

[HIGH COURT OF AUSTRALIA.]

TUNLEY APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

H. C. OF A. *Income Tax—Contracts &c. to avoid tax—Settlement—Declaration of trust—Settlor*
 1927. *divesting himself of income from shares—Trust for charitable and religious*
 ~~~~~ *institutions—Income Tax Assessment Act 1922-1925 (No. 37 of 1922—No. 28*  
 BRISBANE, *of 1925), sec. 93.\**

June 17, 23.

Rich J.

The income to be derived from 1,500 fully paid up shares of which the settlor was the absolute owner was declared by him to be held by him for the sole and separate use and benefit of such religious and charitable institutions as he should think fit during his lifetime, it being further declared that all such income was to be paid to such institutions for their sole use and benefit as the settlor should decide. The settlement also provided that after the death of the settlor the shares should revert to and become part of his estate.

*Held*, that a power of selection only was reserved to the settlor, that the gift was one for religious purposes, that the settlor had effectually divested himself of the whole of the income from the shares and that, the settlement not being void under sec. 93 of the *Income Tax Assessment Act 1922-1925*, the income from the shares was not part of the settlor's taxable income.

APPEAL from the Federal Commissioner of Taxation.

In assessing the income tax payable by the appellant, William James Tunley, for the year 1925-1926, the Commissioner of Taxation

\* The *Income Tax Assessment Act 1922-1925*, by sec. 93, provides that "Every contract, agreement, or arrangement made or entered into, in writing or verbal, whether before or after the commencement of this Act, shall, so far as it has or purports to have the purpose or effect of in any way,

directly or indirectly . . . (b) relieving any person from liability to pay any income tax or make any return; or (c) defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or (d) preventing the operation of this Act in any respect; be absolutely void" &c.



added to his gross income an amount of £75, representing the dividends from 1,500 shares held by the appellant in the capital of Joyce Bros. (Q.) Ltd., a company duly incorporated and registered in Queensland. The appellant objected to the assessment, and requested that his notice of objection be treated as an appeal to the High Court. The main ground of objection was that under a declaration of trust the appellant was not entitled to the income of the shares, the trust having been created for the benefit of charitable and religious institutions and all income therefrom paid out to such institutions according to particulars furnished to the Commissioner of Taxation.

The deed of trust was executed by the appellant on 19th February 1925 and, so far as material, was as follows:—"Whereas the said William James Tunley is the holder and absolute owner of 1,500 fully paid up shares hereinafter mentioned, and is desirous of dealing with the income to be henceforth derived therefrom to and for the ends, intents and purposes herein declared, and for that purpose of creating the trust herein contained: Now this indenture witnesseth that in consideration of the sum of one shilling this day paid and for divers good causes and considerations it is hereby declared, firstly, that the income to be derived from the 1,500 ordinary shares of one pound each numbered 12751 to 14250, inclusive, in the capital of Joyce Bros. (Q.) Ltd., a company duly incorporated and registered in Queensland under the *Companies Acts 1863 to 1913*, on 18th June 1915, . . . shall be held by the said William James Tunley to and for the sole and separate use and benefit of such religious and charitable institutions as the said William James Tunley shall think fit during his lifetime; secondly, that all income forthwith to be derived from the said shares shall be paid by the said William James Tunley to any charitable or religious institutions or body for the sole use and benefit of such religious or charitable institutions as the said William James Tunley shall decide; that the said William James Tunley hereby declares himself to hold the said shares as trustee to and for the ends, intents and purposes above set out and for the due fulfilment thereof; that on and after the death of the said William James Tunley the said shares in Joyce Bros. (Q.) Ltd. shall revert

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H. C. OF A. back to and become part of the estate of the said William James  
1927. Tunley and this trust shall become null and void.”

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TUNLEY On 17th June, before *Rich J.*, oral evidence was given by the
v. appellant, for the purpose of determining the validity of the docu-
FEDERAL ment under sec. 93 of the *Income Tax Assessment Act 1922-1925*,
COMMISS- and on 23rd June the matter came before *Rich J.* for further
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Walsh, for the appellant. The document creates a trust. The income from the shares is held by the settlor in trust for religious and charitable institutions. All income was paid to those institutions. It is a perfectly valid divesting of the income from the shares for the life of the settlor.

