[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION . APPELLANT;

AND

ELDER'S TRUSTEE AND EXECUTOR COMPANY LIMITED . . . . . } RESPONDENT.

H. C. OF A. 1946.

MELBOURNE, *May* 27, 28; *June* 7.

Latham C.J.

Income Tax (Cth.)—Assessment—Rebate—Gifts "made by the taxpayer" to charitable institutions—Income of deceased person's estate taxable in hands of executor—Legacies to charities—Payment by executor—Right of executor to rebate—Income Tax Assessment Act 1936-1943 (*No.* 27 *of* 1936—*No.* 10 *of* 1943), *ss.* 95-99, 100A, 101A, 160 (1), (2) (*g*).

Legacies paid by an executor in accordance with the terms of a testator's will to charitable institutions specified in s. 160 (2) (*g*) of the *Income Tax Assessment Act* 1936-1943 are "gifts . . . made by the taxpayer" within the meaning of that sub-section, so as to entitle the executor to a concessional rebate of tax under s. 160 (1) in his assessment to income tax in respect of the income of the trust estate.

APPEAL under *Income Tax Assessment Act.*

This was an appeal by the Federal Commissioner of Taxation from a decision of a Board of Review under the *Income Tax Assessment Act* 1936-1943 on an appeal against an assessment to income tax of Elder's Trustee and Executor Co. Ltd., as executor of the estate of T. E. Barr Smith, in respect of the income year 1942-1943. The facts and the relevant statutory provisions sufficiently appear in the judgment hereunder.

Hudson K.C. and *D. M. Little*, for the appellant.

E. Phillips, for the respondent.

Cur. adv. vult.

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June 7.

LATHAM C.J. delivered the following written judgment:— The question which arises upon this appeal from a Board of Review under the *Income Tax Assessment Act* 1936-1943 is whether legacies to charitable institutions paid by an executor in accordance with the terms of a will are gifts made by a taxpayer within the meaning of s. 160 (2) (*g*) so as to entitle the taxpayer to a concessional rebate of tax under that section.

Section 160 (1) of that Act provides:—

"A taxpayer shall be entitled to a rebate in his assessment of tax equal to an amount ascertained by applying—

(*a*) to each of the amounts set forth in sub-section (2) of this section where the taxpayer is a resident; or

(*b*) to each of the amounts set forth in paragraphs (*g*) and (*h*) of that sub-section where the taxpayer is not a resident,

the rate of tax appropriate to a taxable income from personal exertion equal to the taxable income of the taxpayer, or, where the taxpayer is a company, the rate appropriate to the taxable income of the company."

This provision, which was introduced by Act No. 22 of 1942, s. 24, substituted a system of rebates in tax in certain cases for a system of deductions from assessable income.

Section 160 (2) (*g*) provides that—"The amounts in respect of which a rebate of tax shall be allowed under the last preceding sub-section shall be . . .

(*g*) gifts (not exceeding in the aggregate an amount equal to the taxable income) of the value of One pound and upwards of money or of property other than money which was purchased by the taxpayer within twelve months immediately preceding the making of the gift, made by the taxpayer in the year of income (not being gifts which are allowable as deductions under this Act in the assessment of the taxpayer) to any of the following funds, authorities or institutions in Australia:"

Then follows a list of seven classes of institutions or funds charitable or public in character, e.g. public hospitals, public benevolent institutions, universities &c.

By the *Income Tax Assessment Act* 1922-1929, s. 23, a deduction from assessable income was allowed on gifts of this character, but it was required that the gift should be made out of the assessable income derived during the year in which the gifts are made. This provision raised problems which came before this Court in *Symon* v. *Federal Commissioner of Taxation* (1). In s. 160 (2) (*g*) of the present

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

Act there is no requirement that the gifts should be made out of income.

The late T. E. Barr Smith, who died on 26th November 1941, left by will nine gifts amounting in all to £16,000 to institutions falling within the classes specified in s. 160 (2) (*g*). The executor of the will (who is a trustee as defined in the Act, s. 3) received an amount of £13,651 which he returned as assessable income of the year 1942-1943 by reason of s. 101A of the Act, which was introduced by Act No. 58 of 1941, s. 16.

Section 101A is in the following terms :—" Where in the year of income, the trustee of the estate of a deceased person receives any amount which would have been assessable income in the hands of the deceased person if it had been received by him during his lifetime, that amount shall be included in the assessable income of that year of the trust estate and shall be deemed to be income to which no beneficiary is presently entitled."

This provision alters the previous law as interpreted in *Commissioner of Taxation* (*N.S.W.*) v. *Lawford* (1).

The amount of £13,651 represented moneys which would have been assessable income in the hands of the testator if they had been received by him during his lifetime, and accordingly the trustee returned it as assessable income. The trustee claimed to be entitled to a rebate of income tax under s. 160 (2) (*g*). The Commissioner refused to allow the rebate, but upon appeal to the Board of Review the Board held that the rebate should be allowed.

