[HIGH COURT OF AUSTRALIA.]

DEPUTY FEDERAL COMMISSIONER OF TAXATION. . . . . } APPELLANT;
RESPONDENT,

AND

EVANS LIMITED . . . . . RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1933.

MELBOURNE, *June* 9.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Income tax (Cth.)—Income generally—Ascertainment of assessable income—Premiums and other payments in connection with leases and their assignment—Sub-demise for residue of term—Money paid to sub-lessor—Income Tax Assessment Act 1922-1929 (*No.* 37 *of* 1922—*No.* 11 *of* 1929), *sec.* 16 (*d*)*.

The respondent, which held a sub-lease of certain business premises in Perth, sold the sub-lease to another company. The transaction between the respondent and the purchaser was carried out by sub-demise and not by way of assignment.

Held, that a sum of money paid by the purchaser to the respondent at the commencement of the sub-lease was a premium, fine or foregift within the meaning of sec. 16 (*d*) of the *Income Tax Assessment Act* 1922-1929.

Clarke v. *Federal Commissioner of Taxation*, (1932) 48 C.L.R. 56, applied.

Decision of the Supreme Court of Western Australia (*Dwyer* J.): (1932) 35 W.A.L.R. 42; 2 A.T.D. 208, reversed.

APPEAL from the Supreme Court of Western Australia.

Mayer Breckler sub-leased to the respondent, Evans Limited, certain property in Perth for a term of ten years less the last day thereof from 16th October 1922 at a weekly rental of £28 for the

* Sec. 16 (*d*) of the *Income Tax Assessment Act* 1922-1929 provides:—"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 connexion with leasehold estates."

first five years of the term and at the weekly rental of £30 for the balance of the term. By an agreement made on 8th May 1925 in consequence of certain structural alterations made to the premises it was agreed that the following additional rents should be paid by the respondent to Breckler and by Breckler to the owners of the freehold, namely, (1) a sum equal to ten per cent of the estimated value of the improvements £2,300; (2) the sum of £230 the estimated cost of a second story to a small building at the rear of the premises, which sum was to be paid by seven equal annual instalments of £33 each. In 1928 the respondent sold the lease of the land to Woolworths Pty. Ltd. The price was £7,380, of which £4,260 was paid in 1928 in cash. To carry out this arrangement a sub-lease was executed whereby "Evans Limited . . . (hereinafter called the sub-lessor . . .) being registered or entitled to be registered as the proprietor of a sub-lease" of the land in question "in consideration of the premium or sum of seven thousand three hundred and eighty pounds to be paid by Woolworths (W.A.) Proprietary Limited . . . (hereinafter called the 'sub-lessee' . . .) to the sub-lessor as hereinafter mentioned . . . hereby sub-leases to the said Woolworths (W.A.) Proprietary Limited" the land in question "to be held by the sub-lessee for a term commencing on the first day of October one thousand nine hundred and twenty-eight and ending on the thirteenth day of October one thousand nine hundred and thirty-two" at the clear weekly rental of forty-five pounds payable weekly to the sub-lessor on Monday in each week the first of such payments to be made on the eighth day of October One thousand nine hundred and twenty-eight subject to the covenants and powers implied under the *Transfer of Land Act* 1893 . . . "and also to the covenants and conditions hereinafter contained:—1. The sub-lessee . . . covenants with the sub-lessor . . . (*a*) To pay to the sub-lessor . . . the sum of Four thousand two hundred and sixty pounds on or before the first day of October One thousand nine hundred and twenty-eight and prior to the sub-lessor granting possession of the leased premises to the sub-lessee. (*b*) To pay to the sub-lessor . . . the sum of Three thousand one hundred and twenty pounds by equal weekly instalments of ten pounds each on the Monday in each and every

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week the first of such instalments to be paid on the seventeenth day of October One thousand nine hundred and thirty-two. (*c*) To pay to the sub-lessor . . . the rent hereinbefore reserved on the days and in the manner hereinbefore appointed for payment thereof clear of all deductions."

