Appl Comr of Taxation v Myer Emporium Ltd (1985) 8 FCR 136
Appl Myer Emporium Ltd, The v Comr of Taxation 81 FLR 372
Appl GP International Pipecoaters Pty Ltd v FCT 170 CLR 124

[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION APPELLANT;

AND

BECKER . . . . . RESPONDENT.

H. C. OF A. 1951-1952.

1951. ADELAIDE, *Sept.* 24, 25; MELBOURNE, *Oct.* 8.

Fullagar J.

1952. ADELAIDE, *Sept.* 17; SYDNEY, *Nov.* 19.

Dixon C.J., Webb and Kitto JJ.

Income Tax (Cth.)—Assessable income—"Profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale, or from the carrying on or carrying out of any profit-making undertaking or scheme"—Land sold by taxpayer to company in consideration of issue of shares at par—Shares sold at premium—Whether amount of premium assessable income—Income Tax Assessment Act 1936-1948 (*No.* 27 *of* 1936—*No.* 44 *of* 1948), *s.* 26 (*a*).

In order to sell certain land, which he had not acquired for the purpose of profit-making by sale, at £12,000 without contravening land sales control legislation, B. formed a private company with a nominal capital of £10,000 divided into 10,000 shares of £1 each. He then entered into a contract with the company which provided for (1) the sale of the land by B. to the company for the sum of £8,000 or such lesser sum as the appropriate authority might approve and (2) that the consideration should be satisfied by the issue by the company to B. of 8,000 £1 shares in the company or such lesser number as should equal in face value the purchase price approved. B. then contracted (subject to the transfer of the land by the company to him) to sell to T. 8,000 £1 shares in the company for a price of £1 10s. per share. The consent of the appropriate authority to the sale of the land by B. to the company for £8,000 was duly obtained. The land was transferred by B. to the company, and the company allotted 7,998 £1 shares to B. which, with one share already held by him and one share held in trust for him, made up 8,000 shares. These 8,000 shares were then transferred to T. and his nominee, who paid £12,000 to B. for them. The Commissioner of Taxation assessed B.'s income for the relevant year on the basis that it included the difference between the sum of £12,000 and the sum of £8,000, i.e., £4,000.

Held, that there had not been a profit arising from the sale of property acquired for the purpose of profit-making by sale or from the carrying on or carrying out of a profit-making undertaking or scheme within the meaning

of s. 26 (*a*) of the *Income Tax Assessment Act* 1936-1948, and that the sum of £4,000 had, accordingly, been wrongly included as part of B.'s assessable income.

Decision of *Fullagar* J. affirmed.

APPEAL from *Fullagar* J.

This was an appeal by Jack Ellerton Becker against an assessment to income tax and social services contribution under the *Income Tax Assessment Act* 1936-1948 in respect of the income derived during the year ended 30th June 1949. The facts appear hereunder in the judgment of *Fullagar* J. before whom the appeal came for hearing.

H. G. Alderman K.C. (with him *E. W. Palmer*), for the appellant.

A. L. Pickering, for the respondent.

Cur. adv. vult.

FULLAGAR J. delivered the following written judgment :— Oct. 8, 1951.

This is an appeal against an assessment to tax in respect of income derived during the year ended 30th June 1949. The relevant facts are simple and are not in dispute.

In April 1943 the taxpayer purchased a large area of land in South Australia near the Victorian border. Part of the land was freehold, and part held under perpetual lease. It was not acquired for the purpose of profit-making by sale. The land was of poor quality and low productivity, but at a later date it was discovered, as a result of experiments conducted by the C.S.I.R.O., that it could, by the addition of certain " trace elements ", be made much more productive and consequently of much greater value. By the year 1948 the taxpayer, by utilising this discovery, had developed a part of the land and had found that this part was as much as he could effectively handle and continue to develop. For this reason, and also because he desired further capital for the further development of this part, he decided to sell the remainder of the land if he could obtain a satisfactory price for it.

