[HIGH COURT OF AUSTRALIA.]

UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED . . . . . . APPELLANT;

AND

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

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BRISBANE, *July* 9, 10.

Rich, Dixon and McTiernan JJ.

Income Tax (Cth.)—Assessment—Allowable deduction—Retiring allowance made to business manager—Long service—Retirement on account of old age and incapacity due to ill health—Expenses actually incurred in gaining or producing assessable income—Assessable income set aside or paid by employer to a fund to provide retiring allowance—Gift to charitable institution—Purchase of land—Deposit paid during income year—Balance of purchase moneys paid in subsequent year—Income Tax Assessment Act 1922-1930 (*No.* 37 *of* 1922—*No.* 50 *of* 1930), *sec.* 23 (1) (*a*), (*h*) (ii), (*j*).

A taxpayer voluntarily made a retiring allowance in the form of Commonwealth bonds and a cheque to a business manager who by reason of old age and ill health had become incapacitated and had been replaced by a younger man.

Held:—

(1) That the taxpayer was not entitled to a deduction in respect thereof under sec. 23 (1) (*a*) of the *Income Tax Assessment Act* 1922-1930, there being no connection between the payment and the production of assessable income.

(2) That the taxpayer was not entitled to any deduction under sec. 23 (1) (*j*) of the Act as the payment was not made to a fund but to an individual.

The taxpayer in May 1929 had paid a deposit and entered into a contract to buy certain land which was then presented to an institution for the purposes of a home for aged people. During the following income year, in July 1929, the taxpayer paid the balance of the purchase money.

Held that the taxpayer was not entitled to any deduction in respect of the balance of the purchase moneys under sec. 23 (1) (*h*) (ii) of the *Income Tax Assessment Act* 1922-1930, on the grounds that the gift was a gift of land and

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not of money and was made in the income year preceding that in respect of which the exemption was sought, and it was for the Commissioner to be satisfied that the gift was acquired by the use of assessable income.

CASE STATED.

The Union Trustee Co. of Australia as executor and trustee of the will of William Robert Black appealed against the assessment of the testator by the Federal Commissioner of Taxation to income tax for the year ending 30th June 1930. The appeal came before *Dixon* J. who at the request of the parties stated a special case substantially as follows for the opinion of the Full Court:—

William Robert Black died on 2nd October 1930 and probate of his will was granted to the Union Trustee Co. of Australia Ltd. Black commenced business in the year 1885 as a coal merchant, and in the course of his business became sole proprietor of extensive property consisting of city lands and river lighters, tugs, launches, coal punts and wharfage, together with collieries known as the Abermain Colliery situated at North Ipswich, the Blackheath Colliery situated at Bundamba, and the Caledonian Colliery situated at Walloon, Queensland, and each consisting of about one thousand acres. He also acquired various other properties which were subsequently transferred to companies in which Black held shares. In or about the year 1897 or 1898 Sydney Cumberland Lecky was engaged by Black as his general business manager. The companies were all enterprises of Black and the shares therein were almost entirely owned by him, and after the formation and registration of the companies the services of Lecky were continued with the companies, with the addition that during the year ended 30th June 1922 and thereafter continuously until the year 1930 Lecky was further engaged by Black as his own confidential secretary and accountant.

