[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION . APPELLANT;

AND

SAGAR . . . . . RESPONDENT.

H. C. OF A. 1946.

MELBOURNE, *March* 15, 18.

SYDNEY, *April* 9.

Williams J.

Estate Duty (Cth.)—Assessment—Valuation of shares in company—Company not listed on Stock Exchange—Estate Duty Assessment Act 1914-1942 (*No.* 22 *of* 1914—*No.* 18 *of* 1942), *s.* 16A.*

Section 16A of the *Estate Duty Assessment Act* 1914-1942 does not operate automatically. If the section is applied, par. (1) (*a*) does not require the valuation to be made on the assumption that the company is listed on the Stock Exchange at the date of death: it merely refers to the memorandum and articles of association satisfying the requirements of the committee of the

* Section 16A of the *Estate Duty Assessment Act* 1914-1942 provides:—

"(1) Where the Commissioner is of the opinion that it is necessary that the following provisions should apply for the purpose of assessing the value for duty of an estate for the purposes of this Act, the following provisions shall apply:—

(*a*) the value of shares or stock in any company, whether incorporated in Australia or elsewhere, shall be determined upon the assumption that the memorandum and articles of association or rules of the company, at the date of death, satisfied the requirements of the committee or governing authority of the Stock Exchange at the place where the share or stock register is situate for the purpose of enabling that company to be placed on the current official list of that Stock Exchange;

(*b*) no regard shall, in determining the value of any such shares or stock, be had to any provision in the memorandum or articles of association or rules of the company whereby or whereunder the value of the shares or stock of a deceased or other member is to be determined;

(*c*) where the estate includes any shares or stock in any company the shares or stock of which are not or is not quoted in the official list of any Stock Exchange, the Commissioner may, in his discretion, notwithstanding anything contained in the last two preceding paragraphs, adopt as the value of any such shares or stock such sum as the holder thereof would receive in the event of the company being voluntarily wound up on the date of death.

(2) Any Board or Court having jurisdiction to determine, for the purposes of this Act, the value of any shares or stock to which the last preceding sub-section applies, may substitute its own opinion for, or use its own discretion in lieu of, any opinion or discretion of the Commissioner under that sub-section."

H. C. OF A. 1946.

FEDERAL COMMISSIONER OF TAXATION v. SAGAR.

Stock Exchange for the purpose of enabling the company to be placed on the current official list. Expert witnesses often differ materially as to the effect upon the value of shares of articles compelling shareholders or their executors who desire to sell the shares to offer them to the other shareholders at a named or ascertainable sum which is in fact below their real value, and of articles placing the management and control of the company's affairs in the hands of certain shareholders to the exclusion of others. The purpose of par. (1) (*a*) was to eliminate this element of discrepancy from the valuation of unlisted shares. But the paragraph does not eliminate the difference in value, if any, between shares in two companies with comparable businesses and assets and having memoranda and articles of association in the same form, one of which is listed and the other is not listed on the Stock Exchange, due to the difference in the ease with which shares in the former category can be sold and mortgaged in comparison with shares in a company in the latter category.

A Board or Court can substitute its own opinion for that of the Commissioner under s. 16A, whether he considered it necessary to apply the provisions of the section or not.

APPEAL under *Estate Duty Assessment Act*.

This was an appeal by the Federal Commissioner of Taxation under s. 25 (7) of the *Estate Duty Assessment Act* 1914-1942 from a decision of a Valuation Board valuing certain shares in a company. The facts sufficiently appear in the judgment hereunder.

Tait K.C. and *Phillips* K.C., for the appellant.

Coppel K.C. and *Gowans*, for the respondent.

Cur. adv. vult.

April 9.

WILLIAMS J. delivered the following written judgment:— This is an appeal by the Commissioner of Taxation under s. 25 (7) of the *Estate Duty Assessment Act* 1914-1942 against a decision of a Valuation Board valuing 7,190 shares of £1 each in Cohn's Bros. Victoria Brewery Co. Ltd. forming part of the estate of W. H. Sagar, who died on 2nd January 1943, at 32s. 6d. per share. This company, which I shall hereinafter refer to as the company, is incorporated and has its share register in Victoria. The respondent, the administratrix of the estate, returned the shares for the purpose of estate duty at the value of 17s. The Commissioner assessed them at 36s. The respondent objected on the ground that the Commissioner should have valued the shares at 20s. The Commissioner disallowed the objection. The respondent, being dissatisfied, requested the Commissioner in writing to refer so much of his decision