Up to September 1948 the price at which land could be sold in Australia was controlled under the *National Security* (*Economic Organization*) *Regulations*, and thereafter it was similarly controlled in South Australia under the *Prices Act* 1948. Under the Act, as under the regulations, it was not lawful for any person to purchase any land without the consent of a prescribed authority. It was the State Act which was in force at the time which is actually material

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for the purposes of the present case. It is not necessary to set out, or even to summarise, the relevant provisions either of the Act or of the regulations. It is enough to say that, under the Act, the consent of the prescribed authority was not to be expected if the purchase price of the sale of any land was in excess of the " fair and reasonable price for the land as at the 10th February 1942 ". The taxpayer accordingly employed two valuers to value as at 10th February 1942 the land which he wished to sell. The value given by one valuer was £12,248, and the value given by the other £10,935. Strictly speaking, I do not think that there is before me any evidence of the actual value of the land as at 10th February 1942 : I think the only evidence is that the taxpayer obtained these two valuations. This, however, is, I think, of no importance.

The taxpayer was naturally anxious to obtain the best price he could for the land which he wished to sell. He was also anxious not to transgress the law. What he did, after taking legal advice, was to form a company with a nominal capital of £10,000 divided into 10,000 shares of £1 each. The name of the company was Laffer Pastoral Co. Ltd. He and his solicitor subscribed the memorandum of association for one share each. The company was incorporated on 10th August 1948. On the same day a contract in writing was executed by the taxpayer and the company, whereby the taxpayer agreed to sell and the company agreed to buy the land in question. The contract provided that the consideration for the sale should be the sum of £8,000 or such lesser sum as the appropriate authority might approve, and that the consideration should be satisfied by the issue by the purchaser to the vendor of 8,000 fully paid shares of £1 each in the company or such lesser number of shares as should equal in face value the purchase price approved as aforesaid.

On 11th August 1948 the taxpayer applied to the appropriate authority for consent to transfer the land to the company. On 27th August 1948 the taxpayer and one Thomas signed a contract whereby the taxpayer agreed to sell and Thomas agreed to buy 8,000 fully paid shares of £1 each in the company. The price was 30/- per share, so that the total amount payable was £12,000. The contract was expressed to be subject to the transfer by the taxpayer to the company of the land in question. On 15th October 1948 the consent of the appropriate authority was given to the transfer of the land by the taxpayer to the company in pursuance of the contract of 10th August. Since part of the land was held on lease from the Crown, the consent of the Minister for Lands was also necessary. This consent was given on 29th November 1948. On 10th February 1949 a further contract for the sale and purchase

of shares in the company at 30/- per share was signed by Thomas and the taxpayer. This contract, which was of a more elaborate and detailed character, superseded, of course, the contract between the same parties of 27th August 1948, but no reason was suggested for supposing that the earlier contract was not a finally binding instrument until superseded. On 24th February 1949 the company, in pursuance of the contract between it and the taxpayer, allotted to the taxpayer 7,998 fully paid shares of £1 each. The taxpayer held, of course, one further share by virtue of his subscription of the memorandum, and the share for which his solicitor had subscribed belonged beneficially to him. On 26th February 1949 the necessary documents were executed for effectuating transfers of the legal title to the land from the taxpayer to the company. On 17th March 1949 4,000 shares in the company were transferred to Thomas and 4,000 to his wife as his nominee, and at the same time Thomas and his wife paid the sum of £12,000 to the taxpayer.

The Commissioner assessed the taxpayer's income of the year ended 30th June 1949 on the footing that it included the difference between the sum of £12,000 and the sum of £8,000, i.e., £4,000. His contention has been, and is, that this sum represents a profit arising from the sale of property acquired for the purpose of profit-making by sale, or from the carrying on or carrying out of a profit-making undertaking or scheme, within the meaning of s. 26 (*a*) of the *Income Tax Assessment Act* 1936-1948. I am quite unable to accept this contention.

