[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF TAXES (VICTORIA) APPELLANT;

AND

PHILLIPS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1936,

MELBOURNE, *Mar.* 5, 6.

SYDNEY, *April* 27.

Starke, Dixon and Evatt JJ.

Income Tax (Vict.)—Assessment—Amount paid as compensation on termination of appointment—Lump sum—Capital or income—Income Tax Act 1928 (*Vict.*) (*No.* 3701).

The taxpayer was employed as governing director of a company for a period of ten years at a remuneration equivalent to 12½ per cent. of the net annual profits. Before the expiration of the period of ten years the company disposed of its business to another company and the taxpayer's employment was terminated. It was agreed between the company and the taxpayer that he should receive £20,301 as compensation for the termination of his employment, computed on a basis of £5,252 a year for the unexpired portion of the period of ten years and payable by monthly instalments.

Held that the monthly payments were of an income nature and liable to income tax.

Decision of the Supreme Court of Victoria (Full Court): *In re Income Tax Acts*, (1935) V.L.R. 407, reversed.

APPEAL from the Supreme Court of Victoria.

Herman Frank Phillips objected to an assessment to income tax made by the Commissioner of Taxes (Victoria) and requested the Commissioner to transmit the objection to be heard and determined by a Judge of County Courts. The objection came on for hearing

before Judge *Woinarski*, who stated a case, substantially as follows, for the opinion of the Full Court of the Supreme Court :—

1. Herman Frank Phillips (hereinafter called " the taxpayer ") and his brother Leon Phillips have for many years carried on business in partnership as amusement managers and directors.

2. The partnership has been so carried on pursuant to a verbal agreement between the partners, one of the terms of which was that all moneys received by either partner from amusement enterprises or other sources and whether by way of capital or income should be brought into the partnership and should belong to the partners in equal shares. The partnership received or was credited with by way of income the whole of the moneys received by each partner as directors' fees, salaries and commission and also as dividends, rents and interest from investments in amusement enterprises and properties.

3. Returns of income have been made and assessments issued under the *Income Tax Act* 1928 (Vict.) on the footing that the taxpayer and Leon Phillips are partners in equal shares in the business and that all income received by either of them as aforesaid is income of the partnership.

4. For the year ended 30th June 1932 the income of the partnership included directors' fees received by the taxpayer and/or Leon Phillips for their services as directors of Luna Park Ltd., Central Theatre Co. Pty. Ltd., and Town Hall Property Co. Pty. Ltd., salaries received by the taxpayer and/or Leon Phillips from various amusement enterprises, dividends upon shares in various companies held by the taxpayer and/or Leon Phillips, and interest upon capital sums invested by the partnership. The partnership furnished a return of income for the said year, which included as partnership income all of the above items.

5. Central Theatre Co. Pty. Ltd. (hereinafter called the " Central Co.") is a company which was on 4th December 1920 duly incorporated under the law of Victoria and the taxpayer is and was at all material times a director of the Central Co.

6. By an agreement under seal dated 6th December 1920 and made between the Central Co. and the taxpayer, the Central Co. agreed to conduct all kinds of amusements, cinema shows, variety

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enterprises, entertainments, concerts and other kinds of amusement or some or one of them at the Capitol Theatre, then intended to be erected by the Central Co. in Melbourne, for a period of 10 years from the date of opening the theatre, and for a like period agreed to employ the taxpayer and the taxpayer agreed to serve the Central Co. as governing director of the theatre at a remuneration equivalent to 12½ per cent on the net annual profits arising from the entertainments carried on in the theatre by or on behalf of the Central Co.

7. The theatre was opened on 7th November 1924, and thereafter until 25th December 1930 entertainments were daily (except on Sundays) conducted therein by or on behalf of the Central Co. under the direction and management of the taxpayer.

8. Pursuant to the agreement under seal referred to in par. 6 hereof the taxpayer served the Central Co. as governing director of the theatre and received as remuneration therefor sums equivalent to 12½ per cent on the net annual profits of the entertainments conducted therein by or on behalf of the Central Co. The sums received by the taxpayer as aforesaid were brought in as income from personal exertion in the return of income for the respective years when so received as aforesaid made by the partnership under the Act, and one-half of the sums was taken into account as assessable income from personal exertion in the assessments under the Act made on the taxpayer and Leon Phillips respectively in respect of the said years.

