because the lessor exacted it, or required the payment to be made, but because an expectation of renewal was annexed to the expiring lease by the practice of the brewers in dealing with their tenants. The sum was, therefore, not paid as a consideration in the nature of a fine, premium or foregift.

The taxpayer's claim to a deduction in respect of the remaining portion of the consideration which he gave for the head-lease, namely, the sum of £12,000, has been allowed by the Commissioner.

The second sum which has been included in the taxpayer's assessable income under sec. 16 (*d*) gives rise to other questions. On 19th February 1925 one McDonough became, by transfer from the taxpayer, licensee of the Burwood Hotel and went into occupation. He obtained a lease of it with a currency of five years from 1st July 1924 at a weekly rent of £30, for which he paid into the taxpayer's bank account the sum of £10,000, being part of a consideration of £20,000. At the same time, or shortly afterwards, a further lease to take effect on the expiry of this lease was granted to him for a term equal to the period which had expired since 1st July 1924 so that together they would make up five years. The taxpayer applied the money paid into his account to his own use. The amount of

(1) (1929) 42 C.L.R. 452.

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£8,651, which the Commissioner has included in his assessable income, is the net balance of this sum after proper deductions. If no more appeared, the sum would be considered a premium demanded and given in connection with a leasehold or a consideration in that nature. But the taxpayer relies upon the following additional facts: (1) The lease for five years from 1st July 1924 was not granted directly to McDonough, but to a company of which the taxpayer was governing director and sole beneficial shareholder and by that Company forthwith assigned to McDonough; (2) the Company in its books treated the sum as payable to it and afterwards, when it went into voluntary liquidation, credited him, as shareholder, with an equivalent amount as on a distribution of its surplus assets. Upon the argument it was assumed by the parties that, if the sum was treated as an amount paid by the Company in its liquidation to its sole beneficial member, it should not be included in his assessable income. But as the Company gave nothing for the lease and, upon this assumption, received the entire sum for its immediate assignment, the amount would form profits of the Company and, moreover, these profits would not arise "from the sale of assets which were not acquired for . . . resale at a profit." Sec. 16 (*b*) (i.) includes the word "distributed" which was not contained in sec. 14 (*b*) of the Act of 1915-1918 upon which *Webb* v. *Federal Commissioner of Taxation* (1) was decided. *Inland Revenue Commissioners* v. *Burrell* (2) does not necessarily conclude the question whether the language of sec. 16 (*b*) (i.) covers a distribution of profits in the guise of surplus assets in a liquidation, and, in spite of the judgment of *Higgins* J. in *Webb's Case* (3), the question appears susceptible of argument. It is not, however, necessary to consider it in the present case. Facts have been found which, in our opinion, bring it under the operation of sec. 93 (*c*). This difficult provision is expressed to make absolutely void, but without prejudice to its validity in any other respect or for any other purpose, every contract, agreement or arrangement so far as it has or purports to have the purpose or effect of in any way directly or indirectly avoiding any duty or liability imposed

(1) (1922) 30 C.L.R. 450.
(2) (1924) 2 K.B. 52.
(3) (1922) 30 C.L.R., at pp. 481 *et seqq.*

on any person by the *Income Tax Assessment Act*. In its application perhaps it can do no more than destroy a contract, agreement, or arrangement in the absence of which a duty or liability would subsist. Where circumstances are such that a choice is presented to a prospective taxpayer between two courses of which one will, and the other will not, expose him to liability to taxation, his deliberate choice of the second course cannot readily be made a ground of the application of the provision. In such a case it cannot be said that, but for the contract, agreement or arrangement impeached, a liability under the Act would exist. To invalidate the transaction into which the prospective taxpayer in fact entered is not enough to impose upon him a liability which could only arise out of another transaction into which he might have entered but in fact did not enter. Where, however, the annihilation of an agreement or arrangement so far as it has the purpose or effect of avoiding liability to income tax leaves exposed a set of actual facts from which that liability does arise, the provision effectively operates to remove the obstacle from the path of the Commissioner and to enable him to enforce the liability.

In the present case the question is whether the course adopted by the taxpayer amounts to an arrangement of this nature which, when avoided, leaves him in the character of a recipient of a premium, fine or foregift, or consideration of that nature demanded and given in connection with a leasehold estate. On the whole, we think that the facts stated in the special case do disclose such an arrangement. The transaction which resulted in the payment by McDonough of the £10,000 to the taxpayer began in a negotiation or contract with another intending lessee, one Plasto. On 6th May 1924 the taxpayer had incorporated his Company. He and six nominees had executed the memorandum of association in respect of one share, but no further capital had been issued. Nevertheless, from that date the Company, as a weekly tenant at a rental, took over and conducted the business of the Burwood Hotel, the taxpayer retaining the character of licensee. The special case states that in the month of October 1924 it was agreed between the taxpayer and Plasto that the taxpayer would grant or cause to be granted to Plasto a five years' lease of the hotel for a cash payment of £20,000 and a weekly rental of £30; that it was part of such agreement (1) that