as related to the value of the shares to a Valuation Board for review of this value. Before the Board the only expert witness called on behalf of the administratrix was Mr. H. P. Glass, a member of the firm of Flack & Flack, Chartered Accountants (Aust.), who valued the shares at 26s. The Commissioner called Mr. E. V. Nixon, a member of the firm of E. V. Nixon & Partners, Chartered Accountants (Aust.), and an officer of his department, Mr. F. H. Worland, a bachelor of laws, who has passed the accountancy examinations relating to company accounts at the University of Melbourne. Mr. Nixon valued the shares at 30s. and Mr. Worland at 36s. All these witnesses agreed that if the shares had been listed on the Stock Exchange at the date of death and had then been as well and favourably known as the shares in certain comparable companies it would have been proper to capitalize the sum which they anticipated would be available for dividend in the future at 5 per cent. The Board fixed this sum at £16,893, which, when capitalized at 5 per cent, divided by the number of shares issued by the company gave a value of 36s. per share. But the articles of association of the company include article 29, which authorizes the directors to decline to register any transfer of shares without assigning any reason therefor. This article does not comply with the requirements of the Melbourne Stock Exchange relating to companies applying to be listed that there shall be no restriction on the transfer of paid-up shares. Thus, at the date of death, the shares were shares in a company which was not and could not be listed on the Melbourne Stock Exchange. Mr. Glass thought that on this account the value of the shares should be discounted by 20 per cent, Mr. Nixon by 16.66 per cent, while Mr. Worland did not think that it was necessary to make any discount. The Board made a discount of 10 per cent and thereby reached the value of 32s. 6d.

It is only competent for the Court to entertain an appeal under s. 25 (7) if the decision of the Board involves a question of law. Unless the statute provides that some portion of the Board's decision is to be unappealable, the whole decision and not merely the question of law is then open to review and the Court must rehear the whole case although it rejects the point of law (*Federal Commissioner of Taxation* v. *Lewis Berger & Sons (Australia) Ltd.* (1); *Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (2); *Barripp* v. *Commissioner of Taxation* (3)). The appeal is a proceeding in the original jurisdiction of the Court so that, unless the parties agree that the evidence given before the Board shall be used on the appeal, the

(1) (1927) 39 C.L.R. 468.
(2) (1928) 41 C.L.R. 148, at p. 154.
(3) (1940) 41 S.R. (N.S.W.) 16, at pp. 18, 19; 58 W.N. 23, at pp. 24, 25.

H. C. OF A. 1946.

FEDERAL COMMISSIONER OF TAXATION v. SAGAR.

Williams J.

evidence must be tendered again, and, as the appeal is a rehearing, further evidence can be called. On this appeal it was agreed that the oral and documentary evidence given before the Board should be regarded as evidence tendered on the appeal, and neither party called any further evidence.

Counsel for the appellant made a number of submissions to establish that a point of law was involved in the decision of the Board. Their purport was that the Board was bound to value the shares in accordance with s. 16A and that if it had done so the only finding reasonably open upon the evidence was that the value of the shares was 36s. In my opinion the submission that the Board misconstrued s. 16A does raise a question of law which is involved in its decision so that this Court has jurisdiction to entertain the appeal. The Board in its reasons did not attempt to place a construction on s. 16A beyond making a very general statement that it regarded the section "as a direction by the legislature to set bounds to the range of conjectural inferences" in relation to the valuation of shares in companies not listed on the Stock Exchange as these inferences "have been difficult to reduce to exact reasoning or to explain to others." This statement appears, as I said during the argument, to have been somewhat in the nature of a prefatory averment and was not intended to be an attempt to construe the section. It did not have, as far as I can see, any effect upon the decision. The hearing before the Board appears to have been conducted by both parties on the assumption that s. 16A (1) (*a*) requires shares to be valued as shares in a company listed on the Stock Exchange.

The Board valued the shares of the deceased in the company on three bases, which it described as (1) the holding value, (2) the sale value, and (3) the liquidation value. The holding value was, it would seem, the value on the assumption that the shares were shares in a company listed on the Stock Exchange, while the sale value was an estimate of the sum which a reasonably willing vendor could have been expected to receive and a reasonably willing purchaser could have been expected to pay rather than fail to obtain the shares if they had been sold in friendly negotiation on 2nd January 1943. The sale value is based on the assumption that the shares were shares in a company not listed on the Stock Exchange, and, if I understand the reasons correctly, on the further assumption that they were shares in a company whose articles of association included article 29. The liquidation value was, in the Board's own words, "an estimate of the sum which the holder of the shares would be expected to receive in the event of the company being voluntarily wound up at the date of death." It would have been preferable for the Board to have stated