9. By an agreement under seal dated 11th December 1930 and made between the Central Co., Famous Lasky Film Service Ltd. (hereinafter referred to as the "Lasky Co."), and Town Hall Property Co. Pty. Ltd. the Central Co., agreed to let and the Lasky Co. agreed to take the Capitol Theatre for a period of 10 years from 26th December 1930. It was a term of the last-mentioned agreement that the Lasky Co. undertook and agreed that in addition to the moneys thereinbefore agreed to be paid by it, it would pay to the Central Co. the sum of £20,301, which sum it was necessary for the Central Co. to pay to Herman Frank Phillips in order to retire him from the service of the Central Co. as its governing director of the theatre, and the sum of £20,301 was made payable as follows: £404 on 23rd January 1931 and thereafter by equal payments of

£404 every four weeks until the final payment which should be £101.

10. Pursuant to the agreement referred to in par. 9 hereof the Lasky Co. entered into possession of the theatre and on and from 26th December 1930 conducted and still conducts entertainments therein. The Lasky Co. did not employ the taxpayer to manage the theatre for it and on and from the said date the taxpayer ceased to carry on any of the duties of governing director of the theatre, which duties were performed for the Lasky Co. by persons employed by it.

11. Prior to the execution of the agreement referred to in par. 6 hereof the taxpayer informed the other directors of the Central Co. that he would expect to receive compensation for loss of remuneration as governing director of the theatre if the proposed lease to the Lasky Co. were granted. It was recognized by the directors that unless the amount of such compensation could be agreed upon the taxpayer could recover damages for breach by the Central Co. of the agreement. Discussions accordingly took place between the taxpayer and the other directors of the Central Co. as to the amount to be paid to the taxpayer as compensation and it was agreed that the amount should be £20,301, which amount was computed on a basis of £5,252 a year for the unexpired portion of the period of ten years mentioned in the agreement referred to in par. 6 hereof. The amount of £5,252 a year was arrived at as being the estimated annual amount which the taxpayer would be likely to receive during the balance of the term of the agreement, having regard to the sums he had in fact received in respect of past years. It was further agreed that the directors should procure the insertion of a provision in the terms of what is now clause 18 of the agreement referred to in par. 9 hereof in such agreement and that the Central Co. upon receipt of the moneys provided to be paid to it by clause 18 would forthwith pay over the same to the taxpayer. [Clause 18 provided that " the lessee " (the Lasky Co.) " hereby undertakes and agrees that . . . it will pay to the lessor " (the Central Co.) " the sum of twenty thousand three hundred and one pounds which sum it is necessary for the lessor to pay to " the taxpayer " in order to retire " the taxpayer " from the service of the lessor as its governing director of the . . . theatre and the said

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sum . . . shall be paid as follows: Four hundred and four pounds on the twenty-third day of January one thousand nine hundred and thirty-one and thereafter by equal payments of Four hundred and four pounds every four weeks until the final payment which shall be One hundred and one pounds."] The taxpayer thereupon informed the directors of the Central Co. that he was satisfied with the arrangement and that he would not claim compensation from the Central Co. except to the extent to which the Lasky Co. paid to the Central Co. the amounts referred to in the said clause. Save as aforesaid no agreement between the taxpayer and the Central Co. regarding payment of compensation to the taxpayer has been made.

12. The Lasky Co. has paid to the Central Co. the periodical sums mentioned in clause 18 of the agreement referred to in par. 9 hereof and the Central Co. has forthwith paid each of such sums as and when received to the taxpayer, who has treated them as belonging to the partnership referred to in par. 1 hereof, and they have been divided equally between the partners. During the year ended 30th June 1932 the Central Co. received from the Lasky Co. and paid to the taxpayer as aforesaid monthly sums amounting in all to £4,444.

13. Since December 1930 the taxpayer has not obtained any regular full time employment but has continued to engage in the partnership activities and has received one-half share of the partnership income.

14. On 30th November 1933 the Commissioner of Taxes made an assessment pursuant to the Act of the taxable income of the taxpayer for the year ended 30th June 1932 and of the tax payable thereon for the financial year beginning 1st July 1932. In making the assessment the Commissioner assessed the taxable income of the taxpayer at one-half the amount at which he assessed the taxable income of the partnership for the same year, and in assessing the taxable income of the partnership he included as part of the assessable income of the partnership the sum of £4,444 referred to in par. 12 hereof. Notices of the assessments of the taxpayer and in respect of the partnership were duly sent to the taxpayer by the Commissioner.

