[HIGH COURT OF AUSTRALIA.]

HAYES . . . . . APPELLANT;

AND

FEDERAL COMISSIONER OF TAXATION . RESPONDENT.

H. C. OF A. 1956.

HOBART, *Mar.* 16;

MELBOURNE, *May* 23.

Fullagar J.

Income Tax (Cth.)—Assessable income—Income—Inclusion by statutory definition of value of allowances etc. to taxpayer incidental to an employment—Gift of shares to former employee—Friendship and business association between donee and donor apart from employment—Absence of relation between receipt of shares and income-producing activity—Appeal from Board of Review—Confined to decisions involving "a question of law"—What is—Income Tax and Social Services Contribution Assessment Act 1936-1950 (*No.* 27 *of* 1936—*No.* 48 *of* 1950) *ss.* 6, 26 (*e*), 196 (1).

Section 196 (1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1951 confers a right of appeal to the High Court from any decision of a board of review "which involves a question of law".

Held, that a question whether money or property received is assessable income involves a question of law.

Farmer v. *Cotton's Trustees* (1915) A.C. 922, per Lord *Parker of Waddington* at p. 932, applied.

H., an accountant, was employed by R. on a full-time basis from 1939 to 1942 as supervising accountant and general adviser in his business. From 1942 he ceased to be a full-time employee. In 1944, when R.'s business was taken over by a proprietary company, H. became a share-holder and a director and secretary of the company, for which he received remuneration. By 1947 the business had deteriorated and it was considered that R. should resume control. He refused to do so unless he held all the shares in the company and H. reluctantly parted with his shares at a price he considered to be much less than their potential value, R. telling him that he would make it up to him some day. H. thereupon ceased to be a director of the company but remained secretary. In 1950 a public company took up the shares of the private company which continued to be the operating organisation. H. was secretary of both companies and received an adequate remuneration. After 1944 H. was at no time engaged or employed as R.'s private accountant although

H. C. OF A. 1956. HAYES v. FEDERAL COMMISSIONER OF TAXATION.

from time to time he performed services of a trifling nature for which he did not appear to have been paid. H. and his wife were on terms of personal friendship with R. and his wife and R. often discussed business matters with H. asking for and receiving his advice in an informal way on matters connected with the business of the companies. On the incorporation of the public company R. received a large number of shares therein some of which he gave to H.

Held, that the receipt of the shares by H. was not a receipt of income, it being impossible to relate the receipt of the shares by H. to any income-producing activity on his part.

Quaere whether s. 26 (*e*) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1950 has the effect of bringing into charge any receipt which would not be brought into charge in any case either by virtue of the general conception of what constitutes income or by virtue of the definition of " income from personal exertion " in s. 6.

APPEAL under the *Income Tax and Social Services Contribution Assessment Act* 1936-1950.

Lewis Hayes appealed to the High Court from a decision of a Taxation Board of Review (1) confirming the disallowance of an objection by him to the inclusion in his assessable income for the year ended 30th June 1951 of the sum of £3,000 being the face value of certain shares given to him by one Richardson.

The appeal was heard by *Fullagar* J., in whose judgment the material facts appear.

H. J. Solomon, for the appellant.

G. H. Lush, for the respondent.

Cur. adv. vult.

May 23. FULLAGAR J. delivered the following written judgment :—

This is an appeal from a decision of a Taxation Board of Review. In the year ended 30th June 1951 the taxpayer received from one George William Richardson, in circumstances which will have to be examined, 12,000 fully paid shares of 5s. 0d. each in a company named Richardson's Meat Industries Ltd. The commissioner included the face value of these shares (£3,000) in the taxpayer's assessable income of that year. A majority of the board of review were of opinion that the sum in question was rightly so included, and from that decision the taxpayer appeals to this Court.

In 1939 the taxpayer, Hayes, who is an accountant, was residing in Melbourne. At that time Richardson was carrying on business

(1) (1955) 6 T.B.R.D. (N.S.) 336.

in Hobart in meat and smallgoods under the name of " Richardson's Choice Provisions ". His business was expanding, and he desired the services of a qualified accountant with special experience in costing. He went to Melbourne, where he was introduced to Hayes, who, at his invitation, came over to Hobart and entered into his employment. His exact position was not made very clear, but he seems to have been a sort of supervising accountant and general financial adviser in the business.