Two things should be noted at the outset. The first is that, since the taxpayer owned or was to own the whole of the shares in the company, and since the company owned or was to own the whole of the land and nothing more, the value of the land and the value of the shares were, as from the date of the contract between the taxpayer and the company, for all practical purposes identical. I agree, of course, that the shares and the land were different things, but, in the absence of evidence, it cannot be taken that there was any real difference in value between the two things. The second is that the sum of £8,000, which is the price named in the contract between the taxpayer and the company, appears to have been—and the taxpayer said that it was—an arbitrary figure selected as one to which the prescribed authority was very unlikely to take objection. But, since the contract provided for sale at £8,000 or such lesser sum as the prescribed authority might approve, it seems to have been immaterial what figure was chosen. It might have been £100 or £100,000. It was not indeed necessary that any figure should be mentioned at all. The contract

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might equally well have provided for the transfer of the land in consideration of the allotment of 8,000 shares *simpliciter*—though probably the fixing of a money sum was due to a fear that the prescribed authority might (justifiably or unjustifiably) require a statement of the consideration in terms of money.

The case was argued—rightly, I think—on the footing that there were two possible analyses of what the taxpayer did. Mr. *Alderman*, for the Commissioner, said that, on one or the other of these, the taxpayer was caught by s. 26 (*a*). Mr. *Pickering*, for the taxpayer, said that on neither view was it possible to say that the case fell within s. 26 (*a*).

On the first view the whole transaction is to be regarded as a realisation by the taxpayer of land owned by him. On this view the first limb of s. 26 (*a*) is excluded, because the land was not acquired by the taxpayer for the purpose of resale at a profit. Did the realisation of the land, then, amount to a profit-making undertaking or scheme? Clearly, in my opinion, it did not. The object of the taxpayer was simply to realise a capital asset and to obtain for that asset the best price he could. I would doubt myself whether what he did amounted to an "undertaking" or "scheme" at all within the meaning of s. 26 (*a*). But, in any case, the taxpayer's object was not "profit-making". Nor did any "profit arise" from it within the meaning of the second limb of s. 26 (*a*). He may have made a profit in the sense that the sum of money which he finally received was greater than the sum of money which he originally paid for the land. But this profit was not taxable as such, because he did not buy the land for the purpose of resale at a profit. That this is fully recognised by the Commissioner is shown by the fact that there is no evidence before me of the price originally paid by the taxpayer for the land. A profit can only be ascertained by comparing one sum of money with another. We have the price of £12,000 ultimately realised for the land. What sum is to be compared with this in order to ascertain the taxpayer's profit? There is no sum which we can so compare. The whole of the evidence suggests, and suggests only, that the value of the land at all material times was £12,000.

It was suggested that the value of the land at the date of the contract with the company was the price at which the prescribed authority would consent to a sale of the land, and that the taxpayer had "carried out" a "scheme" whereby a "profit" had "arisen" to him represented by the difference between that price and the sum of £12,000. There are probably several answers to this suggestion, but one will suffice. It is that the value of the land at the date

of the contract was *not* the price at which the prescribed authority would consent to a sale of the land but the price which could be obtained for the land without transgressing the law. This price was £12,000, and the difference between £12,000 and £12,000 is nought.

The second view of the case presented was that the transaction was to be regarded as an acquisition and disposal of shares in a company. On this view it is the first limb of s. 26 (*a*) that applies to the case. It may be conceded (though not without some doubt) that the shares were " acquired " by the taxpayer with a view to " resale ". But they were not acquired with a view to resale at a profit, and they were not resold at a profit. They were, so far as the evidence goes, of exactly the same value at the date when they were acquired as at the date when they were resold. No profit arose to the taxpayer from the sale of the shares to Thomas.

For these reasons the appeal of the taxpayer must be allowed. The order of the court is :—Appeal allowed. Order that assessment be reduced by excluding from assessable income as assessed the sum of £4,000. Order that Commissioner pay appellant's taxed costs of appeal.

From this decision the commissioner appealed to the Full Court.