specifically whether it had formed an opinion that it was necessary to apply the provisions of s. 16A, and in this event whether it had decided in the exercise of its discretion to make the valuation under the provisions of par. 1 (*a*) or (*c*), and I venture to suggest that Boards should in future adopt this course. But the frequent references to the section and discussion as to its meaning during the hearing and the fact that the Board valued the shares on three bases, the third of which has particular reference to par. 1 (*c*), indicate to my mind that the Board must have considered these matters, and decided that it was not necessary to use the section. The section does not operate automatically. It requires that the Commissioner should be of the opinion that it is necessary to apply its provisions before it has any effect. If the section is applied, par. 1 (*a*) does not require the valuation to be made on the assumption that the company is listed on the Stock Exchange at the date of death. It merely refers to the memorandum and articles of association satisfying the requirements of the committee of the Stock Exchange for the purpose of enabling the company to be placed on the current official list. The shares must therefore be assumed to be shares in a company having a memorandum and articles in a similar form to those of public companies listed on the Stock Exchange. It is well known that the articles of association of companies not listed on the Stock Exchange often contain clauses compelling shareholders or their executors who desire to sell the shares to offer them to the other shareholders at a named or ascertainable sum which is in fact below their real value. Such articles of association also frequently place the management and control of the company's affairs in the hands of certain shareholders to the exclusion of others. Expert witnesses often differ materially in their opinions as to the effect of such articles upon the value of the shares. Many of these witnesses attribute an extremely depressing effect to the presence of such articles. As a result widely differing estimates can be placed on the value of shares in companies carrying on entirely comparable businesses in an equally profitable manner because of differences in their articles of association, or even on the value of shares in the same company though its business remains equally profitable because of alterations in its articles of association from time to time. The purpose of the paragraph was to eliminate this element of discrepancy from the valuation of unlisted shares, and to relate their value to the profits and assets of the company, and the yield that investors might reasonably expect to receive having regard to the nature of the business. But the paragraph does not eliminate the difference in value, if any, between shares in two companies with

H. C. OF A. 1946.

FEDERAL COMMISSIONER OF TAXATION v. SAGAR.

Williams J.

comparable businesses and assets and having memoranda and articles of association in the same form, one of which is listed and the other is not listed on the Stock Exchange, due to the difference in the ease with which shares in a company in the former category can be sold and mortgaged in comparison with shares in a company in the latter category. But I should doubt whether the presence or absence of article 29 in the articles of association of a company in the latter category would have any depressing effect on the value of its shares. That must have been, I think, the view taken by the Commissioner. Section 22 makes the assessment in proceedings on appeal prima-facie evidence that the amount and all the particulars of the assessment are correct. But there is no statement in the assessment that the Commissioner applied s. 16A. Neither of his witnesses relied upon it, and the officer of his Department who conducted the proceedings before the Board on his behalf stated that it was not applied by the Department and the Board could use its own discretion. There is therefore no express evidence that the Commissioner formed the opinion that it was necessary to apply the section. The proper inference from the evidence is, I think, that he did not consider that it was necessary to do so. Further, as I said during the argument, I think that if the Commissioner decides to apply the section he should inform the taxpayer that he has done so and state which paragraphs he has used. Otherwise the taxpayer cannot take a specific ground of objection to the Commissioner forming such an opinion, and may be placed at a disadvantage, since he is limited on the review before the Board or on an appeal to the Court to the grounds stated in his objection.

The question arises whether, in the absence of a positive opinion by the Commissioner that it is necessary to apply the provisions of the section, there is any power in a Board or Court to form such an opinion. Dr. *Coppel* contended that I should hold that the Commissioner had not formed any opinion either way so that there was no opinion for which the opinion of the Board could be substituted. But it is the duty of the Commissioner to administer the Act, and for that purpose to keep the section in mind, and I think that I must hold that he did not apply the section because he did not consider that it was necessary to do so. Sub-section 2 provides that a Board or Court having jurisdiction to determine the value of any shares to which sub-s. 1 applies may substitute its own opinion for any opinion of the Commissioner. This does not mean that the Board or Court can only substitute its own opinion for the positive opinion of the Commissioner. The shares must be valued whether the provisions of the section are applied or not. The necessity or