In assessing the respondent for income tax on income derived during the year ended 30th June 1929 the Commissioner included the sum of £4,260 in the arriving at the assessable income of the respondent. The respondent objected to the inclusion of this item in calculating its assessable income substantially on the grounds— 1. That the sum of £4,260 was an amount received by the respondent in respect of the sale or disposal or realization of a capital asset, and that such sum was not income or assessable or chargeable income within the meaning of the *Income Tax Assessment Act* 1922-1928. 2. That the sum of £4,260 was not in the true meaning of the transaction between the respondent and Woolworths (W.A.) Pty. Ltd. a premium, fine or foregift or consideration in the nature thereof demanded and given in connection with a leasehold estate. 3. That such sum was an accretion or addition to capital. The Commissioner disallowed the objection. The respondent thereupon requested the Commissioner to treat the objection as an appeal and forward it to the Supreme Court of Western Australia in accordance with sec. 50 (4) (*b*) of the *Income Tax Assessment Act* 1922-1931.

The appeal was heard by *Dwyer* J. who delivered the following judgment :—" The sole question for determination on this appeal is whether a sum of £4,260, payable to the appellant taxpayer by Woolworths Ltd., was a premium fine or foregift or consideration in the nature of a premium fine or foregift demanded and given in connection with a leasehold estate. The taxpayer was the holder of a leasehold estate in premises in Hay Street, Perth, holding such estate by virtue of a sublease from one Breckler ; it contracted to sell its interest to Woolworths Ltd., and the sum referred to was part of the price agreed on the sale. The transaction, though in substance a sale of what admittedly was a capital asset, was carried through in the form of an assignment by way of sub-demise for the residue of the term. In my view the expression ' premiums

fines or foregifts ' is not apt to describe the monetary price paid to a sublessee on the sale to a purchaser of the totality of his interest under a sub-demise. It is an expression commonly used and understood to refer to payments to a lessor or sublessor for the granting renewal or surrender of leases, or as a consideration for assenting to an assignment and similar transactions, and the history of the relevant section and its amendments from time to time seems to indicate that the words were used in what I think is their ordinary significance. In my opinion, therefore, this appeal should be allowed."

From this decision the Commissioner now appealed to the High Court.

Phillips, for the appellant. The sum assessed was a premium, fine or foregift within the meaning of sec. 16 (*d*) of the *Income Tax Assessment Act* 1922-1929. The relevant provision is set out in sec. 16 (*d*) of the Act of 1922-1924. Since that date there have been some amendments to the section. The sub-lease from Breckler to the respondent expired on 15th October 1932, and the sub-lease from the respondent to Woolworths expired on 13th October of that year. The transaction was thus clearly carried out by way of sub-demise and not by way of assignment. *Dwyer* J. assumed that the last sub-lease was an assignment. A sum such as this paid for a sub-lease is taxable (*Executor Trustee and Agency Co. of South Australia* v. *Federal Commissioner of Taxation* (1); *Dalrymple* v. *Federal Commissioner of Taxation* (2); *Australian Mercantile Land and Finance Co.* v. *Federal Commissioner of Taxation* (3); *Clarke* v. *Federal Commissioner of Taxation* (4)). The taxpayer was paying less rent to his lessor than he was receiving from his sub-lessee. It was necessary to protect this profit that the transaction should be carried out by sub-demise and not by way of assignment. This was in fact a sub-lease and the taxpayer was rightly assessed.

Fullagar, for the respondent. This appeal discloses a very remarkable reversal of attitude by the Commissioner. The transaction was treated in the Court below on the basis that the document

(1) (1932) 48 C.L.R. 26.
(2) (1924) 34 C.L.R. 283.
(3) (1929) 42 C.L.R. 145, at p. 152.
(4) (1932) 48 C.L.R. 56.

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in question was an assignment and not a sub-lease, and the whole argument was whether this sum being a payment under an assignment was taxable. The Commissioner is bound by his conduct of the case in the Court below (*Owners of Ship "Tasmania" and Owners of Freight* v. *Smith and Others, Owners of Ship "City of Corinth"* (1)). The whole question is whether the particular payment is a payment of a premium, fine or foregift within the meaning of the section. The question is what is the character of the payment made under the document. To ascertain that the Court can go behind the document. Where the true substance of the transaction is that the owner of the leasehold estate is getting rid of that estate, as he is doing in this case, though he may be getting a profit in the sense that the asset is worth more than he gave for it, the money he receives for it has not the nature of an income payment but of a capital receipt (*Evans Ltd.* v. *Commissioner of Taxation* (*State*) (2)). When you find that a company such as this is selling the lease of the premises where it carries on business and is finally winding up that business the money received on the sale of the lease should be treated as a realization of capital and not as income.

June 9.