In 1944, on Hayes's advice, a proprietary company, Richardson's Choice Provisions Pty. Ltd., was formed to take over the business. This company had a paid-up capital of £17,000, about three-fifths of which was held by persons other than Richardson, who thus ceased to have a controlling interest in the business. Hayes was allotted either 2500 or 3000 shares of £1 in the company. He says that Richardson lent him £500 to enable him to complete payment for these shares. He became a director of the company, and also its secretary, retaining a right of private practice which he seems to have had since 1942.

In 1947 it was considered desirable that Richardson should resume control of the business, which appears to have deteriorated to some extent. His attitude was that he would hold all the shares or none, and eventually all the shares of the other shareholders, apart from 500, which were held by his son, were purchased by him at 22s. 6d. or 23s. 0d. Hayes was extremely reluctant to part with his shares which he considered to be worth potentially a good deal more than the price offered, but eventually he did so, the transfer being made on 21st August 1947.

It seems to have been considered essential that Richardson should resume complete control of the business. He was a " forceful man ", he refused to do so except upon taking over all the shares, and Hayes considered himself, in all the circumstances, under a moral obligation to facilitate the change of control. At the time, or shortly afterwards, when Hayes was " doing a real moan about it ", Richardson told him : " You won't lose anything ; I will make it up some day ".

During the next three years the business, under the control of Richardson, appears to have prospered and expanded greatly, and in 1950 it was decided to form a public company. This company was incorporated on 22nd May 1950 under the name of Richardson's Meat Industries Ltd. The scheme adopted did not involve the liquidation of the proprietary company : that company continued in existence as the operating organisation, but all the shares in it passed into the hands of the new public company, which also acquired

H. C. OF A. 1956.

HAYES v. FEDERAL COMMISSIONER OF TAXATION.

Fullagar J.

certain properties owned by Richardson himself. The consideration receivable by Richardson for his shares in the proprietary company and the other property acquired from him was, or included, 212,000 shares of 5s. 0d. each in the public company.

On completion of this transaction Richardson (to use his own words) felt that he had "done particularly well"—that he had "achieved an ambition and made a success of things". It cannot be doubted that it was primarily in a spirit of generosity, prompted by these not unnatural reflections, that he decided to make certain voluntary dispositions. He made large monetary gifts to certain public institutions, as to which no question arises. He also, by letter dated 27th June 1950 directed the secretary of the public company to issue 52,000 of the 212,000 shares, to which he was entitled, to the following persons—4000 to D. C. Richardson, 4000 to G. H. Richardson, 12,000 to Henri Albert Christie, 12,000 to Lewis Hayes, and 20,000 to Christie and Hayes "on behalf of the staff of" the proprietary company. Shares were, I understand, issued in accordance with these directions. The last-mentioned shares were no doubt to be held by Christie and Hayes on trusts to be declared by the donor for members of the staff of the proprietary company. No question arises before me as to these shares. Nor does any question arise as to the shares issued to D. C. Richardson and G. H. Richardson, who are sons of the donor. The commissioner, however, claims that the shares issued to Hayes constitute assessable income in his hands. He makes the same claim with regard to those issued to Christie, but I am at present concerned only with those issued to Hayes. The commissioner's view is based on English cases, which make it clear that a payment of money or a transfer of property, although voluntary and a "gift" in the sense that there was no antecedent obligation to make it, may in certain circumstances be income in the hands of the recipient. Those cases were recently considered by this Court in *Squatting Investment Co. Ltd.* v. *Federal Commissioner of Taxation* (1), and on appeal by the Privy Council *Federal Commissioner of Taxation* v. *Squatting Investment Co. Ltd.* (2). They were also considered to some extent in *Federal Commissioner of Taxation* v. *Dixon* (3).