15. Notice in writing dated 7th December 1933 of objection to the assessment of the taxpayer was given to the Commissioner by the taxpayer, the grounds of the objection being set out as follows :—

(1) That you have incorrectly included as assessable income in my assessment an amount of £2,222, being half the amount paid to the partnership of H. F. & L. Phillips in respect of compensation for the cancellation of an agreement made 6th December 1920 between Central Theatre Co. Pty. Ltd. and Herman Frank Phillips.

(2) That such amount is not assessable income within the meaning of the *Income Tax Act* 1928 and the *Unemployment Relief Tax Act* 1930.

(3) That the tax is excessive.

16. The Commissioner considered the objection and on 16th January 1934 gave notice to the taxpayer that he disallowed the same, and on 30th January 1934 the taxpayer gave notice that he was dissatisfied with the decision of the Commissioner in disallowing the objection and requested the Commissioner to transmit the objection to be heard and determined by a Judge of County Courts.

17. The objection came on for hearing before Judge *Woinarski* at Melbourne on 13th September 1935, and upon the hearing counsel for both parties applied that the Court should state a special case upon the question set out below arising in this matter for the opinion of the Supreme Court. Pursuant to the said application Judge *Woinarski* then stated this special case.

The question for the opinion of the Supreme Court was :—

> Was the Commissioner right for the purpose of assessing the taxable income of the taxpayer for the year ended 30th June 1932 in including in the income of the partnership for that year one-half of which was taxable income of the taxpayer the sum of £4,444 ?

The Supreme Court answered the question asked in the negative: *In re Income Tax Acts* (1).

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

Fullagar K.C. (with him *Tait*), for the appellant. The payments received by the taxpayer are income. Actually he received monthly sums which were equivalent to salary. They extended over the

(1) (1935) V.L.R. 407.

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same period as his salary would have covered and amount to the same total. Had the contract been continued and not terminated the money so received would have been income. The contract having been terminated and the obligations under it having been commuted to a money payment, the money so received arising from the substituted agreement takes its character from the original contract, and when received is itself income in the hands of the recipient (*J. Gliksten & Son Ltd.* v. *Green* (1); *R.* v. *B. C. Fir and Cedar Lumber Co. Ltd.* (2); *Commissioners of Taxation (N.S.W.)* v. *Meeks* (3); *Commissioners of Inland Revenue* v. *Northfleet Coal and Ballast Co. Ltd.* (4); *Burmah Steam Ship Co. Ltd.* v. *Commissioners of Inland Revenue* (5)). On the other hand, there may be cases in which money is paid by way of damages or compensation for the loss of, or damage to, a capital asset (*Californian Oil Products Ltd. (in Liquidation)* v. *Federal Commissioner of Taxation* (6); *Glenboig Union Fireclay Co. Ltd.* v. *Commissioners of Inland Revenue* (7)). The taxpayer received monthly an estimated equivalent of the percentage he would have received as salary, and those receipts are income.

Wilbur Ham K.C. (with him *Coppel*), for the respondent. Compensation for loss of employment is not income. The receipt of this money was not income, but a capital receipt received by way of compensation. What the taxpayer sold was a chose in action. What he received was compensation for putting an end to his business (*Scott* v. *Commissioner of Taxation* (8)). The only difference between that case and the present is that here the compensation went into a partnership account. That fact makes no difference to the nature of the receipts. The receipt of compensation for the cessation of carrying on a business is a capital receipt and not income (*Californian Oil Products Ltd. (in Liquidation)* v. *Federal Commissioner of Taxation* (6)). [He also referred to *Income Tax Act* 1928, sec. 16, and *Chibbett* v. *Joseph Robinson & Sons* (9).]

Fullagar K.C., in reply.

Cur. adv. vult.