otherwise for its application is a question which arises in the course of the valuation. It is a question which naturally falls to be determined by the person or body charged with this duty. The Commissioner is the first valuer because he has to value the shares to make the assessment. But the Act provides for an administrative review of the assessment by a Board or a judicial review by a Court at the request of the taxpayer, and the duty of ascertaining the value is then transferred from the Commissioner to the Board or Court. In such circumstances it would be reasonable to expect that the right of the Board or Court to form an opinion would not be dependent upon a previous positive opinion of the Commissioner. It is before the Board or Court that the conflict of expert opinion arises. I am of opinion that the section means that the Board or Court can substitute its own opinion for that of the Commissioner, whether he considered it necessary to apply its provisions or not. The use of the word " necessary " shows that the Commissioner or Board or Court should not lightly decide to substitute notional for actual memoranda and articles of association. Section 16A (1) contains three paragraphs. Paragraph *b* would appear to be unnecessary where par. *a* is adopted because a memorandum and articles of association which satisfied the requirements of the Stock Exchange would not contain the provisions excluded by par. *b*. Thus the presence of par. *b* as a separate paragraph points to a separate discretion to exclude these provisions from the memorandum and articles of association of a company without at the same time excluding other provisions which would infringe par. *a*. Paragraphs *a* and *b* apply to the valuation of shares in a company as a going concern, whereas par. *c* applies to their valuation on the basis that the company is placed in voluntary liquidation at the date of death. The Board placed a value on the shares on the basis of par. *c* but did not ultimately act upon it. If the Board had done so I could not agree that there was any evidence on which it could reasonably have valued the shares on this basis because, in order to make such a valuation, it would be necessary to have proper evidence of the actual value of the assets of the company at the date of death, of the amount which these assets could reasonably be expected to realize when sold and of the amount of the costs, charges and expenses of the liquidation. Other matters, such as the possible incidence of other taxation, for instance, income tax under s. 47 of the *Income Tax Assessment Act*, and their relation to the paragraph might have to be considered.

There was a great deal of argument before the Board as to the circumstances in which it would be proper for the valuer to form an opinion that it was necessary to apply the provisions of the section,

H. C. OF A. 1946.

FEDERAL COMMISSIONER OF TAXATION v. SAGAR.

Williams J.

and in that event as to the circumstances in which it would be proper to decide whether to apply pars. *a* or *c*. The only fetter placed by the Act upon a decision to apply the section is that the Commissioner or Board or Court must be of opinion that it is necessary to apply it. This is a considerable fetter, but it would be unwise to attempt to define its limits, because a discretion necessarily involves a latitude of individual choice according to the individual circumstances, and the Commissioner or Board or Court could not be bound by a previous decision to exercise the discretion in a particular way because this would be in effect putting an end to the discretion (*Evans* v. *Bartlam* (1)). But the discretion must be exercised honestly and for the purpose for which it was given, that is to say, the method should be chosen which in the opinion of the Commissioner or Board or Court is most calculated to place a fair value on the shares as at the date of death. And where a company is a going concern the instances would appear to be rare in which it would be proper to use par. *c*. One instance might be where the deceased held or controlled sufficient shares to enable him to pass a special resolution that the company be wound up voluntarily, but even then it would appear to be preferable, where practicable, to use pars. *a* or *b*.

In the present case, as I have said, neither the Commissioner nor the Board appear to have formed the opinion that it was necessary to apply the provisions of the section, and I cannot accede to the contention that the Board was bound in law to form that opinion. On the contrary, I think that it would have been difficult for either the Commissioner or the Board to have done so. As I have said, I do not think that the presence of article 29 would be likely to have any detrimental effect on the value of shares in a company not listed on the Stock Exchange beyond the detriment due to non-listing. The appeal to this Court is a rehearing, but even on a rehearing the Court should not set aside the value placed upon the shares by the Board and substitute its own opinion for that of the Board unless it is satisfied that the Board acted on some wrong principle of law or that the value was entirely erroneous (*Robertson* v. *Federal Commissioner of Taxation* (2) ; *Lee Transport Co. Ltd.* v. *Watson* (3) ; *Rook* v. *Fairrie* (4)).

In the present case I am not satisfied on either point. I might not have deducted 10 per cent from the initial value of the shares because they were not listed on the Stock Exchange but, on the other hand, I might have attached more weight than the Board did to the actual

(1) (1937) A.C. 473, at pp. 488, 489.
(2) (1937) 57 C.L.R. 147.
(3) (1940) 64 C.L.R. 1.
(4) (1941) 1 K.B. 507.

sales. In short, I am not prepared to substitute my own opinion for that of the Commissioner and the Board that it was not necessary to apply the provisions of s. 16A or to interfere with the " sale value " adopted by the Board. I agree that it is not necessary to apply the section.

For these reasons I must dismiss the appeal with costs.

Appeal dismissed with costs.

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

Solicitor for the respondent, *John H. Maguire.*

E. F. H.