H. G. Alderman Q.C. (with him *E. W. Palmer*), for the appellant. This was a profit-making scheme. It was not a change of investment ; it was a case of a taxpayer acquiring shares for the purpose of sale at a profit. It was at the same time a scheme for selling land at a profit. The contract in the present case cannot be distinguished from the contract in *J. C. Williamson's Tivoli Vaudeville Pty. Ltd.* v. *Federal Commissioner of Taxation* (1). The consideration shown in the contract for the sale of the land must be accepted as the real consideration, unless shown to be illusory. The consideration here was £8,000, not a parcel of shares : *R.* v. *Bullfinch Proprietary (W.A.) Ltd.* (2). In view of the price control on land, the land could not have been sold for more than £8,000 if this scheme had not been used. By means of the scheme, £12,000 has been obtained. The sale of the shares by the taxpayer must be regarded as a real transaction, distinct from the sale of the land to the company, for otherwise there would be an offence under s. 42 of the *Prices Act* 1948 (S.A.), which prohibited evasion of the Act.

A. L. Pickering, for the respondent. The transaction, in substance, was simply the realization of land. The scheme was designed merely

(1) (1929) 42 C.L.R. 452. (2) (1912) 15 C.L.R. 443.

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to get for the land what it was actually worth. If the transaction is viewed as a transaction in land, the land was not acquired for resale at a profit. Its real value was £12,000. The figure of £8,000 stated in the contract is not to be taken as the value of the land; it was merely an arbitrary figure. The actual price received (i.e. £12,000) is the best evidence of the value of the land: *Australian Apple and Pear Marketing Board* v. *Tonking* (1). If the transaction is viewed as a transaction in shares, there was no profit. The transaction was merely the transmutation of property from one form to another and the realisation of that property at the same figure as was the value of the original property. [He referred to *Gold Coast Selection Trust Ltd.* v. *Humphrey* (2); *Murphy* v. *Australian Machinery and Investment Co. Ltd.* (3); *Hobart Bridge Co. Ltd.* v. *Federal Commissioner of Taxation* (4); *H. R. Lancey Shipping Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (5); *Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (6); *Darvall Estate Ltd.* v. *Federal Commissioner of Taxation* (7); *Scottish Australian Mining Co. Ltd.* v. *Federal Commissioner of Taxation* (8); *Archibald Howie Pty. Ltd.* v. *Commissioner of Stamp Duties (N.S.W.)* (9); *Rand* v. *Alberni Land Co. Ltd.* (10).]

H. G. Alderman Q.C., in reply.

Cur. adv. vult.

Nov. 19, 1952.

The following written judgments were delivered :—

DIXON C.J. I have had the advantage of reading the judgments prepared by *Webb* J. and *Kitto* J. I agree in that the appeal should be dismissed and agree in the reasons those judgments contain.

WEBB J. This is an appeal from an order of *Fullagar* J. allowing an appeal by the respondent taxpayer against an assessment to income tax, and reducing the assessable amount by £4,000. This £4,000 was included in the assessment under s. 26 (*a*) of the *Income Tax Assessment Act* 1936-1948 as profit arising from the sale by the taxpayer of property acquired by him for the purpose of profit-making by sale, or from the carrying out of a profit-making scheme.

Uncontradicted evidence was given by the taxpayer that in 1942 he purchased in South Australia land of poor quality, but that,

(1) (1942) 66 C.L.R. 77, at pp. 102, 103.
(2) (1948) 30 Tax. Cas. 209.
(3) (1948) 30 Tax. Cas. 244.
(4) (1951) 82 C.L.R. 372.
(5) (1951) A.L.R. 507.
(6) (1928) 41 C.L.R. 148, at pp. 151, 152, 154.
(7) 1934) 3 A.T.D. 1.
(8) (1950) 81 C.L.R. 188.
(9) (1948) 77 C.L.R. 143.
(10) (1920) 7 Tax. Cas. 629.