(1) (1929) A.C. 381.
(2) (1932) A.C. 441.
(3) (1915) 19 C.L.R. 568, at p. 580.
(4) (1927) 12 Tax Cas. 1102.
(5) (1930) 16 Tax Cas. 67.
(6) (1934) 52 C.L.R. 28.
(7) (1922) 12 Tax Cas. 427.
(8) (1935) 35 S.R. (N.S.W.) 215; 52 W.N. (N.S.W.) 44.
(9) (1924) 9 Tax Cas. 48.

The following written judgments were delivered :—

STARKE J. This is an appeal from a decision of the Supreme Court of Victoria upon a special case stated by a Judge of County Courts. Every person is liable to tax, under the Victorian *Income Tax Act* 1928, in respect of income, whether from property or personal exertion (secs. 10 and 3). Persons carrying on any trade in partnership are liable to make a joint return as such partners in respect of the trade which they carry on, but are liable to tax only in their separate individual capacities (sec. 53). It appears from the case stated that the taxpayer—the respondent here—and his brother carried on for many years a business in partnership, as amusement managers and directors. Directors' fees, salaries, dividends, &c., were received by them in the course of their business, and were treated as the income of the partnership. The taxpayer had an agreement with the Central Co. Theatre Pty. Ltd. (called the Central Co.) to serve it as governing director for ten years at a remuneration equivalent to 12½ per cent on the net annual profits arising from entertainments carried on by the company in a theatre to be erected in Melbourne, and afterwards known as the Capitol Theatre, in addition to the taxpayer's share of ordinary directors' fees. This remuneration was carried to the credit of the partnership accounts. The Famous Lasky Film Service Ltd. (called the Lasky Co.) took over the Capitol Theatre from the Central Co. and conducted entertainments therein. The Lasky Co. agreed to pay to the Central Co. £20,301, " which sum it was necessary for the Central Company to pay " to the taxpayer to retire him " from the service of the Central Co. as its governing director of the said theatre." The amount of £20,301 was computed on a basis of £5,252 a year for the unexpired portion of the period of ten years mentioned in the agreement between the Central Co. and the taxpayer. Prior to this last-mentioned agreement, the taxpayer had informed the Central Co. that he would expect compensation for loss of remuneration as governing director if the Lasky Co. took over the Capitol Theatre, but upon the agreement between the Central Co. and the Lasky Co. being executed, the taxpayer informed the Central Co. that he was satisfied with the arrangement contained in it, and would not claim compensation from it except

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to the extent to which the Lasky Co. paid the Central Co. During the year 1932 the Lasky Co. paid the Central Co. a sum of £4,444, part of the sum of £20,301, pursuant to the agreement already mentioned. The Central Theatre Co. during the same year paid to the taxpayer this sum of £4,444. The taxpayer ceased to carry on his duties as governing director of the Capitol Theatre soon after the agreement was made between the Central Co. and the Lasky Co. This sum of £4,444 was carried to the credit of the partnership accounts.

The Commissioner made an assessment of the taxable income of the taxpayer for the financial year 1932-1933. He assessed the taxable income of the taxpayer at one-half the amount at which he assessed the taxable income of the partnership for the same year, and in assessing the taxable income of the partnership he included as part of its assessable income the sum of £4,444. The question stated was: "Was the Commissioner right for the purpose of assessing the taxable income of the taxpayer for the year ended 30th June 1932, in including in the income of the partnership for that year, one-half of which was taxable income of the taxpayer, the said sum of £4,444?" The Supreme Court by a majority resolved this question in the negative: hence this appeal on the part of the Commissioner.

The services rendered by the taxpayer to the Central Co. were of a personal nature, but according to the facts stated in the case, the performance of such services was part of the partnership business, and payments made in respect thereof were rightly credited to the partnership account. Further, the case states as a fact that the sum of £4,444 was treated as belonging to the partnership, and was accordingly credited to the account of the partnership. But the question remains whether it was an income receipt for the purposes of the *Income Tax Act* 1928.

