[HIGH COURT OF AUSTRALIA.]

MOWLING . . . . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

H. C. OF A. 1954.

MELBOURNE, *Sept.* 21;

SYDNEY, *Nov.* 8.

Taylor J.

Income Tax (Cth.)—Assessable income—Annuity—Exclusion from assessable income of part representing purchase price—Irrespective of whether purchased by taxpayer—Income Tax Assessment Act 1936-1947 (*No.* 27 *of* 1936—*No.* 11 *of* 1947), *s.* 26 (*c*).

Section 26 (c) of the *Income Tax Assessment Act* 1936-1947 provides that the assessable income of a taxpayer shall include—" (c) the amount of any annuity, excluding, in the case of an annuity which has been purchased, that part of the annuity which represents so much of the purchase price as has not been allowed or is not allowable as a deduction or in respect of which a rebate of income tax has not been allowed or is not allowable in assessments for income tax under this Act or any previous law of the Commonwealth ".

Held that the conditions of exclusion apply to all annuities which have been purchased, whether by the taxpayer or by some other person for him.

APPEAL under the *Income Tax Assessment Act* 1936-1947.

Eleanor Mowling, the widow of George Mowling, who died in May 1934, appealed to the High Court from a majority decision of the Board of Review No. 2, dated 23rd April 1954 (1), refusing to uphold her objection, dated 19th August 1949, to an amended assessment, issued on 21st June 1949, in respect of income derived by her during the year ended 30th June 1947.

The appeal was heard before *Taylor* J. in whose judgment the material facts and relevant statutory provisions are set forth.

C. I. Menhennitt, for the appellant.

J. A. Nimmo, for the respondent.

Cur. adv. vult.

(1) T.B.R.D. Vol. 4, Case No. D. 96, p. 494.

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TAYLOR J. delivered the following written judgment:—

This is an appeal from a decision of a Board of Review which, by a majority, dismissed the appellant's appeal against an amended assessment to income tax based upon income derived during the year ended 30th June 1947. For the purpose of the amended assessment the taxpayer's assessable income was increased by the sum of £855, being part of the payments on account of an annuity which she had received during that year, in the circumstances hereinafter referred to, from the Colonial Mutual Life Assurance Society Ltd. The taxpayer's objection was to the inclusion of this sum.

The husband of the taxpayer died in May 1934 and by his will he bequeathed to his trustees the annual sum of £1,000 to be held by them upon trust to pay the same to his wife during her life, unless and until some event should happen whereby if the same income belonged to her absolutely, she would be deprived of the personal enjoyment thereof or any part thereof. In the event of the trust for the payment of the said income to his said wife determining or failing during her life, he directed his trustees during the remainder of her life or during such shorter period continuous or discontinuous as they should in their absolute discretion think fit, to pay all or any part of such income or apply the same for the maintenance and personal support and benefit of all or any one or more to the exclusion of the others or other of the following objects, namely, his said wife and her children or remoter issue for the time being in existence in such proportions and manner as his trustees should in their absolute and uncontrolled discretion from time to time think proper. Subject to such discretionary power the trustees were directed, during the remainder of the life of his said wife, to hold the said income or so much thereof as should not be applied under such discretionary power as part of his residuary estate. Following upon a direction to convert his real estate and the residue of his personal estate, the testator directed that, subject to the payment of his debts, funeral and testamentary, expenses, legacies and annuities and all duties whether Federal or State payable in respect of his estate, his trustees should invest in manner thereinafter authorized the proceeds of the sale calling in and conversion and stand possessed of such investments upon trust to pay thereout a number of pecuniary legacies and upon trust as to the ultimate residue for four named children in equal shares as tenants in common.

Subsequently to the death of the testator the trustees of his estate continued to carry on a manufacturing business, which formed a substantial part of his estate, and out of the profits of the said business they paid to the appellant an annuity of £1,000 per annum.

