[HIGH COURT OF AUSTRALIA.]

COMMISSIONER OF TAXES (QUEENSLAND) APPELLANT;

AND

CAMPHIN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *June* 22, 23, 25.

Latham C.J., Rich and McTiernan JJ.

Income Tax (Q.)—Option to purchase—Valuable consideration—Whether sale of personal property—Taxable income—Income Tax Acts 1924 *to* 1933 *(Q.)* (15 *Geo. V. No.* 34—24 *Geo. V. No.* 25), *sec.* 10 (2).

The grant for value of an option to purchase the residue of the term of a lease creates in the optionee an equitable interest in the lease, but is not a sale to him of such interest. The moneys paid for the option are therefore not taxable under sec. 10 (2) of the *Income Tax Acts* 1924 *to* 1933 (Q.) as net gains or profits arising from the sale of personal property.

Decision of the Supreme Court of Queensland: *Commissioner of Taxes* v. *Camphin*, (1937) Q.S.R. 126, affirmed.

APPEAL from the Supreme Court of Queensland.

Otto Camphin, a person domiciled and resident in New South Wales, acquired a lease of the old town hall premises, Brisbane, from the Brisbane City Council. By a deed dated 5th May 1935 and made between Camphin and the Wintergarden Theatre Ltd., a company incorporated in Queensland, Camphin granted to the Wintergarden Theatre Ltd. in consideration of £8,320 an option exercisable before the 17th May 1936 to purchase the residue of the term of the lease. The amount due in respect of the option was payable by 104 weekly instalments of £80 each. Seven instalments amounting to £560 were paid up to 30th June 1934. For the income

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tax year ending 30th June 1934 the Commissioner of Taxes claimed to tax the full amount of £8,320 as taxable income within the meaning of the *Income Tax Acts* 1924 *to* 1933 (Q.). The taxpayer objected and the matter came before *Blair* C.J. in the Court of Review, who held that the moneys were not taxable income. The Commissioner of Taxes appealed to the Full Court by way of special case and it was held by the Full Court that no part of the £8,320 was taxable income: *Commissioner of Taxes* v. *Camphin* (1).

The Commissioner of Taxes appealed to the High Court.

The questions arising on the special case were the following (and a fourth question not material for the purposes of this report):—

(1) Was the sum of £8,320 or any part thereof and if so what part taxable income within the meaning of the *Income Tax Acts* 1924 *to* 1933 ?

(2) Was the appellant right in assessing the whole of the sum of £8,320 to tax as income earned in or derived directly or indirectly by the respondent in or from sources in Queensland during the period of twelve months ending 30th June 1934, or should the appellant have assessed to tax only so much of the said sum as was received by the respondent on or before 30th June 1934 ?

(3) Assuming the sum of £8,320 or any part thereof to be income received in and for the year ending 30th June 1934, was such income or any part thereof and if so what part earned in or derived directly or indirectly by the respondent in or from sources in Queensland ?

Further facts appear in the judgment hereunder.

Hart, for the appellant. The grant of an option creates an equitable interest in the land (*London and South-Western Railway Co.* v. *Gomm* (2)). There is an equitable interest in the optionee. It was created by the person who had the leasehold and as it was created by that person for value there was a sale. There is thus a profit arising from a sale in Queensland of the equitable right to property. There is a sale of personal property, within the meaning

(1) (1937) Q.S.R. 126.

(2) (1881) 20 Ch. D. 562, at p. 586.

of sec. 10 (2) of the *Income Tax Acts* (*Goldsbrough Mort & Co. Ltd.* v *Quinn* (1); *Gerraty* v. *McGavin* (2); *Carter* v. *Hyde* (3); *In re Lind, Industrials Finance Syndicate Ltd.* v. *Lind* (4)).