On 7th November 1929 Black requested one George Johnston, accountant at Union Bank Chambers, Brisbane, to make himself completely acquainted with all his affairs, and Black stated to Johnston that when this was completed Johnston would take over the duties of Lecky who was then of the age of seventy-one years and had by reason of old age and ill health become incapacitated, and Black then stated to Johnston that he would provide for Lecky on his retirement. The employment of Lecky with Black was accordingly terminated in January 1930 at which date and until the death of Black, Johnston, whilst continuing to carry on his business of a public accountant, carried on the duties formerly carried on for Black by Lecky. On 17th January 1930 Black informed Johnston that the retiring allowance for Lecky would consist of a sum of £3,364, being an amount equal to one year's salary and a further sum of £3,000. On 18th January 1930 Black paid to Lecky the sum of £3,364 in the form of Commonwealth Government Bonds amounting to £3,350, and the remainder by a cheque drawn on the bank of Black. The bonds were as to the amount of £3,000 purchased by Black before 30th June 1929, and as to the amount of £350 during the year ended 30th June 1930, and the whole of the bonds were deposited with his bankers for safe custody. On 16th May 1929 Black purchased from Frank Maiden Allsop certain land with residential buildings erected thereon and situated at Graceville, Queensland. The purchase price of the land and buildings was the sum of £1,317 10s., of which sum £250 was paid by Black as a deposit. On 12th June 1929 the land and buildings were accepted from Black by the Presbyterian Church of Queensland for use as a home for aged women, and the oversight and management of the home were given to a committee then existing and managing a home for aged men. During the month of July 1929 Black paid to Cameron Brothers of Brisbane on behalf of Allsop the sum of £1,067 10s. being the balance of the purchase money for the land and buildings, and the land by direction of Black was transferred by Allsop to the Presbyterian Church of Queensland, a corporation duly incorporated by letters patent issued in pursuance of the *Religious Educational and Charitable Institutions Act* 1861, for the use of the Home for Aged Women. The land and buildings with additions made from time to time have been exclusively used as a home for aged women.

The Home for Aged Women is open to and is maintained for the benefit of members of the public generally, with no restrictions whatsoever as to the qualifications of applicants for admission other than age and sex and the need of the applicant, and every such

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application is considered solely with regard to the need of such applicants and the resources of the Home.

The sum of £1,067 10s. was shown in the income tax return of Black prepared by Johnston for the year ended 30th June 1930 as a deduction of the sum of £1,067.

By an assessment dated 8th May 1931 the deductions of £3,364 and £1,067 were allowed and the total tax for the year was assessed at the sum of £436 9s. 1d., which sum was duly paid on 7th July 1931.

By further assessment dated 9th October 1931 both deductions were disallowed and the tax for that year was reassessed at the sum of £1,735 7s. 2d. which, after allowing for the sum of £436 9s. 1d. and for a further sum of £120 1s. 4d. credited from the Queensland State assessment for the year, left an additional assessment for the year of £1,178 13s. 9d. which, on demand of the Deputy Commissioner for Taxation, was paid on 8th October 1933. On 10th December 1931 the company as executor and trustee lodged an objection to the amended assessment which was disallowed.

The company as executor and trustee notified the Deputy Commissioner of its desire that the objection be treated as a notice of appeal and forwarded to the High Court for hearing and determination.

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

(1) Should a deduction be made from the assessable income of William Robert Black for the year ended 30th June 1930 of the sum of £3,364 or any part thereof pursuant to :—
   (*a*) Par. *a* of sec. 23, sub-sec. 1 of the *Income Tax Assessment Act* 1922-1930, or
   (*b*) Pursuant to par. *j* of the said sub-sec. 1 ?
(2) Should a deduction of the sum of £1,067 or any part thereof be made pursuant to par. *h* (ii.) of sub-sec. 1 of sec. 23 of the said Act ?
(3) By whom should the costs of and incidental to this appeal be paid ?

Grove, for the appellant. The Commonwealth bonds were the means by which provision was made from assessable income for the