About the year 1937, however, it was desired to form a proprietary company to take over the assets of this business and, for the purpose of carrying this proposal into effect, a proprietary company was formed and the assets of the business were sold to it. As consideration for such sale the company undertook to create in favour of the trustees a charge on certain land forming part of such assets for the purpose of securing an annuity of £1,000 per annum to the appellant. The balance of the consideration was the allotment to the trustees of some 64,000 shares in the capital of the company and an undertaking to pay, satisfy and discharge all the debts and liabilities of the trustees in relation to the said business. The sale took place with the concurrence of the appellant and of the residuary beneficiaries and on 1st November 1937 the company duly executed a charge over the land in question. The land was expressed to be charged for the benefit of the trustees with an annuity of £1,000 to be paid monthly during the life of the appellant and the first of such payments was to be made on 1st August 1937. From the last-mentioned date until the year 1946 this annuity was paid to the appellant at the rate of approximately £80 a month. During part of this period the trustees were the sole shareholders and, ultimately, the surviving trustee was said to be the sole shareholder in the company. At the end of this period, namely in 1946, the residuary beneficiaries were desirous of procuring the realisation of the shares and of obtaining a substantial distribution of capital. Accordingly a proposal was made that the shares should be sold, that the charge created by the company dissolved, and that, subject to the purchase of an annuity out of the proceeds of the sale of the shares, the balance should be distributed among the residuary beneficiaries. The appellant was agreeable to this course and the shares were sold. Thereafter on 1st April 1946 the surviving trustee purchased from the Colonial Mutual Life Assurance Society Ltd. for the sum of £6,637 3s. 0d. a policy securing to the appellant the payment of an annuity to her of £1,000 per annum payable quarterly on the first days of January, April, July and October in each and every year during her life. Thereupon, on 30th April 1946 the appellant by deed released the surviving trustee, his estate and effects and the estate of the testator from all claims and demands by her under the will of the testator and purported to release the company's land from all claims in respect of the charge to which I have referred.

In making her return of income for the year ended 30th June 1947, the appellant returned the sum of £145 as income from property during that year. This amount was that portion of the

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annuity which was said to represent a payment by the insurance company by way of interest as distinct from the return or payment of any part of the capital sum paid for the purchase of the annuity. The original assessment upon this return accepted this amount as accurately representing the appellant's assessable income for that year from that source, but on 21st June 1949 an amended assessment was issued which, *inter alia*, increased the amount of her assessable income by the balance of the annual payments during the year, namely £855.

The dispute between the appellant and the respondent is concerned with the provisions of s. 26 (c) of the *Income Tax Assessment Act* 1936-1947 which provides that: "The assessable income of a taxpayer shall include—. . . (c) the amount of any annuity, excluding, in the case of an annuity which has been purchased, that part of the annuity which represents so much of the purchase price as has not been allowed or is not allowable as a deduction or in respect of which a rebate of income tax has not been allowed or is not allowable in assessments for income tax under this Act or any previous law of the Commonwealth".

The contentions of the appellant are two-fold. In the first place, it is said, the facts establish a purchase by the appellant of the annuity in question and, since the other conditions of exclusion specified by the sub-section are satisfied, the assessment should be set aside. The alternative argument is that it is unnecessary to consider whether or not the annuity was purchased by the appellant, for the provisions of the sub-section extend to every case where an annuity has been purchased whether by the annuitant or by some other person.

On the hearing of the appeal, the latter submission was that upon which most discussion took place and I feel that it may, in reality and without injustice to the first contention, be described as the appellant's primary argument. It was based upon the circumstance that the language of the sub-section is completely silent on the vital point and provides in terms for an exclusion in all cases where an annuity has been purchased and the prescribed conditions are satisfied. There is, it is said, no prescription of a condition that the annuity should have been purchased *by the annuitant* and since the sub-section is perfectly clear and *unambiguous* it is of no consequence, since the annuity was purchased, that it was purchased by some person other than the appellant. The respondent on the other hand maintains that the sub-section operates only where the annuitant was the purchaser.

The first objection to the appellant's contention on this point is that it appears to be inconsistent with the notion, which it was suggested by the respondent was readily apparent upon a reading of the sub-section, that it was intended merely to exclude from a taxpayer's assessable income amounts which in reality represent a *repayment* to him of capital. But, quite apart from the fact that the sub-section may have been framed upon a more liberal basis than this (see e.g. s. 160 (2) (f)), there are good reasons why its meaning should not be dictated by that consideration. Nevertheless, considerable support may be found in the language of the sub-section for the construction contended for by the respondent. The primary subject matter with which the sub-section deals is " the amount of any annuity " and, whatever may be the precise meaning of that expression, it is common ground that it must be taken to refer to the amounts received or, possibly, receivable on account of an annuity to which the taxpayer is entitled. Accordingly, it is said, it applies in respect of all annuities whether purchased by the taxpayer or acquired by him in some other way. But " in the case of an annuity which has been purchased " a portion of the amounts received or receivable is, in the prescribed circumstances, excluded from the taxpayer's assessable income and the critical question is whether these words merely constitute a reference to the manner in which the taxpayer acquired his right to the annuity or extend, also, to cases where the obligation to pay the annuity has been undertaken pursuant to an agreement for consideration made between the obligee and some third party, and quite irrespectively of the manner in which, or when, the taxpayer became entitled to receive such payments. The words of the sub-section, considered by themselves, furnish some ground for thinking that they refer to the manner in which the taxpayer acquired the annuity. When it is borne in mind that what the sub-section is dealing with primarily is the amount of any annuity to which the taxpayer is entitled and that what is then excluded in appropriate circumstances is part of the amount received or receivable " in the case of an annuity which has been purchased " it may well be thought that the latter expression is a reference to the manner in which the taxpayer acquired the right to the annuity and not to some event or circumstance which may have coincided with or preceded in point of time his acquisition of that right.