McGill K.C. (with him *Gain*) for the respondent. The property referred to in sec. 10 (2) of the *Income Tax Acts* is something which the seller has acquired and transferred to the buyer. The statute contemplates and is limited to a thing in existence. Here the thing said to be sold is brought into existence by the transaction itself. The transaction which brings a thing into existence cannot be a sale. Here the purchaser acquired a right to purchase within a particular period. The option creates an equitable right enforceable in equity. The creation of that right is not a sale (*Byrne, Dictionary of English Law* (1923), p. 789 ; *Ex parte Miller and Gray* (5) ; *Commissioner of Stamp Duties* (*N.S.W.*) v. *Yeend* (6)). The contract creates an interest in property only in so far as the contract is specifically enforceable in equity. The taxpayer was resident out of Queensland. The contract was made outside Queensland. The courts of Queensland could not have jurisdiction to grant specific performance of the contract (*Penn* v. *Baltimore* (*Lord*) (7) ; *City Finance Co. Ltd.* v. *Matthew Harvey & Co. Ltd.* (8); *Ex parte Gove* (9); *Commissioners of Inland Revenue* v. *Angus* (10) ; *Currey* v. *Federal Building Society* (11) ; *Commissioner of Taxes* v. *Union Trustee Co. of Australia* (12)).

Hart, in reply. There was the sale of an interest in leasehold. There was the sale of personal property situate in Queensland (*Thomas* v. *Federal Commissioner of Taxation* (13) ; *Hawksley* v. *Outram* (14) ; *Luke* v. *Mayoh* (15); *Jurd* v. *A. C. Saxton & Sons Ltd.* (16) ; *Commissioner of Road Transport and Tramways* v. *Green Star Trading Co. Pty. Ltd.* (17) ; *English, Scottish and Australian*

(1) (1910) 10 C.L.R. 674, at p. 692.
(2) (1914) 18 C.L.R. 152, at pp. 163, 164.
(3) (1923) 33 C.L.R. 115, at p. 123.
(4) (1915) 1 Ch. 744.
(5) (1892) 18 V.L.R. 31; 13 A.L.T. 159.
(6) (1929) 43 C.L.R. 235.
(7) (1750) 1 Ves. Sen. 444; 27 E.R. 1132.
(8) (1915) 21 C.L.R. 55.
(9) (1921) 21 S.R. (N.S.W.) 548; 38 W.N. (N.S.W.) 189.
(10) (1889) 23 Q.B.D. 579.
(11) (1929) 42 C.L.R. 421, at p. 445.
(12) (1931) A.C. 258.
(13) (1923) 33 C.L.R. 256.
(14) (1892) 3 Ch. 359.
(15) (1921) 29 C.L.R. 435.
(16) (1935) Q.S.R. 72.
(17) (1936) 36 S.R. (N.S.W.) 320; 53 W.N. (N.S.W.) 94.

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Bank Ltd. v. *Inland Revenue Commissioners* (1); *Fry* on *Specific Performance*, 6th ed. (1921), p. 641).

Cur. adv. vult.

The following judgments were delivered:—

LATHAM C.J. This is an appeal from a decision of the Full Court of the Supreme Court of Queensland by which it was determined that no part of a certain sum of £8,320 was taxable income of the respondent under the *Income Tax Acts* 1924 *to* 1933 of Queensland.

The respondent, Otto Camphin, conducted negotiations with the Brisbane City Council with the object of securing a lease of land known as the " old town hall " area. Part of the land was already leased to one Massey. The respondent bought the lease from Massey and it was assigned to him with the consent of the city council. The respondent formed a company—Civic Theatres (Brisbane) Limited—in New South Wales. Only seven shares of £1 each were issued and the company had no assets beyond the £7 which it had received in respect of the shares. The negotiations with the city council were intended by the respondent to secure a lease of the old town hall site for the company.

The respondent entered into an agreement on the 5th May 1934 with Wintergarden Theatre Ltd. Under the agreement the respondent granted to that company, in consideration of £8,320, an option to purchase the residue for the time being of the term of the lease which the respondent had bought from Massey, and also an option to purchase all issued shares in Civic Theatres (Brisbane) Ltd. for the price of £18,320. The option was to be exercised before 17th May 1936. The amount paid for the option to purchase at that price (£18,320) was to be deemed to have been paid on account of the purchase price if the option was exercised. It was provided that the assignment of Massey's lease should be subject to the consent of the Brisbane City Council (the head lessor) being obtained, but that the sum of £8,320 was to be paid even if the respondent was unable to obtain such consent. It was provided that the £8,320 should be paid by 104 equal weekly instalments of £80. The com-

(1) (1932) A.C. 238.

missioner claims tax upon the full amount of £8,320 as income within the meaning of the *Income Tax Acts* as derived in the year ended 30th June 1934. In fact the respondent had received only £560 (seven weekly instalments) in the year mentioned. In argument upon this appeal the commissioner did not press the claim to tax the whole amount in respect of one year, but contended that the amounts received were taxable as income in respect of the years during which they were in fact received. The option was not in fact exercised.