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purpose of providing the retiring allowance (*British Insulated and Helsby Cables* v. *Atherton* (1)). The payment was income and not capital expenditure, and was wholly and exclusively laid out and expended for the purposes of trade (*Mitchell* v. *B. W. Noble Ltd.* (2)). It was necessary that the older man should retire and be replaced by a younger man who was more efficient. The inference is that in consequence there would be a greater assessable income. If the older man were retained the assessable income would be smaller. The payment of the retiring allowance is to be considered as the investment of a sum of money to produce a return (*Barnett* v. *Sheffield* (3) ; *Shand* v. *Du Buisson* (4) ; *Fisher* v. *Calvert* (5) ; *Hill* v. *Halford* (6)). The payment has to be treated as a sum of money out of which the retiring allowance was paid (*Metropolitan Gas Co.* v. *Federal Commissioner of Taxation* (7) ; *Symon* v. *Federal Commissioner of Taxation* (8)). So far as the fund will permit, the payment is treated as having been made out of the fund (*Sterling Trust Ltd.* v. *Commissioners of Inland Revenue* (9)). The Commissioner must act reasonably and according to law (*Metropolitan Gas Co.* v. *Federal Commissioner of Taxation* (10)). There was a gift to a public charitable institution (*Halsbury*, 2nd ed., vol. 4, p. 162, par. 215) ; *Perpetual Trustee Co.* v. *Federal Commissioner of Taxation* (11) ; *Shaw* v. *Halifax Corporation* (12)). The gift amounted to a gift of money and the deduction should be allowed.

Fahey, for the respondent. The institution was not established at the date of the gift. There was no institution in existence as required by the *Income Tax Assessment Act*. The gift was made to the Church to found the institution. The gift was made in the income tax year preceding the year of taxation. That is not sufficient to entitle the taxpayer to a deduction. The moneys must be paid during the year the gift was made. Where there

(1) (1926) A.C. 205, at p. 214.
(2) (1927) 1 K.B. 719, at pp. 725, 726.
(3) (1852) 1 DeG.M. & G. 371 ; 42 E.R. 595.
(4) (1874) L.R. 18 Eq. 283.
(5) (1879) 27 W.R. 301.
(6) (1801) 2 Bos. & P. 413 ; 126 E.R. 1357.
(7) (1932) 47 C.L.R. 621.
(8) (1932) 47 C.L.R. 538, at pp. 545, 546, 547.
(9) (1925) 12 Tax Cas. 868.
(10) (1932) 47 C.L.R., at pp. 631, 632.
(11) (1931) 45 C.L.R. 224, at pp. 232, 233.
(12) (1915) 2 K.B. 170, at pp. 184, 185.

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is a blended fund the taxpayer is entitled to no more than he has paid into the fund (*Symon* v. *Federal Commissioner of Taxation* (1)). The gift to aged people *simpliciter* is not a good charitable gift (*In re Lucas*; *Rhys* v. *Attorney-General* (2); *Attorney-General* v. *Haberdashers' Co.* (3); *Attorney-General* v. *Comber* (4)).

Grove, in reply. There is a gift to a benevolent institution (*O'Farrell* v. *Council of the Municipality of Bathurst* (5)). The Attorney-General could intervene and have a scheme drawn up (*Halsbury*, 2nd ed., vol. 4, p. 213, par. 306).

The following judgments were delivered :—

RICH J. This is a case stated under the provisions of the *Income Tax Assessment Act* 1922-1930. There are two questions asked :—(1) Should a deduction be made from the assessable income of William Robert Black for the year ended 30th June 1930 of the sum of £3,364, or any part thereof, pursuant to par. (*a*) of sec. 23, sub-sec. 1 of the *Income Tax Assessment Act* 1922-1930 or pursuant to par. (*j*) of sec. 23, sub-sec. 1 of the same Act ? (2) Should a deduction of the sum of £1,067, or any part thereof be made pursuant to par. (*h*) (ii) of sec. 23, sub-sec. 1 of the same Act ?

The sum of £3,364 was paid to Lecky on his retirement. Lecky had for a number of years been Black's general business manager, secretary and accountant. On 7th November 1929 Lecky, who was then of the age of seventy-one years, and had by reason of old age and ill health become incapacitated, was retiring, and Black said he would provide for him on that event. Black said that the retiring allowance would amount to £3,364, which was one year's salary and a further sum of £3,000. On 18th January 1930 Black paid Lecky that sum in the form of Commonwealth bonds amounting to £3,350, and the remainder by cheque drawn on the bank of Black. The bonds were as to the amount of £3,000 purchased by Black before 30th June 1929, and as to the amount of £350 during the year ended 30th June 1930.