acting on the advice given by the C.S.I.R.O. as to how to treat the land, he was able to make a portion of it fertile, and that to get money to develop that portion he decided to sell the balance. But at the time of the sale there was State legislation in South Australia requiring a specified official's consent to the sale of land, and this consent was not to be expected unless the purchase price did not exceed the fair and reasonable value of the land as in February 1942. In order to avoid selling his land at a price based on that value the taxpayer devised a scheme : he formed a private company and sold the land to it, subject to the official's consent, for 7,999 shares of £1 each, that is to say for all but one of the shares in the company. The necessary consent was given subject to a maximum selling price of £8,000 ; the land was transferred to the company ; and the shares were issued to the taxpayer. At this stage it might appear that the sale price of the land was £7,999, as the nominal value of each share was £1. But the taxpayer then sold the shares to one Thomas for £12,000 i.e. at the rate of 30/- per share. It is on the difference between £8,000 and £12,000 that the commissioner arrived at £4,000 as the profit made by the taxpayer.

When the taxpayer transferred the land to this company, which owned nothing else and had no liabilities, and in return got all the shares of the company but one, he cannot be said to have made a profit. He got nothing more valuable than he gave : he received the exact equivalent of what he gave.

In the absence of evidence of what the land was worth when the company bought, it would have to be assumed that it was worth no more than the taxpayer was prepared to sell it for i.e. £8,000. But the sale of the shares to Thomas for £12,000 reveals that the land was worth that amount when sold to the company by the taxpayer, seeing that the sale of the land and the sale of the shares took place about the same time. The explanation of the difference in the two sale prices is to be found in the evidence of the taxpayer, which *Fullagar* J. accepted, and which this court should accept i.e. that the £8,000 fixed by the official was an amount suggested by the taxpayer, and was fixed at a low figure to ensure that the necessary consent would be given to the sale of the land to the company. The official was not informed that the shares were agreed to be sold for £12,000, although in fact, before his consent was given on 15th October, 1948, the taxpayer and Thomas had made a written agreement, dated 26th August, 1948, for the sale of the shares for £12,000. Another contract to the same effect was executed by them in February, 1949, some months after the consent was given.

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Looking at the facts as found by *Fullagar* J. and disregarding the figure adopted by the State official in giving his consent as not being reliable evidence of the value of the land, the proper conclusion is that when the land was transferred to the company by the taxpayer it was worth what the sale of the shares proved it to be worth i.e. £12,000; so that there was in fact no real profit to the taxpayer arising out of the transaction.

How the State legislation bears on the conduct of the taxpayer is an irrelevant consideration in these proceedings.

Fullagar J. also found, on the taxpayer's uncontradicted evidence, that the land in question was not bought for resale at a profit and his finding must be accepted.

The appeal should be dismissed.

KITTO J. This is an appeal from an order of *Fullagar* J., reducing an assessment by the Deputy Commissioner of Taxation in South Australia of the income tax payable by the respondent in respect of income derived during the year ended 30th June 1949. The assessment was made upon the footing that the respondent's assessable income of that year included a sum of £4,000 as being, within the meaning of s. 26 (*a*) of the *Income Tax Assessment Act* 1936-1948, profit arising from the sale of property acquired for the purpose of profit-making by sale, or from the carrying out of a profit-making scheme. *Fullagar* J. held that the respondent did not derive such a profit, and ordered that the assessment be amended by excluding the £4,000 from the assessable income.

The facts upon which the commissioner relied are recounted in detail in his Honour's reasons for judgment, and an outline of them will be sufficient here. In 1948 the respondent decided to sell a portion of a tract of land which he had acquired some years before. He had not acquired the land for the purpose of profit-making by sale, and his reason for selling a part of it was that the remainder had come to be as much as he could handle. His opinion was that the area he decided to sell was worth £12,000, but until 19th September 1948 the provisions of the *National Security* (*Economic Organization*) *Regulations*, and after that date the provisions of the *Prices Act* 1948 (S.A.), made it at least doubtful whether he could lawfully obtain that sum by means of a sale in the ordinary way. These provisions did not place any specific limit upon the price for which a sale might be made, but, subject to an exception in respect of a sale to a Commonwealth or State authority or the like, they made it unlawful to sell without official consent, and their tenour, and the known official practice in relation to the