The decisions of the House of Lords in *British Insulated and Helsby Cables Ltd.* v. *Atherton* (1), and *Van den Berghs Ltd.* v. *Clark* (2), state the general considerations which govern the determination of the question. "When an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an

(1) (1926) A.C. 205. (2) (1935) A.C. 431.

advantage for the enduring benefit of a trade . . . there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital" (1). But whether a receipt is an income or a capital receipt is substantially a question of fact. Now, as was asked in *Van den Berghs' Case* (2), what was the taxpayer giving up ? It is very relevant to inquire whether the thing in respect of which the taxpayer received the sum in question here is a deprivation of one of the capital assets of the trading enterprise, or, short of that, the deprivation of an opportunity of earning profits in the ordinary course of the business (*Burmah Steam Ship Co.* v. *Commissioners of Inland Revenue* (3); *Short Bros. Ltd.* v. *Commissioners of Inland Revenue* (4)). The service agreement which was given up, in the present case, was one made in the ordinary course of the partnership business : it was not, as in *Van den Berghs' Case* (2) and in *Californian Oil Products Ltd. (in Liquidation)* v. *Federal Commissioner of Taxation* (5), the basis or the foundation of the trading activities of the taxpayer. It does not follow that the payment of the sum of £4,444 made to the taxpayer necessarily represented income because it was measured by the stipulations contained in the service agreement, but nevertheless the taxpayer received, in an agreed sum and by instalments, the remuneration which would otherwise have been received under that agreement over a series of years. In the course of the partnership business and with reference to the service agreement only, the taxpayer gave up the opportunity of earning remuneration under that agreement, for the agreed sum, payable by instalments. Sums received under such an arrangement are in my judgment revenue or income receipts and not receipts of a capital nature.

The appeal should be allowed, and the question stated in the case answered in the affirmative.

DIXON AND EVATT JJ. The taxpayer's calling is described as that of amusement manager and director. In 1920 he undertook to manage and direct a large theatre about to be erected by a company

(1) (1926) A.C., at pp. 213, 214; (1935) A.C., at pp. 439, 440.
(2) (1935) A.C. 431.
(3) (1931) S.C. 156.
(4) (1927) 12 Tax Cas. 955.
(5) (1934) 52 C.L.R. 28.

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which was then formed. He was a member of the company's board of directors. An agreement was entered into between the taxpayer and the company by which for a period of ten years from the opening of the theatre he agreed to serve, and the company to employ him, as governing director of the theatre. His duties included the management and control of the theatre and of all entertainments, exhibitions and shows held therein by or on behalf of the company. As remuneration for his services as governing director of the theatre he was to receive a percentage of the profits of the undertaking. The percentage was independent of his fees as a director of the company. His remuneration as governing director of the theatre was fixed by the agreement at twelve and a half per cent of the annual net profits arising from the amusements carried on in the theatre by or on behalf of the company. It was payable monthly. The theatre was opened on 7th November 1924. The term of the taxpayer's agreement, therefore, would expire on 7th November 1934.

After the company had carried on the theatre for six years, it agreed to lease the theatre to another concern for a period of ten years, beginning on 26th December 1930, with an option of purchase exercisable within four years. Before this agreement was completed, the taxpayer stated that he expected compensation for loss of his remuneration as governing director of the theatre. The company's board of directors did not dispute his right to damages if the transaction went through and no agreement upon the amount of his compensation were made. After discussion with the taxpayer, they did agree upon an amount of £20,301. The unexpired period of his agreement was three years and forty-five weeks. Having regard to the amounts he had received in the past, the annual amount the taxpayer was likely to receive in the future, if his agreement were to go on, was estimated at £5,252, that is, £101 a week. It was on this basis that the amount was fixed at £20,301, which is the total of £101 a week for the residue of the term. The board of directors agreed to and did procure the inclusion of the following provision in the agreement between the company and the lessee which took over the theatre, viz. :—" The lessee hereby undertakes and agrees that in addition to the aforesaid moneys it will pay to the lessor the sum of twenty thousand three hundred and one pounds

which sum it is necessary for the lessor to pay to " the taxpayer " in order to retire the said " taxpayer " from the service of the lessor as its governing director of the said theatre and the said sum of twenty thousand three hundred and one pounds shall be paid as follows: Four hundred and four pounds on the twenty-third day of January one thousand nine hundred and thirty-one and thereafter by equal payments of four hundred and four pounds every four weeks until the final payment which shall be one hundred and one pounds."

In the taxpayer's assessment for Victorian income tax derived during the twelve months ended 30th June 1932, the Commissioner has included the amounts derived by him from payments received pursuant to this arrangement. A partnership existed between the taxpayer and his brother under the terms of which they shared equally their receipts from all sources. Accordingly the amount carried into the assessment represented only half the sums which the company received from the lessee and paid to the taxpayer.