A gallant effort was made by Mr. *Grove* to support the payment as an exemption under sec. 23, sub-sec. 1 (*a*) of the *Income Tax*

(1) (1932) 47 C.L.R. 538.
(2) (1922) 2 Ch. 52.
(3) (1834) 1 My. & K. 420; 39 E.R. 741.
(4) (1824) 2 Sim. & St. 93; 57 E.R. 281.
(5) (1923) 40 W.N. (N.S.W.) 78.

Assessment Act 1922-1930. But it is not enough that the payment sought to be deducted was made as a superannuation or a retiring allowance for an employee serving in a business. It is not enough that it was made in the course of business. It must appear that it is an outgoing incurred for the production of assessable income. There must be a connection between the purpose of the payment and the further pursuit of gain, the production of income. There must be some facts which justify the inference that the outgoing was incurred to conduce to that end. But there is nothing in the facts appearing in the case stated to show or to support the payment as an exemption under that sub-section. The facts do not show that the payment was incurred in gaining or producing the assessable income. Then Mr. *Grove* contended that the payment was deductible under sub-sec. 1 (*j*) of sec. 23 of the Act. Here again the facts fail to show that the payment came out of assessable income and was a payment made to a fund to provide the assessable income. It was said that the decision of the majority of the Court, in *Symon* v. *Federal Commissioner of Taxation* (1) rendered it unnecessary to adduce such facts. Even assuming that that decision produces such a result, the deduction cannot be established. Sec. 23 (1) (*j*) does not relate to a simple payment to an individual. The payment in fact was made to an individual and not to a fund which would provide the retiring allowance. The same reasoning applies to the proviso to sub-sec. 1 (*j*) of sec. 23.

With regard to the second question I regret to say I am unable to hold that the payment comes under par. *h* (ii) of sub-sec. 1 of sec. 23 of the Act. The sum in question was the balance of purchase money of certain land and residential buildings in Twickenham Street, Graceville. A sum was paid as deposit on the land on 16th May 1929 and the balance was paid in the subsequent income tax year. The land and buildings were accepted from Black by the Presbyterian Church and used as a home for aged women, and were subsequently transferred to the corporation of the Presbyterian Church and handed to the then existing committee for control and management. It seems to me that the gift was a gift of land, and not money, and made in the income tax year preceding that under

(1) (1932) 47 C.L.R. 538.

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consideration. The Commissioner of Taxation was not satisfied that the donor Black had used any part of his assessable income for the acquisition of this gift. In my opinion both questions should be answered : No, and costs should be costs in the appeal.

Dixon J. I agree in the judgment just delivered.

In 1897 or 1898, Lecky became business manager for Black whose affairs were widespread. From time to time some shares were allotted to Lecky ; but he received not a very large salary. In November 1929 Black decided to replace Lecky, who was then seventy-one years of age, by a younger man. Possibly it might be right to infer that he considered that the proper management of his affairs made this step necessary. On the retirement of Lecky, Black voluntarily gave him, by way of superannuation allowance, a lump sum of £3,364, being £3,000 together with a year's salary. There is nothing to establish that Black had, during the course of Lecky's service, promised him a superannuation allowance.

The first question arising is whether this payment by Black can be considered an outgoing actually incurred by Black in gaining the assessable income within sec. 23 (1) (*a*) of the *Income Tax Assessment Act* 1922-1930, and money wholly and exclusively laid out or expended for the production of assessable income within sec. 25 (*e*). The requirements which must be satisfied under these provisions have been explained in this Court in *Maryborough Newspaper Co.* v. *Federal Commissioner of Taxation* (1), *Federal Commissioner of Taxation* v. *Gordon* (2), *Herald and Weekly Times Ltd.* v. *Federal Commissioner of Taxation* (3) and *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (4). Of these the first only relates to a retiring allowance, but the others discuss the meaning of the provision and the application of English cases. Subject to the cautions which these authorities contain English cases such as *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (5) and *Mitchell* v. *B. W. Noble Ltd.* (6), suggest the test to be applied, a test which was formulated by *Rich* J. in the *Maryborough Case* (1). Tried by that test, the