Henchman, for the respondent. On the language used in the document it is not clear that the settlor is bound for the rest of his life to appoint to charitable and religious institutions part or parts or all of the income from the shares. If on the true construction of the document the settlor retains power to pocket the whole or part of the income, a good trust for charity has not been created. If the settlor can keep any part of the income, then the income should be taxed. [Counsel referred to *In re Willis*; *Shaw v. Willis* (1), and *In re White*; *White v. White* (2).]

RICH J. In this appeal two questions are involved. The first relates to the genuineness of the settlement. Clear and convincing evidence was given which enabled me, without any hesitation, to hold that the settlement was not void within sec. 93 of the *Income Tax Assessment Act 1922-1925*. The remaining question is concerned with the construction of the settlement.

The declaration of trust—after reciting that the settlor was the holder and absolute owner of 1,500 fully paid up shares in the capital of *Joyce Bros.* and was desirous of dealing with the income to be henceforth derived therefrom to and for the ends, intents and purposes therein declared, and for that purpose of creating the trust therein contained—declared that the income to be derived from 1,500 specified shares should be held by the settlor to and for the

(1) (1921) 1 Ch. 44.

(2) (1893) 2 Ch. 41.

sole and separate use and benefit of such religious and charitable institutions as the settlor should think fit during his lifetime, and that all income forthwith to be derived from the said shares should be paid by the settlor to any charitable or religious institutions or body for the sole use and benefit of such religious or charitable institutions as the settlor should decide. It was further declared that he held the said shares as trustee to and for the ends, &c., above set out and for the due fulfilment thereof. The document then provides that after the death of the settlor the said shares shall revert to and become part of his estate.

It was urged on behalf of the Commissioner that under the terms of the settlement it was competent for the settlor to retain the whole or portion of the income from the shares so settled, for his own benefit, according to whether he made no distribution or a partial distribution to religious and charitable institutions. Mr. *Henchman*, for the Commissioner, argued the case with great clearness and commendable frankness. And on the authorities cited by him (*In re Willis* (1) and *In re White* (2)) I hold that a power of selection only is reserved to the settlor, and that the gift to religious institutions is one to them for religious purposes. I also consider that the words "think fit" and "decide" in their connotation sufficiently bind the settlor, and that the settlor has effectually divested himself of the whole of the income of the shares the subject of the settlement. And I make a declaration accordingly.

The question is really of academic interest, and in view of the evidence given by the settlor I cannot imagine that the Commissioner will persist in any attempt to defeat a genuine desire on the part of this settlor to benefit charities. The settlor stated in his evidence that if the settlement now under consideration were inoperative he was willing to execute another document which would legally carry out his charitable intentions. His instructions were clear and definite enough. Indeed, he wished to set apart not only the income but also the corpus of the shares, but was advised to retain the corpus for his estate. Under these circumstances it seems rather futile and harassing to prosecute this matter further.

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I hold that the document creates a trust of the whole of the income of the shares for the benefit of such religious and charitable institutions as may be selected by the settlor and that no interest in this income is reserved to the settlor.

In answer to me counsel for the settlor has undertaken to supply the Attorney-General of the State of Queensland and the Commissioner with an annual statement of such institutions and of the sums allocated to them.

Appeal allowed. Declare that the declaration of trust dated 19th February 1925 is not void under sec. 93 of the Income Tax Assessment Act 1922-1925 and that it completely divests the settlor of all beneficial interest in the income of the shares settled thereby during his lifetime. And the appellant by his counsel undertaking so to do, direct the appellant to supply the Attorney-General of the State of Queensland and the Commissioner with an annual statement of the institutions selected by him and of the sums allocated to them. Respondent to pay the costs.

Solicitor for the appellant, *Stephens & Tozer.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth, by *Chambers, McNab & McNab.*

B. J. J.