The question is whether the sums so included in the assessment formed part of the taxpayer's assessable income. In our opinion the sum does form part of his assessable income.

The substance of what the taxpayer obtained under the agreement he made was a right to receive a monthly payment of £404 during the unexpired residue of his agreement of service with the company. The agreement of cancellation or rescission substituted this payment for the monthly payments which he would have earned by directing the theatre, payments of uncertain amount representing $12\frac{1}{2}$ per cent of the profits. An estimate of these future payments of uncertain amount produced the regular monthly sum of £404. He gave up the right to the future payments calculated upon the profits and was relieved of the duties of management. While, if his agreement had gone on, the performance of that agreement would have been the proximate source of the income and its amount would have fluctuated, under the new arrangement the receipts were derived from the mere subsistence of the contract, which needed no performance on the part of the taxpayer, and the amount of the monthly payment was fixed. It appears to us that, for future income which he had a right to earn by performing the agreement,

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he exchanged a right to receive, through the same duration of time and at the same intervals of time, amounts estimated as equivalent to the income otherwise payable to him. It is true that to treat a sum of money as income because it is computed or measured by reference to loss of future income is an erroneous method of reasoning (cf. *Californian Oil Products Ltd. (in Liquidation)* v. *Federal Commissioner of Taxation* (1); *Van den Berghs Ltd.* v. *Clark* (2)). It is erroneous because, for example, the right to future income may be an asset of a capital nature and the sum measured by reference to the loss of the future income may be a capital payment made to replace that right. Or, again, the computation may be done for the purpose of ascertaining what capitalized equivalent should be paid for the future income. But, where one right to future periodical payments during a term of years is exchanged for another right to payments of the same periodicity over the same term of years, the fact that the new payments are an estimated equivalent of the old cannot but have weight in considering whether they have the character of income which the old would have possessed. Even in the case of a sale of land, the parties may, if they choose, adopt a consideration consisting of annual payments which are income and not merely deferred payments of capital (see *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (3) and the cases there cited). A contract of service is valuable only because of the income it will bring during the residue of its term. It is not a piece of marketable property. Unless it is rescinded or broken, it is not usually possible to obtain a lump sum or any other consideration representing its value. When such an occasion arises its value is likely to be expressed in terms of income and is by no means certain to be translated into capital. No prima facie reason exists for regarding as instalments of capital annual payments which are taken in place of the contractual rights such a contract gave.

In the present case, the contract expressed the total of the monthly payments as a lump sum. But the period being fixed, the rate of payment being estimated and the intervals being already established, the statement is no more than an arithmetical equivalent.

(1) (1934) 52 C.L.R., at pp. 46, 49, 51.
(2) (1935) A.C., at p. 442.
(3) (1934) 51 C.L.R. 568, at pp. 572, 573.

Indeed, it is not the present value of the future payments but merely their sum. In *Van den Berghs Ltd.* v. *Clark* (1) Lord *Macmillan* says: "If the" taxpayers "were merely receiving in one sum down the aggregate of profits which they would otherwise have received over a series of years the lump sum might be regarded as of the same nature as the ingredients of which it was composed."

In the present case, there is no lump sum down: there are monthly payments estimated to correspond in amount with the monthly payment which otherwise the taxpayer would have received and the payments are to be made over the same period of time. In these circumstances they must, in our opinion, be regarded as of the same nature as the payments they replace. They are of an income nature.

For these reasons we think the appeal should be allowed, the order of the Supreme Court discharged and the question in the special case answered in the affirmative, and the special case with that answer should be remitted to the County Court.

The taxpayer, the respondent to this appeal, should pay the costs of this appeal and of the special case in the Supreme Court.

Appeal allowed. Judgment of Supreme Court of Victoria dated 31st October 1935 set aside. Question stated in case answered: "Yes." Case remitted to County Court at Melbourne with the answer aforesaid. Order that respondent, Phillips, pay costs of and incidental to preparation, and reference to and hearing by the Supreme Court, of the special case, and the costs of the appeal to this Court.

Solicitor for the appellant, *F. G. Menzies*, Crown Solicitor for Victoria.

Solicitors for the respondent, *Arthur Robinson & Co.*

H. D. W.

(1) (1935) A.C., at p. 442.