It was found as a fact by the learned Chief Justice that the respondent did not traffic in options. There is no finding that the respondent purchased the lease from Massey in pursuance of a profit-making scheme. The Chief Justice, indeed, accepted the evidence of the respondent that he did not purchase the lease for resale, for the evidence of the respondent to that effect is regarded by the learned judge as showing that he had no such intention. Thus the instalments cannot be regarded as income under the principle applied in *Blockey* v. *Federal Commissioner of Taxation* (1) (See *Commissioners of Taxation* (*N.S.W.*) v. *Mooney* (2)).

In some cases it has been held that a transaction amounts to the disposition by its owner of a capital asset as consideration for a series of payments which bear the character of income in his hands. He may purchase income by an outlay of capital. The simplest case is that of the purchase of an annuity. But the mere fact that payment of a debt is made by periodical instalments does not bring about the result that the instalments constitute income in the hands of the respondent (*Secretary of State in Council of India* v. *Scoble* (3) ; *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (4) ; *Foley* v. *Fletcher* (5)).

It thus becomes necessary to consider certain special provisions of the *Income Tax Acts* which expressly provide for the taxation of moneys which would not be included within the ordinary meaning of the word " income." The first of these provisions is sec. 10 (2), which is as follows :—" Without limiting the force or effect of sections

(1) (1923) 31 C.L.R. 503.
(2) (1907) A.C. 342 ; 4 C.L.R. 1439.
(3) (1903) A.C. 299, at p. 303.
(4) (1934) 51 C.L.R. 568, at pp. 572, 573.
(5) (1858) 3 H. & N. 769 ; 157 E.R. 678.

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four and seven of this Act, assessable income shall expressly include, as income from personal exertion . . . (2) All net gains or profits arising from the sale of any personal property whatsoever (except where otherwise provided in the next succeeding sub-section of this section and in section eleven of this Act), whether or not arising from any business carried on by the taxpayer, arrived at by deducting from the total sale price of such personal property the expenses of sale and the cost to the vendor (less any amount in respect of depreciation which the commissioner considers just) of such personal property." It is unnecessary for the purposes of this case to consider a proviso which excludes from this provision gains or profits arising from the sale of personal property which, subject to certain exceptions, the taxpayer has not purchased during the year in which the sale took place or the six years prior thereto.

An option given for value is an offer, together with a contract that the offer will not be revoked during the time, if any, specified in the option. If the offer is accepted within the time specified a contract is made and the parties are bound. If the offeror, in breach of his agreement, purports to revoke his offer, his revocation is ineffectual to prevent the formation of a contract by the acceptance of the offer within the time specified (*Goldsbrough Mort & Co. Ltd.* v. *Quinn* (1); *Gerraty* v. *McGavin* (2); *Carter* v. *Hyde* (3)).

When an option to purchase property has been given for value and the option contract is one which would be specifically enforced in equity, a court of equity attaches to it the consequence that it creates an equitable interest in the property which is the subject matter of the option (*London and South Western Railway Co.* v. *Gomm* (4)). The contract remains a contract imposing an obligation on the person giving the option, but, when it is an option relating to land and capable of specific performance, the ordinary doctrine of a court of equity results in the person giving the option becoming a trustee of the land for the intended objects of the trust (*Central Trust and Safe Deposit Co.* v. *Snider* (5)). Where the option to purchase is an option to purchase a leasehold estate, then

(1) (1910) 10 C.L.R. 674.
(2) (1914) 18 C.L.R., at pp. 163, 164.
(3) (1923) 33 C.L.R. 115.
(4) (1882) 20 Ch. D. 562.
(5) (1916) 1 A.C. 266, at p. 272.