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Plasto should pay to the taxpayer £20,000 for his 2,001 shares in the Company, (2) that when the shares were transferred, the Company itself should be the lessee of the hotel for the agreed period of five years at the rental of £30 per week, and (3) that the details of the agreement should be arranged by the legal advisers of the taxpayer and Plasto. The special case further states that on or about 27th October 1924, and after the making of the said agreement between the taxpayer and Plasto, the Company and the taxpayer agreed that the hotel should be leased by the taxpayer to the Company for a period of five years as from a date to be agreed upon and at a rental of £30 per week. On 27th October 1924, accordingly, the taxpayer, who under the Company's articles was permanent governing director possessing all powers and authorities and discretions to carry on its business, allotted to himself 2,000 fully paid up shares of £1 each.

Some delay occurred in carrying through this transaction, and in December 1924 Plasto procured McDonough to take his place in it. But first a written agreement between the taxpayer and Plasto was executed, bearing date 12th December 1924. The effect of this agreement was that Plasto should buy and the taxpayer should sell 2,000 shares in the Company for £20,000 payable, as to £1,000 in cash as a deposit, as to £9,000 upon transfer of the licence, delivery of the scrip indorsed with a transfer and the giving of possession of the hotel and furniture, and, as to the balance of £10,000, by various instalments, the greater part of which were to be satisfied by the taxpayer procuring from the brewers an advance to the Company and applying it as directed by the brewers and himself. The agreement then provided that on the termination of what it described as "the existing lease of five years granted" by the taxpayer to the Company, Plasto would resell the 2,000 shares to the taxpayer at a price equal to the value of the hotel furniture. In the meantime no further shares were to be issued. Possession was to be given, as nearly as possible, on 15th December 1924. In fact, no lease had been granted to the Company. By an agreement dated 15th December 1924 between Plasto and McDonough, the latter agreed to take over this contract from the former. Further delays, however, occurred, and at length, in January 1925, McDonough

objected to complete the purchase of shares. As the special case states:—"It was then arranged that the transaction securing to McDonough a five years' lease of the hotel would be carried out thus: (*a*) the Company to take a five years' lease from the appellant, from 1st July 1924 to 1st July 1929, at a rental of £30 per week. The commencing point of the lease between the appellant and the Company was thus fixed as at 1st July 1924; (*b*) the Company to transfer immediately the whole of its interest in such lease to McDonough for £20,000, and (*c*) the appellant to lease the hotel to McDonough at £30 per week from 1st July 1929 to such a date in 1930 as would make up to McDonough the balance of the agreed term of five years." This agreement necessarily involved the rescission of the former agreement and the termination of the Company's weekly tenancy. The taxpayer could have granted a five years' lease directly to McDonough. He adopted the course which he in fact pursued because, as it was found by the special case, he believed and intended that he would become liable to pay in the aggregate a less sum in respect of Federal income tax. When in May 1924 he registered his Company, he did so partly in view of a provision of the licensing law which forbids holding an interest in more than one licence and partly because of the probability of so lessening his obligations under State and Federal income tax legislation. The purpose, therefore, clearly appears of avoiding the liability which was imposed by the requirement of sec. 16 (*d*) that assessable income shall include consideration in the nature of a premium demanded and given in connection with leaseholds. McDonough definitely sought and obtained a leasehold interest in the Burwood Hotel, which the taxpayer granted to satisfy that very purpose. He gave, as a consideration for that leasehold interest, a premium. He paid the premium directly into the taxpayer's hands and the taxpayer retained the money. But to avoid the application of sec. 16 (*d*) which these facts would otherwise require, the taxpayer interposed his Company as a conduit for the assurance of the leasehold interest and as an imputed recipient of the premium. The grant of the lease to the Company, his automaton, and its immediate assignment to the intending lessee, and the subsequent liquidation

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of the Company, and the entries in the books of the Company narrating the taxpayer's accountability to it for the money and the accountability of himself as the Company's liquidator in a like sum, all amount to an arrangement adopted for the sole purpose of intercepting the liability to income tax which would otherwise flow from the payment to him of a consideration actually demanded and actually given in connection with a leasehold. For these reasons the sum of £8,651 formed part of the taxpayer's assessable income.

The questions in the special case should be answered as follows:— (1) Yes, the whole. (2) Yes, the whole. (3) No such deduction should be made under sec. 23 (1) (*a*) of the *Income Tax Assessment Act* 1922-1925 independently of sec. 25 (*i*). (4) No. (5) Having regard to the foregoing answers, an answer to this question is not necessary. The costs of the special case should be made costs in the appeal.

Questions answered accordingly. Costs, costs in the appeal.

Solicitors for the appellant, *F. C. Emanuel & Pearce.*

Solicitor for the respondent, *W. H. Sharwood*, Commonwealth Crown Solicitor.

J. B.