The following judgments were delivered :—

RICH J. I think the facts in this case bring the payment in question within sec. 16, sub-sec. (*d*) of the *Income Tax Assessment Act* 1922-1929 and within the principle of the previous decisions of this Court of which the latest is *Clarke* v. *Federal Commissioner of Taxation* (3). In my opinion the appeal should be allowed.

STARKE J. In my opinion the decision of this Court in *Clarke* v. *Federal Commissioner of Taxation* (3) governs this case. The transaction as embodied in the document before us shows that the premises in question were sub-let in consideration of a premium or sum of £7,380 and certain covenants and other stipulations set forth in the sub-lease. In the face of a transaction so recorded I fail to understand precisely why the payment in question should not be treated as a premium and a premium within sec. 16, sub-sec. (*d*), of the Act.

(1) (1890) 15 App. Cas. 223, at p. 225. (2) (1932) 34 W.A.L.R. 136; 2 A.T.D. 14.
(3) (1932) 48 C.L.R. 56.

DIXON J. I agree that the decision of this Court in *Clarke* v. *Federal Commissioner of Taxation* (1) excludes the contention that sec. 16 (*d*) is confined to the payment of money on an assignment of a lease and shows that it includes sums of money paid by a lessee for the purpose of obtaining a lease. In this case *Dwyer* J. seems to have considered that the transaction which the documents were intended to carry into effect was in the nature of a sale of capital assets including the lease held by the taxpayer. In fact the transaction included and must have included the grant of the sub-lease. For not only was a large sum of money payable immediately to the sub-lessor, but also a weekly payment was required which was sufficient to pay the rent for which he was liable and to give him a profit of almost £10 per week. Therefore it was necessary to carry out the transaction in the form which was adopted. The argument that this conclusion involves the proposition that capital profits and capital sums are taken into account as being assessable income is not to the point. It might, perhaps, have formed the foundation of an attack upon the validity of the provisions as infringing sec. 55 of the Constitution, but such an attack has not been made. In any event, where sums of money are obtained which in one aspect may be said to be a capitalization of future profits and in another aspect may be said to be nothing more than ordinary taxable income paid in advance they do not for that reason alone necessarily cease to be taxable in an Income Tax Act and become another subject of taxation.

EVATT J. In my opinion the case of *Clarke* v. *Federal Commissioner of Taxation* (1) decides the main point of this appeal in favour of the Commissioner.

The only matter I wish specially to refer to is this. The learned Supreme Court Judge appeared to consider that it was open to him to go behind the documents in order to find out " the substance " of the transaction between the parties. As to that, I agree with what has been said by my brother *Starke*. In this case the form of the transaction cannot be distinguished from its substance; its substance is its form, and its form its substance.

(1) (1932) 48 C.L.R. 56.

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I therefore agree that the sum of £4,260, which was payable and paid under the document of sub-lease, was demanded and given as a premium in connection with a leasehold estate.

The appeal should therefore be allowed.

McTIERNAN J. I agree that the appeal should be allowed.

Appeal allowed.

Solicitor for the appellant, *Albert A. Wolff*, Assistant Crown Solicitor for Western Australia.

Solicitors for the respondent, *Downing & Downing.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

COUVE . . . . . APPELLANT;

RESPONDENT,

AND

J. PIERRE COUVE LIMITED (IN LIQUIDATION) AND ANOTHER . . . . } RESPONDENTS.

APPLICANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1933. SYDNEY, *Aug.* 11, 14. MELBOURNE, *Sept.* 21. Dixon, Evatt and McTiernan JJ.

Company—Winding up—Misfeasance by director—Fraudulent preference—Undrawn salary of managing director—Company's assets taken in lieu thereof after presentation of petition—Measure of loss—Companies Act 1899 (*N.S.W.*) (*No.* 40 *of* 1899), *secs.* 152*, 162*.

Company—Winding up—Misfeasance by director—Proceedings by liquidator for order for repayment—Defences—Assets insufficient to meet amount due under debenture—Proceedings effective to benefit debenture-holder only.

The appellant was the managing director of a company of which he was the only substantial shareholder. After the presentation of a petition for the

The *Companies Act* 1899 (N.S.W.) provides, by sec. 152: "Where a company is being wound-up by the Court, or under the supervision of the Court, all dispositions of the property, effects, and choses in action of such company, . . . made between the commencement of the winding-up and the order for winding-up shall, unless the Court otherwise orders, be void." By sec.