the result of the granting of an option for value is, it is argued, to create an equitable interest in personal property. Thus it is said and, in my opinion, rightly said, that the option in this case created an equitable interest in the leasehold estate which the respondent owned by virtue of the assignment from Massey, the original lessee from the city council. Similarly an equitable interest was created in the issued shares of Civic Theatres (Brisbane) Ltd. It may here be mentioned that the agreement between the respondent and Wintergarden Theatres Ltd. was made in New South Wales between the parties who were in New South Wales and that the respondent has at all material times resided in New South Wales. The commissioner does not seek to tax any part of the £8,320 which may properly be attributable to the said issued shares. These shares, however, appear to be quite valueless and, in my opinion, the reference to them in the document giving the option does not affect any of the issues in this appeal.

It must, I think, therefore be held that Wintergarden Theatres Ltd. did acquire by virtue of the agreement an interest which was personal property.

Gains and profits which are made subject to tax by sec. 10 (2) are gains and profits arising from the sale of any personal property &c. Thus the fact that the Wintergarden Company became entitled to personal property by reason of the transaction is not material unless that property was sold to the company by the respondent. In my opinion it cannot properly be said that whenever a proprietary interest is created in return for a money payment the proprietary interest has been sold to the person in whom it becomes vested.

When an owner of land grants a lease the lessee obtains a proprietary interest in the land, which is personal property, but the owner has not sold this personal property to the lessee. He himself never was the owner of that personal property. He has created a term in the lessee, and the lessee owns a proprietary interest which he did not own before, but that interest has not been sold to him. The transaction is properly described by saying that the owner of the land has leased his land and has created a term in the tenant and a reversion in himself. The result of giving an option for value is that the person to whom the option is given acquires an equitable

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interest. But this equitable interest has not, in my opinion, been sold to him. The equitable interest is measured by what a court of equity would decree in an action for specific performance. The right of the person who may be called the owner of the option is a right to prevent the owner of the property in question from disposing of it inconsistently with the option, together with a right, if he exercises the option, to compel the owner of the property to carry out the contract which has been made by the exercise of the option. This right of the optionee is a right which has been created by the option, but it is not a right which the owner of the property ever possessed. He has created a new right in the optionee which is a right of property, but he has not transferred to the optionee any right which previously belonged to him as the owner of the property in relation to which the option was given. Thus there has been no sale of any property. When sec. 10 (2) refers to the sale of any personal property, it refers to a transaction in which a person who has been the owner of personal property ceases to be the owner of that property by reason of a sale, the effect of which is to vest that property in another person in succession to himself (See *Byrne, Dictionary of English Law* (1923), p. 789, title "Sale"). This, in my opinion, is the natural meaning of the words and this view is supported by the latter portion of sec. 10 (2) providing for a deduction from the total sale price of the cost to the vendor of the personal property.

Thus, though the optionee acquired an equitable proprietary interest by virtue of the option, the respondent did not sell that interest to the optionee, and therefore sec. 10 (2) does not apply.

Sec. 10 (4) brings into charge net gains or profits arising from the sale outside Queensland of property in Queensland. This provision also depends upon a sale of property having taken place and, for the reasons already stated, is not applicable to the present case.

Sec. 11 relates to bonuses, premiums, fines, foregifts, &c., upon the actual assignment of a lease and similar transactions. This section plainly cannot apply to the case.

Sec. 13 contains provisions relating to the sale, &c., of property to be paid for by periodical instalments. As there was no sale of property in the case, this section is not applicable.

These conclusions make it unnecessary to consider other questions which were raised as to whether the gains or profits in question were, if they were included within income for the purposes of the Act, income derived directly or indirectly in or from sources in Queensland.

For the reasons stated I am of opinion that the judgment of the Full Court was correct and that the appeal should be dismissed.

RICH J. I agree.

MCTIERNAN J. I agree.

Appeal dismissed with costs.

Solicitor for the appellant, *H. J. H. Henchman*, Crown Solicitor for Queensland.

Solicitor for the respondent, *Neil O'Sullivan*.

B. J. J.