granting of consents, made it evident that no sale was likely to be permitted at a price much in excess of the value which the land possessed on 10th February 1942. The respondent, in view of this, resorted to a different course of action, inspired by a realization that neither the regulations nor the *Prices Act* placed any restriction upon sales of shares in companies. He entered into an agreement for the sale of the surplus land to a company which he had formed for the purpose. The purchase price was stated to be £8,000 or such lesser sum as might be approved under the legislation above-mentioned, and the agreement provided that the purchase price should be paid and satisfied by the issue by the purchaser to the vendor of 8,000 fully-paid shares of £1 each or such lesser number of shares as should equal in face value the purchase price approved. The figure of £8,000 was selected for no other reason than that the respondent was confident that it would be officially approved. It was in fact approved, and the respondent received on settlement 8,000 fully-paid shares in the capital of the purchaser company. These he sold for £12,000. The difference between the £8,000 and the £12,000 is the £4,000 which the commissioner included in the assessable income in reliance upon s. 26 (*a*).

If the surplus land had been converted into £12,000 by a simple transaction of sale, it would be too clear for argument that the whole price would have constituted a receipt on capital account. The land was a capital asset, it was not acquired for the purpose of profit-making by sale, and no part of the price could be regarded as profit arising from the carrying on or carrying out of any profit-making undertaking or scheme. Accordingly, neither upon general principles nor by reason of the specific provisions of s. 26 (*a*) of the *Income Tax Assessment Act* would it have been right to include any portion of the price in the respondent's assessable income. The respondent's contention in substance is that the procedure he adopted should be regarded as one entire process by which his capital asset was changed in form, and that there is no more justification for attributing an income character to any part of the money which was the final result of the process than there would have been for attributing that character to any portion of a price realized by a straight-out sale.

The commissioner, on the other hand, makes alternative submissions. In the first place he contends that the respondent's transaction in land and his transaction in shares should be considered separately from one another. It is established, he says, by the terms of the agreement between the respondent and the company that

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the land was sold for £8,000 in money, and that that sum was applied by the respondent in acquiring the shares. Since his purpose was to sell the shares for £12,000, the difference between the two sums is said to be included in the respondent's assessable income by reason of the first limb of s. 26 (*a*). Alternatively, the commissioner submits that the land could not have been sold for more than £8,000, and that therefore the procedure which the respondent followed, if regarded in its entirety, constituted a profit-making scheme from the carrying out of which there arose a profit of £4,000. On this view of the matter it is said that the £4,000 is assessable income under the second limb of s. 26 (*a*).

To support his primary contention, that the respondent must be taken to have paid £8,000 in cash and to have applied that sum in acquiring the 8,000 shares as fully paid, counsel for the commissioner relied upon the decisions of this Court in *R.* v. *Bullfinch Proprietary (W.A.) Ltd.* (1), and *J. C. Williamson's Tivoli Vaudeville Pty. Ltd.* v. *Federal Commissioner of Taxation* (2). In the first of these cases the decision was that, gold mining leases having been sold for a consideration expressed as a money sum to be paid and satisfied by the allotment of a specified number of fully-paid shares, the money sum and not the shares formed the consideration for the conveyance, within the meaning of a provision in the *Stamp Act* 1882 of Western Australia. In the second case the decision was that, where a company purchased a lease for a consideration a part of which was expressed to be a money sum to be paid and satisfied by the allotment of a corresponding number of fully-paid shares, the company, having issued the shares, must be considered by that means to have paid an amount for the assignment of a lease, within the meaning of s. 25 (*i*) of the *Income Tax Assessment Act* 1922-1925 (Cth.). To these decisions may be added, by way of contrast, one in which the consideration for an assignment of a lease, within the meaning of s. 16 (*d*) of the *Income Tax Assessment Act* 1922-1930 (Cth.), was held to consist of shares and not money, although a cheque had actually been given by a company in payment for shares issued to the assignor of the lease: *Messer* v. *Deputy Federal Commissioner of Taxation* (3).