Mr. *Lush*, for the commissioner, contended that the appeal to this Court was incompetent. The right of appeal if given by s. 196 (1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1950 "from any decision of the board which involves a question

(1) (1953) 86 C.L.R. 570.
(2) (1954) A.C. 182; (1954) 88 C.L.R. 413.
(3) (1952) 86 C.L.R. 540.

of law". It was said that the decision of the board here was a decision on a question of fact, there being no disagreement between the parties as to the law applicable to the case. I cannot accept this view. It is true that the decision was a decision on a question of fact in the sense that there was an ultimate *factum probandum*: the taxpayer had to prove that what he received was not income, and the board determined that he had failed in his proof. But that determination involved a consideration of what constitutes income, and that is a question of law. The board had also to consider the construction of s. 26 (*e*) of the Act. The decision turned on the view taken by the board on those matters, and that decision is right or wrong according as the board's view on those matters was right or wrong.

There are decisions in taxation cases, including decisions of the House of Lords, which, to my mind, create serious difficulty in relation to the distinction, which often has to be drawn, between "questions of fact" and "questions of law". For present purposes, however, I think it sufficient to refer to what was said by Lord *Parker of Waddington* in *Farmer* v. *Cotton's Trustees* (1), in a passage quoted by *Latham* C.J. in *Commissioner of Taxation* v. *Miller* (2). His Lordship said:—"The views from time to time expressed in this House have been far from unanimous, but in my humble judgment where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only" (3). With the greatest respect, this seems to me to be the only reasonable view. The distinction between the two classes of question is, I think, greatly simplified, if we bear in mind the distinction, so clearly drawn by *Wigmore*, between the *factum probandum* (the ultimate fact in issue) and *facta probantia* (the facts adduced to prove or disprove that ultimate fact). The "facts" referred to by Lord *Parker* in the passage quoted are the *facta probantia*. Where the *factum probandum* involves a term used in a statute, the question whether the accepted *facta probantia* establish that *factum probandum* will generally—so far as I can see, always—be a question of law. Mr. *Lush* relied on *Commissioner of Taxation* v. *Miller* (4). Special considerations may apply to the word "resident", which was in question in that case. But in any case, in the "absence of unanimity" to which Lord *Parker* referred, I consider myself free to give effect to a view which seems to me to be clearly right. In

(1) (1915) A.C. 922.
(2) (1946) 73 C.L.R. 93, at p. 97.
(3) (1915) A.C., at p. 932.
(4) (1946) 73 C.L.R. 93.

H. C. OF A. 1956. HAYES v. FEDERAL COMMISSIONER OF TAXATION. Fullagar J.

my opinion, the decision of the board involves a question of law, and the appeal lies. See generally *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (1).

The facts which led the majority of the board to the conclusion that what the appellant received was "income" may be stated shortly. I have said that he seems at first to have been employed by Richardson as a supervising accountant and general adviser in the business. For his services in these capacities he was paid a salary. In 1942 he ceased to be a full-time employee of Richardson, and since that year he has been in private practice as a public accountant. When the proprietary company was formed in 1944, he became a director of that company, and also its secretary. For his services in these capacities he was remunerated by the company. In 1947, when he sold his shares to Richardson, he ceased to be a director, but remained secretary of the proprietary company. When the public company was formed in 1950, he became secretary of that company also, and he is in fact still secretary of both companies. For these services he has been remunerated by the companies, and there is no suggestion that his remuneration was at any time inadequate. After the incorporation of the proprietary company he was at no time engaged or employed as Richardson's private accountant, though at times he performed services of a trifling nature, such as the preparation of land tax returns. For these services he does not appear to have received payment. At the same time, it may be truly said that there was a close business relationship between the two men, and he and his wife and Richardson and his wife were on terms of personal friendship. Richardson often discussed business matters with him, and asked and received his advice in an informal way on matters connected with the business of the companies and as to his own private investments and affairs. One gathers that the advice was generally accepted, and the result seldom, if ever, regretted. There can be no doubt, I think, that in 1950, when the public company was formed and Richardson felt that he had "made a success of things", he was disposed to give a real measure of credit for that success to advice and assistance received over the years from his business associate and personal friend.