But consideration of the history of the legislation throws some light upon the problem in this case. The provisions of s. 26 (c) of the Act of 1936-1947 were enacted in 1943, but except for a formal difference, and one which is not material to this case, its

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predecessor in the *Income Tax Assessment Act* 1936 was similar. The provision made by the *Income Tax Assessment Act* 1922 with respect to annuities was, however, substantially different. The provision, which was contained in the definition of " income " in s. 4 of that Act, provided that " income " did not include, " in the case of an annuity which has been purchased—that part of the annuity which represents the purchase price ". It was not until 1930 that the words " to the extent to which that price has not been allowed or is not allowable as a deduction under the provisions of this Act or of any Act repealed by this Act " were added. The *Income Tax Assessment Act* 1915 made no mention of annuity income as such, but that Act did contain a provision (s. 18 (c)) authorizing a deduction from the total income derived by a taxpayer, of every premium or sum paid by the taxpayer for a deferred annuity or other provision for his wife or children. This was succeeded by a substantially similar provision in s. 23 (c) of the *Income Tax Assessment Act* 1922 which operated until the *Income Tax Assessment Act* 1936. By the lastmentioned Act a not dissimilar provision was made by s. 79 (e) and this was to be found in s. 160 (2) (f) of the Act as it stood in 1947. But in 1930 when the amendment to the definition of " income " in the 1922 Act, insofar as it referred to annuity income, was effected, there was no provision, so far as I can see, which authorized the deduction by a taxpayer of moneys, or any part thereof, expended on the purchase of an annuity for himself. In saying this I exclude from consideration payments made to a superannuation fund, which, in appropriate circumstances, were, at least in part, deductible under s. 23 (g) of the Act, for pensions and superannuation and retiring allowances not paid in a lump sum were dealt with specifically and treated as income from personal exertion.

This brief reference to the history of the legislation leads me to enquire why it was that the legislature considered it necessary in 1930 to qualify the expression " that part of the annuity which represents the purchase price " by the addition of the words " to the extent to which that price has not been allowed or is not allowable as a deduction under the provisions of this Act or of any Act repealed by this Act ". Clearly, I should think, the legislature considered that some part of the purchase price of an annuity which had been purchased might have been allowed as a deduction under the provisions of the Act as it stood in 1930 or under earlier legislation, and it was thought proper that in such cases the annuitant should not receive tax free that part of the purchase price which had been the subject of the deduction or deductions. At all events,

the amendment appears to be designed, at least in part, to produce this result. But, as far as I can see, a deduction of the purchase price, or part thereof, was never allowable where a taxpayer had purchased an annuity for himself. On the other hand, deductions were allowable in specified circumstances where the annuity had been purchased for the annuitant by some other person (see s. 23 (c)). These considerations suggest to my mind that the expression "an annuity which has been purchased" was not understood to constitute exclusively a reference to an annuity which had been purchased by a taxpayer for himself. The same expression was used in s. 26 (c) in the Act of 1936 and it was used in much the same circumstance as previously. The construction of this sub-section is by no means free from doubt, but I feel that an examination of the history of the legislation and of the circumstances in which the expression under consideration has been used from time to time, compel me to conclude that the appellant's annuity is one which was purchased within the meaning of the sub-section.

For the reasons given the appeal should be allowed and, in these circumstances, it becomes unnecessary to consider the alternative submission made by the appellant and I express no view upon it.

Declare that the amount of £855 *being portion of the payments received by the appellant from the Colonial Mutual Life Assurance Society Limited during the year ended* 30*th June* 1947 *was not assessable income of the appellant and order that the amended assessment of* 21*st June* 1949 *be amended accordingly. Further order that the respondent pay the appellant's costs of the appeal.*

Solicitors for the appellant, *Coltman, Wyatt & Anderson.*

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth of Australia.

R. D. B.