(1) (1929) 43 C.L.R. 450.
(2) (1930) 43 C.L.R. 456.
(3) (1932) 48 C.L.R. 113.
(4) (1934) 51 C.L.R. 568, at pp. 575-581.
(5) (1914) 3 K.B. 674.
(6) (1927) 1 K.B. 719, at p. 725.

claim to bring the payment within the deduction allowed as a result of secs. 23 (1) (*a*) and 25 (*e*) must fail. There is nothing to show that it was not a purely voluntary grant to Lecky made by Black out of proper feelings of gratitude for long service of a confidential nature. There is nothing to establish a connection between the payment and the production of income.

The next question is whether the payment can be brought within either the first or third limb of par. *j* of sec. 23 (1). The first limb makes it essential in order to found a claim for deduction under it that money should be paid to a fund, and that the fund should be devoted to the provision of individual personal benefits, pensions, or retiring allowances for employees, i.e. a class or description of employees. In this case there was no fund and only a single employee.

The third limb is restricted to moneys applied for the advantage of employees in any business or class of business. Again, it is not applicable to a lump sum payment to one individual on his retirement.

The second deduction claimed is for a sum of £1,067 10s. paid by the deceased taxpayer towards a home for aged women situated at Cliveden. In the previous year of income, he entered into a contract to buy land and buildings which he presented to the Presbyterian Church of Queensland for the purpose of a home for aged women. The premises were placed under the control of a committee administering such institutions, and the Home was thus established. In the first month of the year of income the sum in question was paid in order to complete the purchase, and the land was vested in the corporation of the Presbyterian Church of Queensland. It does not appear exactly when the Home was established. But upon the facts stated in the special case, the deceased taxpayer must be taken in the previous income year to have undertaken a personal obligation to the vendor to pay the purchase money. Whether he is treated as having declared himself a trustee of the contract and thereby given the property, or the gift was made when he procured a transfer to the corporation in the following year, it is, I think, clear that the gift was of the property and not of the money which the taxpayer paid to the vendor. That payment he was obliged to make. It did not constitute a gift of money to anybody.

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The deduction is sought under par. *h* (ii) of sec. 23 (1). A number of objections is made by the Commissioner to the application of this paragraph to the facts of the case. One of these objections appears to me insuperable. There must be a gift within the definition contained in the paragraph. That definition is as follows: " 'Gift' means a gift in the form of money or a gift in kind when the Commissioner is satisfied that the donor has used part of his assessable income of the year for the acquisition of the gift." In my opinion this cannot be treated as a gift in the form of money. But the Commissioner is not satisfied that the taxpayer used part of his assessable income for the year for the acquisition of the gift. *Symon* v. *Federal Commissioner of Taxation* (1) was relied upon to establish that the purchase money should be treated as found out of the assessable income. But the definition of "gift" does not use the same phrase as the operative part of par. ii. It employs the language "has used part of his assessable income." It is for the Commissioner to say, as a matter of fact, whether this language is satisfied in any given case. His decision can be reviewed by the Board of Review. But this Court cannot interfere unless it is made to appear that the Commissioner has misapplied or misunderstood his functions, either because he has misinterpreted the statute, or made some other mistake.

There is nothing in the special case which suggests that the Commissioner has done so. The claim for the deduction cannot in these circumstances be established.

The first and second questions must be answered: No.

McTiernan J. I agree and have nothing to add.

Questions answered:—(1) *No.* (2) *No. Appeal dismissed with costs.*

Solicitors for the appellant, *McGregor, McGregor, Given & Capner.*

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

B. J. J.

(1) (1932) 47 C.L.R. 538.