I have now stated what I consider to be the whole of the relevant facts, but it seems desirable to mention two other matters. The first is a statement which appears to have been signed by Richardson in December 1952 when he interviewed one of the commissioner's officers in response to an invitation to attend at the taxation

(1) (1933) 49 C.L.R. 171, at p. 175.

office in Hobart. The statement reads :—" In connection with 4,000 shares in Richardson's Meat Industries Ltd. issued to each of my sons in July 1950, these shares were given by me inspired by feelings of natural love and affection and were in no way given for personal services rendered. The balance of the shares—namely, 41,385—were given in recognition of services rendered in the past by the recipients and as an inducement or incentive to continue good service in the future ". This statement was not put in as an exhibit at the hearing before the board, but it was shown to Richardson, who admitted his signature, and it was read out and is recorded in the transcript of evidence, no objection being taken by counsel for the appellant. In these circumstances the statement was part of the material properly before the board. Whether it is of any importance is another matter. It contains, I think, the truth, but only part of the truth, and it states nothing that might not have been inferred from the evidence generally.

The second matter is this. In cross-examination of the appellant, the commissioner's representative put it to him that, in an interview with one of the commissioner's officers, he had said that he had obtained legal advice that all the shares given by Richardson in June 1950, except the shares given to his sons, were income subject to tax in the hands of the recipients, and that he did not intend himself to claim exemption. The matter is of small importance, but it should be pointed out that this cross-examination was obviously inadmissible, and it should have been objected to and disallowed. It was rightly ignored by all the members of the board. Neither advice received by Hayes, nor his own view of the legal position, nor his intention at that time to contest or not to contest his assessment, could have any possible bearing on the question before the board.

The receipt of the shares in question here was not, in my opinion, a receipt of income by Hayes. What was done, as I think, amounted to a simple gift of property and nothing more. I agree generally with the reasons given by Mr. *Cotes*, the dissentient member of the board of review.

The commissioner contended that the receipt was an income receipt because it fell within the general conception of income, or alternatively that it fell within the terms of s. 26 (*e*) of the Act. Section 26 provides that " the assessable income of any person shall include . . . (*e*) the value to the taxpayer of all allowances, gratuities, compensations, benefits, bonuses and premiums allowed, given or granted to him in respect of, or for or in relation directly or indirectly to, any employment of or services rendered by him,

H. C. OF A. 1956.

HAYES v. FEDERAL COMMISSIONER OF TAXATION.

Fullagar J.

whether so allowed, given or granted in money, goods, land, meals, sustenance, the use of premises or quarters or otherwise ". I doubt very much whether s. 26 (*e*) has the effect of bringing into charge any receipt which would not be brought into charge in any case either by virtue of the general conception of what constitutes income or by virtue of the definition of " income from personal exertion " in s. 6. The words " directly or indirectly " are doubtless intended to cast the net very wide, but it is clear that there must be a real relation between the receipt and an " employment " or " services ". In *Federal Commissioner of Taxation* v. *Dixon* (1), *Dixon* C.J. and *Williams* J. said :—" We are not prepared to give s. 26 (*e*) a construction which makes it unnecessary that the allowance, gratuity, compensation, benefit, bonus or premium shall in any sense be a recompense or consequence of the continued or contemporaneous existence of the relation of employer and employee or a reward for services rendered given either during the employment or at or in consequence of its termination " (2). If the receipt in the present case does not fall within the general conception of " income ", it is not, in my opinion, caught by s. 26 (*e*). This was, I think, the opinion of all the members of the board. But the majority thought that the receipt was an income receipt within the generally accepted meaning of that term.