It is argued for the Commissioner that the legacies to the charitable institutions are not " gifts made by the taxpayer " within the meaning of s. 160 (2) (*g*)—that the trustee is the taxpayer and that he did not make the gifts to the institutions. It is contended that if the testator is regarded as making the gifts, then he was no longer a taxpayer when, after his death, the payments were made on 20th November 1942 to the legatees.

Counsel for the Commissioner supported his argument by reference to the history of the legislation. The Act of 1936 provided in s. 78 (1) (*a*) for a deduction from assessable income of gifts of this description. It is argued that under that provision a trustee could never have claimed a deduction from the assessable income returnable by him of legacies given by a will. By Act No. 22 of 1942, s. 9 (*b*), this provision was repealed, and by s. 24 of that Act the existing provision introducing rebates in assessments of tax instead of deductions from assessable income was introduced and applied to such gifts. It is argued that, as no deduction could have been

(1) (1937) 56 C.L.R. 774.

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claimed under s. 78 of the Act in its earlier form, that is, as it stood in 1936, in respect of gifts by will to the institutions mentioned in that section, so also, after the 1942 Act, no rebate could be claimed in respect of such gifts under s. 160 (2) (*g*), to which section the words descriptive of such gifts were transferred from s. 78.

On the other hand counsel for the trustee draws attention to other changes in legislation which altered the position of a trustee under the Act. Reference has already been made to s. 101A, introduced in 1941, which subjected certain moneys belonging to a trust estate to income tax from which theretofore under the law as interpreted in *Lawford's Case* (1) they had been free. Therefore, it was said, it was quite reasonable to allow a rebate to the estate of a deceased person in respect of gifts in cases in which the testator would certainly have been entitled to a rebate if he had made the gifts in his lifetime instead of by will.

The argument for the trustee, however, depends principally upon s. 100A, which was introduced by Act No. 22 of 1942 which transferred the provisions relating to these gifts from s. 78 (deductions) to s. 160 (rebates). Section 100A can be understood only in its setting in Division 6 of Part III. of the Act. Section 95 provides that "the net income of a trust estate" means the total assessable income of the trust estate calculated under the Act as if the trustee were a taxpayer in respect of that income, less all allowable deductions, with certain exceptions to which it is not necessary to refer for the purposes of the present case. The trustee must return the whole of the assessable income of the estate under s. 254 (*c*). Section 96, however, provides that, except as provided in the Act, a trustee shall not be liable as trustee to pay income tax upon the income of the trust estate. The following sections draw distinctions between cases where there are beneficiaries presently entitled to the income and other cases where a beneficiary, although presently entitled to a share of income, is under a legal disability, or where there is no beneficiary presently entitled to any part of the income. In the former case the beneficiary is assessed and pays tax—s. 97. In the latter cases the trustee is assessed and pays the tax—ss. 98 and 99, obtaining a recoupment under s. 254 (*d*).

Section 100A is as follows:—"Where any amount specified in paragraph (*g*) or (*h*) of sub-section (2) of section one hundred and sixty of this Act is, or any calls specified in section one hundred and sixty AA of this Act are, paid by a trustee in respect of the trust estate, the trustee and each beneficiary who is liable to be assessed in respect of a share of the net income of that trust estate shall,

(1) (1937) 56 C.L.R. 774.

for the purposes of section one hundred and sixty or one hundred and sixty AA, as the case may be, be deemed to have paid such portion of that amount or of those calls as bears to that amount or to those calls the same proportion as that share bears to the net income of the trust estate."

Counsel for the Commissioner rightly contended that this section provides for the distribution of the benefit of certain rebates under s. 160 between the trustee and beneficiaries liable to be assessed, that is between, on the one hand, the trustee who is assessed and pays tax under s. 98 (where there are beneficiaries presently entitled but they are under a legal disability) or under s. 99 (where there are no beneficiaries presently entitled) and, on the other hand, beneficiaries presently entitled who are assessed and pay tax under s. 97. No doubt this is the immediate effect of the section. In the absence of some such provision, it might be that no person would receive the benefit of a rebate. If, for example, there were beneficiaries presently entitled to the whole of the income, then the trustee would not pay any tax, and so could not get a rebate of tax, and the beneficiaries would get no rebate because they had not made any gift. In order that s. 100A may have any effect in relation to beneficiaries liable to be assessed they must be regarded, quite artificially, not only as having paid "a portion of that amount," but also as having paid it by way of gift. Otherwise they could not claim any rebate by virtue of the operation of s. 100A.

But the necessity for or desirability of making such a provision for distribution of the benefit of the rebate assumes that there are cases to which the provision will apply. Section 100A assumes that gifts may be made by a trustee who is a taxpayer "in respect of the trust estate" in relation to which gifts a rebate is properly allowable, and it is upon this assumption that s. 100A provides for a distribution of the benefit of that rebate. Therefore, it is argued, the gifts which are "specified" in par. (*g*) of s. 160 (2) include gifts made under or in pursuance of a trust. It is therefore contended that the Board was right in holding that s. 100A has no meaning unless it includes legacies in cases where the trustee in question is an executor.