It is important to observe with respect to each of these three cases, as indeed the Court pointed out in the last of them (4), that the question at issue depended upon the true interpretation of the relevant enactment rather than upon the character of the transaction which had taken place. The cases cannot be regarded as

(1) (1912) 15 C.L.R. 443.
(2) (1929) 42 C.L.R. 452.
(3) (1934) 51 C.L.R. 472.
(4) (1934) 51 C.L.R., at p. 482.

establishing, as a principle of general application, that where there is a sale of property for a money sum to be satisfied by an issue of fully-paid shares, there are two separable and substantive transactions, a sale of the property for a cash price and an issue of fully-paid shares, so that if the shares are subsequently sold any excess over the amount paid up on them constitutes a profit. Section 26 (*a*), unlike the provisions with which the court was concerned in the cases cited, uses the language of everyday affairs without artificial restriction or enlargement. Whether a given amount is to be characterized as a profit within the meaning of the provision is a question of the application of a business conception to the facts of the case. This does not mean that formal steps that have been taken are to be ignored on the ground that the same result might have been achieved in another way ; but it does mean that, however many and complicated the steps employed may have been, a profit is not found to have arisen until there has been deducted from the ultimate sum received the amount or value of all that in fact it has cost the recipient to obtain that ultimate sum.

The question then is, what really was the cost to the respondent of the shares which he sold for £12,000 ? The plain fact of the matter is that the cost was the land which he transferred to the company. It simply is not true to say that the cost was only £8,000. That was the sum which the sale agreement named as the price of the land, and it was the sum which was credited as paid up on the respondent's shares. But the respondent did not sell his land for £8,000 payable in money, and he did not receive or become entitled to receive the 8,000 shares upon paying £8,000 in money. The sale agreement provided for only one method of completion : it bound the respondent to transfer his land to the company and it bound the company to issue fully-paid shares to him. Accordingly a profit cannot be said to have arisen from the sale of the shares, unless the land which the respondent gave for the shares was not worth as much as £12,000. The attempt to show that a profit arose from the sale of the shares thus leads to the same question as that upon which the commissioner's alternative submission depends ; for his assertion that the land could not have been sold for more than £8,000 does not assist him to maintain that a profit arose from the entire procedure unless it means that the full value of the land which the procedure was designed to turn to account was £8,000, or at any rate an amount less than £12,000.

In point of fact, there is no ground for the assertion that £8,000 was the highest figure for which the respondent could lawfully have sold the land. That figure was chosen by the respondent in

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the belief that it was sufficiently low to ensure the granting of consent; and the fact that in the event it was consented to provides no clue as to the fate which would have attended an application for consent to a sale at a higher price. Moreover, the respondent was at liberty to sell for any price he could get, if he could find a purchaser amongst the class of bodies permitted by the regulations and the Act to purchase land without consent.

But even if it were true that £8,000 was the maximum price which the law would allow to be obtained by means of a sale, it would not follow that the value of the land was less than £12,000. Indeed, the facts of the case establish the contrary. The shares had no assets behind them but the land, and they had no other profit-earning potential than that which the land provided. Yet the shares brought £12,000. The short answer to the whole argument which was submitted on behalf of the commissioner is that the steps the respondent took had no other purpose or effect than to get the full amount which a person desiring to own the land would pay for it or for its practical equivalent. In the £12,000 which the purchaser paid for the shares there was therefore no element of profit, except to the extent that that sum exceeded, if it did exceed, what the respondent originally paid for the land. If there was such a profit, it was a capital profit and was not included in assessable income by s. 26 (*a*).

The decision of *Fullagar* J. was correct, and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *D. D. Bell*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Pickering, Cornish & Lempriere Abbott.*

B. H.