A voluntary payment of money or transfer of property by A to B is prima facie not income in B's hands. If nothing more appears than that A gave to B some money or a motor car or some shares, what B receives is capital and not income. But further facts may appear which show that, although the payment or transfer was a " gift " in the sense that it was made without legal obligation, it was nevertheless so related to an employment of B by A, or to services rendered by B to A, or to a business carried on by B, that it is, in substance and in reality, not a *mere* gift but the product of an income-earning activity on the part of B, and therefore to be regarded as income from B's personal exertion. A very simple case is the case where A employs B at a salary of £1000 per annum, and at the end of a profitable year " gives " him a " bonus " of £100. Obviously the bonus is income. It is paid without obligation, but it is clearly in truth part of what B has earned during the year. In the *Squatting Investment Case* (3) the taxpayer company, which carried on a pastoral business, had supplied wool during the war to the Commonwealth, for which it received an appraised price. Some

(1) (1952) 86 C.L.R. 540
(2) (1952) 86 C.L.R., at p. 554.
(3) (1953) 86 C.L.R. 570 ; (1954) A.C. 182 ; (1954) 88 C.L.R. 413.

years later it received further sums from the Commonwealth out of a fund, which consisted of profits realised by the Commonwealth on sales by it of the wool supplied to it. It had been understood throughout that the suppliers of wool should share in such a fund if it ever came into existence. The Commonwealth was under no obligation to make this further payment, but it was in truth part of the price paid by the Commonwealth for the wool, part of the proceeds of the business carried on by the taxpayer, and it was accordingly assessable income. A clear example on the other side of the line would be provided if the staff of a company were to collect voluntary subscriptions and make a presentation to a retiring manager.

In the English cases considered by the board of review (in which clergymen and professional sportsmen have played a prominent part) the question has been, as I pointed out in *Dixon's Case* (1), whether a particular receipt fell within a particular description in a schedule which deals with profits or gains arising from an office or employment. I did not myself think that *Dixon's Case* (2) fell precisely within the scope of the English cases cited, but, be this as it may, I think that those cases are directly relevant in the present case. Viscount *Dunedin* in *Stedeford* v. *Beloe* (3), observed that, where a voluntary payment was held not to fall within the schedule, it was because it was "not, in the true sense of the word, income". The question here is whether what Hayes received was, in the true sense of the word, income.

While I would not say that the motive of the donor in making the payment or transfer is, in cases of this type, irrevelant, motive as such will seldom, if ever, in my opinion, be a decisive consideration. In many cases, perhaps in most, a mixture of motives will be discernible. On the one hand, personal goodwill may play a dominant part in motivating a voluntary payment, and yet the payment may be so related to an employment or a business that it is income in the hands of the recipient. On the other hand, the element of personal goodwill may be absent—the dominant "motive" may have been of the most purely selfish and "commercial" character—and yet it may be impossible to find any connexion with anything that can make it income. The question in each particular case is as to the character of the receipt in the hands of the recipient: *Moorhouse* v. *Dooland* (4). The test to be applied is an objective, not a subjective, test. This, I think, is the

(1) (1952) 86 C.L.R. 540, at p. 567.
(2) (1952) 86 C.L.R. 540.
(3) (1932) A.C. 388, at p. 390.
(4) (1955) Ch. 284.

H. C. OF A. 1956. HAYES v. FEDERAL COMMISSIONER OF TAXATION. Fullagar J.

whole point of a passage in the judgment of *Kitto* J. in the *Squatting Investment Case* (1) which is quoted both by the majority and by the dissentient member of the board of review. His Honour speaks of " gifts " as being " taxable " if they are " made in relation to some activity or occupation of the donee of an income-producing character." The point is illustrated by reference to expressions used in some of the English cases, and his Honour then contrasts " *mere* gifts "—" gifts " which are not related in any such activity or occupation and have no significant character except as expressions of a desire to benefit the donee. The objectivity of the test considered appropriate by his Honour has already been made very plain, for, referring to the facts of the particular case, he has said : " in truth and in fact the moneys distributed under the Act to the persons who supplied wool for appraisement cannot be regarded otherwise than as part of the total sum which has taken the place of the wool in the hands of those persons " (2)—in other words, part of the price paid for the wool supplied, and therefore having its true source in a revenue-producing activity carried on by the suppliers.