But it is argued for the Commissioner that a meaning can be found for s. 100A without holding that it applies to legacies or other gifts which it was the duty of the trustee to effectuate in accordance with the terms of his trust. It was said, in the first place, that a trustee might be carrying on a business and that in the ordinary course of carrying on the business it might be wise and judicious for him to make a subscription to a hospital or other charitable institution. Such gifts, it was argued, would be gifts made by the trustee himself

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(not by the testator) and would fall within s. 160 (2) (*g*) and would provide a possible field of operation for s. 100A. But, apart from the consideration that such " gifts " would be negligible in number and amount, in my opinion this example does not assist the argument of the Commissioner. If gifts of this description were properly made by the trustee they would be allowed as deductions from assessable income under s. 51 (1) of the Act as outgoings incurred in gaining or producing assessable income. Accordingly no question of rebate would arise in relation to such gifts. Further, however, it was argued on behalf of the Commissioner that there might be a gift to charities in general terms which allowed to the trustee a power of selecting the objects of benefaction. Where there was a discretion of this character it was said that the gifts might properly be regarded as gifts by the trustee who was a taxpayer. I am unable to regard this argument as based upon a real distinction. Whether a testator makes a gift directly to a hospital or similar institution or gives power to his executor to distribute moneys among such institutions, the benefit received by an institution is derived from the testator by virtue of the terms of the will. The power of selection given to the executor does not make him the donor of the benefit in one case any more than in the other case. The source of the benefit is the same as in the case of a legacy to a named charity. The only distinction between the cases is that selection or identification by the executor is added as a condition of the gift in a case where such a discretion is given to him.

It was argued that the words " gifts made by a taxpayer " in s. 160 (2) (*g*) imply benevolence in the taxpayer, that is, it was said, in the trustee. But I can see no reason why the word " gifts " in this provision should not be interpreted in its ordinary sense as meaning merely dispositions of property made without consideration. As already stated, beneficiaries get the benefit of part or whole of a rebate by virtue of s. 100A, though they in fact have made no gifts at all and though they had no benevolent or other intention in relation to a payment made to a charity. So also this intention or motive in the mind of a trustee appears to me to be an irrelevant matter.

It is difficult, upon any view, to regard the provisions under consideration as constituting an entirely satisfactory and completely coherent scheme for allowance of rebates, but I agree with the decision of the Board of Review that s. 100A shows that the legislature intended that legacies should be regarded as gifts made by a taxpayer within the meaning of s. 160 (2) (*g*). Any payment made by a trustee to any of the institutions mentioned in s. 160 (2) (*g*) which

is paid "in respect of the trust estate" (see s. 100A) must, in my opinion, be a payment which is either directed or authorized by the terms of the trust. A trustee is not at liberty to pay away trust moneys at his own will: See, e.g., *In re Brown's Mortgage*; *Wallasey Corporation* v. *Attorney-General* (1). It would be absurd to hold that the provisions in s. 160 (2) (*g*) and for distribution of the benefit of the rebate in s. 100A apply and apply only to payments made by a trustee wrongfully and without authority to the charitable institutions mentioned. The provision must in my opinion, if it has any application at all, apply to payments made in pursuance of the trust.

I refer to the fact that s. 100A applies not only to gifts specified in par. (*g*) of s. 160 (2), but also to calls specified in s. 160AA. Section 160AA provides for a rebate where a taxpayer has paid calls on shares owned by him in certain mining and other companies. It is well known that there are two classes of mining companies—limited liability companies, where a shareholder is bound to pay calls upon shares held by him, and no-liability companies, where a shareholder can avoid payment of calls by forfeiting the shares. Where a trustee is a holder of shares in a mining company which is a limited liability company he has no option as to paying the calls, but where he can properly retain shares in a no-liability mining company, he has a discretion to be exercised in the interests of the estate as to whether he should pay the calls or not. But it cannot be doubted that in both cases, if he pays the calls, a rebate is allowable under s. 160AA, and the benefit of that rebate then becomes distributable under s. 100A. In the case of calls, the trustee pays by reason of his obligations as trustee, with or without an exercise of discretion, according to the nature of the mining company concerned. So also in the case of gifts by will to charities mentioned in s. 160 (2) (*g*), the trustee pays the gifts by reason of his obligations as trustee, with or without an exercise of discretion, according to whether the gift is a simple gift direct to a charity or is a gift to charities to be selected according to the discretion of the trustee.

In my opinion the decision of the Board was right and accordingly I dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Finlayson, Phillips, Astley and Hayward*, Adelaide, by *Malleson, Stewart and Co.*

E. F. H.

(1) (1945) Ch. 166