The view that what the appellant received in this case was income seems to rest on the view that the gift of the shares was motivated, at least to a substantial extent, by gratitude for services rendered, and advice and assistance given, by the donee to the donor in the past. But this is clearly not enough to make what he received income in his hands. It may be conceded that this motive of gratitude played a part in the donor's decision to make the gift. But gratitude for services rendered was by no means the sole or exclusive motive. It is clear that the donor was moved very largely by a general feeling of goodwill arising from a close relationship which had both a business aspect and a personal aspect. It is clear also that he was moved to no small extent by the fact that Hayes had, some three years before, parted very much against his will with his shares in the proprietary company. He had told Hayes that he " would make it up to him ", and he was now " making it up to him ".

So much for the donor's motives. But as I have said, motive as such cannot be a decisive factor in cases of this kind. What is decisive, in my opinion, is the fact that it is impossible to relate the receipt of the shares by Hayes to any income-producing activity on his part. It is impossible to point to any employment or " personal exertion ", of which the receipt of the shares was in any real sense an incident, or which can fairly be said to have produced that receipt.

(1) (1953) 86 C.L.R. 570, at p. 633. (2) (1953) 86 C.L.R., at p. 632.

Hayes was only employed by Richardson from 1939 to 1944, and it seems absurd to say that the shares represented additional remuneration for work done in that employment. From 1944 to 1950 he was employed by the proprietary company, but it seems equally out of the question to say that the shares represented additional remuneration for work done for the company during that period. I accept, of course, what was said by *Dixon* C.J. and *Williams* J. in *Dixon's Case* (1): I agree that, "if payments are really incidental to an employment, it is unimportant whether they come from the employer or from somebody else" (2). It is perfectly consistent with this to say that, in determining whether a payment is "really incidental to an employment", the fact that it is not made by the employer but by some third party may be a very relevant consideration. Its relevance in the present case, however, need not be considered, for the position simply is that there is nothing whatever to suggest that the gift can properly be regarded as money earned by Hayes as director or secretary of the proprietary company. It was not paid to him in any such capacity. It was in no true sense a product or an incident of any employment in which Hayes had engaged or any business which he had carried on.

The only other way, so far as I can see, in which the case can be put for the commissioner is to say that the gift of the shares represented a reward or recompense for the general advice and guidance given informally on a number of occasions to Richardson personally, and proving of benefit in the long run to Richardson himself or to the company in which he had a controlling interest. I think that the gift was intended in part, though only in part, as such reward or recompense. But surely it is utterly unreal to say that, whenever Hayes expressed a particular opinion or recommended a particular course, he was engaging in an activity capable of producing income for him. Such an idea is foreign to the whole idea of what constitutes income from personal exertion. If Hayes had been employed to give such advice or guidance, or if he had carried on a business of giving such advice or guidance, the position might well have been different. But he was doing neither of those things. If A tells his friend B in a casual conversation that he thinks that the shares of the Z company will rise greatly in a short time, and B buys shares in the Z company and makes a large profit, it will be impossible to contend that a gift of £1000 by a grateful B to his friend A is income earned by A. A has earned the money only in the loose sense that he has done something for which B is grateful. He has

(1) (1952) 86 C.L.R. 540.

(2) (1952) 86 C.L.R., at p. 556.

H. C. OF A. 1956.

HAYES v. FEDERAL COMMISSIONER OF TAXATION.

Fullagar J.

not earned it in the sense—the only relevant sense—that it is the product of a revenue-earning activity on his part.

I should perhaps add (though in the result it is of no consequence) that, if the receipt of the shares were a receipt of income, the amount to be added to assessable income would seem to be not the amount of their face value but the amount of their market value. It may be, of course, that face value and market value were identical.

This appeal should, in my opinion, be allowed.

Appeal allowed with costs. Order that assessment be reduced by excluding from appellant's assessable income of the year ended 30th June 1951 *the sum of* £3,000 *representing the value of shares in Richardson's Meat Industries Ltd. received by appellant in that year.*

Solicitors for the appellant, *Finlay, Watchorn, Baker & Solomon.*

Solicitor for the respondent, *H. E. Renfree,* Crown Solicitor for the Commonwealth of Australia.

R. D. B.