McCARROLL

v.

THE COMMISSIONER OF TAXATION
OF THE COMMONWEALTH OF AUSTRALIA

JUDGMENT

WALSH J.

McCARROLL

v.

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In his return of income for the year ending on 30th June 1968 the appellant disclosed a taxable income of $984. A notice of assessment issued on 11th June 1969 and an adjustment sheet which accompanied it showed that the respondent had added to the taxable income the sum of $2681 and had based his assessment on a taxable income of $3665. In the tax year the taxpayer had been paid part of the price of a property which he had sold in 1964 for a sum much higher than the price which he had paid for it when he bought it in 1957. The property was at Lalor not far from Thomastown and was some eleven or twelve miles from Melbourne. It was bought by the taxpayer for £11,500 and sold by him for about £38,000. The respondent, after allowing for certain costs and expenses, computed the net gain as being a little over $51,000. He treated that net gain as being taxable income. He calculated that $2681 was the amount which represented the profit component in that part of the sale price which had been received in the tax year. The taxpayer gave a notice of objection by which he objected to the inclusion of the amount of $2681 or any part of it in the taxable income. The objection was disallowed and at the request of the appellant it was treated as an appeal and forwarded to this Court.

The question for decision is whether or not the profit formed part of the appellant's assessable income

by reason of s. 26(a) of the Income Tax Assessment Act. This depends upon whether or not the property was acquired by him for the purpose of profit-making by sale. In the circumstances disclosed by the evidence I think there is no need to consider the second part of s. 26(a). Although the notice of objection raised in the alternative a question as to the amount of the profit which should have been added to the assessable income assuming that the profit was taxable, no reasons were advanced in evidence or in argument for reducing the amount fixed by the respondent.

In Buckland v. The Commissioner of Taxation (1960) 34 A.L.J.R. 60 at p. 62 Windeyer J. said:

> "In relation to s. 26(a) it is the main or dominant purpose of the acquisition that is significant. If, a property, say a house or farm, were bought for the purpose of resale at a profit it would be immaterial that the purchaser also had in mind to take the rents and profits in the meantime or pending selling to use it for some purpose of his own. In such a case two purposes, one primary and dominant, the other secondary and subordinate, are not incompatible and could both be accomplished. And similarly along with an intention to retain property as a revenue producing asset, the purpose for which it was acquired, there may exist an appreciation that, if at some time it were necessary or desirable to do so, it could be sold at a profit".

In the present case what the appellant claims in effect is that his purpose when he acquired the property was to retain it and use it, not so much as a revenue-producing asset, but as a place in which to pursue the activity in which he had already become engaged of breeding and training horses, as a hobby for his personal satisfaction and pleasure. If the

evidence satisfied me that this was his main or dominant purpose I think that the appellant would be entitled to succeed, even if it should appear also that he expected that the property could be sold at a profit if at some time it became necessary or desirable to sell it. I am of opinion that the result of the appeal depends upon deciding whether the evidence given by the appellant as to the purpose for which he bought the property should be accepted.

There was evidence which I accept that some years before the property was purchased the appellant, who was engaged in a carrying business a major part of which was the carrying of livestock, had become interested in horse breeding. In particular he became interested in the breeding of ponies and from time to time he caused ponies to be registered in the Stud Book of the Australian Pony Stud Book Society. Before the purchase of the property he had begun to enter horses in events at various agricultural shows and other equestrian competitions. He had no property of his own upon which to keep his horses. From about 1954 to 1957 he had horses running on a large property occupied by a Mr. Purcell, who gave evidence in this appeal. This property was at Donnybrook, some miles away from the property which the appellant later bought. Mr. Purcell said that the number of horses belonging to the appellant on that property varied from a couple to about a dozen. I do not think that there is any need to go into the details of the evidence as to the breeding, training and exhibiting of horses by the appellant, both before and after he bought the property near Thomastown. He had a considerable measure of success. These activities

were not on a very large scale but the appellant attached considerable importance to them. He employed a Miss Hunt (who gave evidence) to look after the horses and train them and to ride them when they competed in exhibitions. The appellant himself continued to be engaged mainly in his carrying business and at a later time in dealing in cattle and horses. It appears that he did not expect to obtain, and did not in fact obtain, any substantial monetary returns from the breeding and showing of horses. The land was not used to any significant extent for general farming purposes. Some improvements were made to the house and some fences were built or repaired and in one year a considerable area of land was cultivated and a crop was produced which was used for fodder. But this was not repeated. At times cattle belonging to others grazed on the land. But on the whole it was not regularly put to use, except as a place on which to keep the horses.

The property had an area of about 58 acres. It had an old house on it. The appellant said in evidence that he intended to live in it but did not do so because his wife was unwilling to go there. In 1957 the land was zoned as rural land but it was not far from an area which was beginning to be developed as a residential district. The appellant denied that it was his intention to seek to have the land re-zoned and it was proved that no application for its re-zoning was, in fact, made afterwards by him or on his behalf. Applications were made however for approval to subdivide the land. The evidence of the appellant in relation to the proposed subdivisions was unsatisfactory. He sought

to give the impression that whatever was done was to be attributed entirely to the zeal of an estate agent and that he himself knew little of it and took no interest in it. I do not find this evidence acceptable.

The appellant gave evidence as to the purpose for which he bought the property. He said "I just bought it for my own ponies" and "I bought it to put my horses on, my stud". If I had been satisfied that the appellant was a completely honest and truthful witness, that evidence would suffice no doubt to establish that it was not acquired for the purpose of profit-making by sale. But I am not so satisfied. On some of the subsidiary questions of fact in the case I formed the opinion that the evidence of the appellant was not trustworthy. I have referred already to the matter of the applications for subdivision approval. If the appellant had said in evidence that in 1963, when these were made, he had made up his mind to sell the land or part of it and for this purpose wished to subdivide into smaller portions, this would not necessarily have been inconsistent with his claim that when he bought it in 1957 he did not have a sale of it at a profit in mind. But he did not say that. He was evasive about this matter. Again, he gave evidence which I do not accept, when he was questioned about having put the property on the market for sale and in particular about its being advertised for sale in a newspaper in April 1964. He gave unsatisfactory evidence, also, concerning interviews which he had in 1960 with Mr. Monger and in the years 1961-1963 with Mr. James, in which his intentions and his prospects as to the sale of the property were discussed. I accept the

evidence of those two witnesses, who were branch managers at the appellant's bank. His professed inability to recall these discussions and his half-hearted disclaimers of parts of the evidence about them were far from impressive.

Having expressed those adverse opinions as to part of the evidence of the appellant, I acknowledge that they do not make it impossible to accept what he said as to his purpose in buying the property. If the only ways in which the truth of that critical part of his evidence could be tested were by seeing what inferences could be drawn from the circumstances established by the evidence and by looking to the probabilities, it would be possible to marshall arguments of some force in favour of the appellant's claim but it would be possible also to point to some significant indications against it. In this case, however, there is weighty direct evidence of admissions made in 1963 by the appellant himself which are inconsistent with the case which he now puts forward and are really destructive of it, unless a satisfactory explanation of them can be discerned. But before coming to that evidence, I wish to make some references to some of the facts which might be regarded as tending for or against the probability of the truth of the appellant's claim.

In his favour it may be said that there is no doubt that he did have in 1957 a need for land on which to run his horses and as he proposed to keep stallions and would need to have stalls and yards suitable for them it would be more satisfactory for him to own than to lease land for that purpose. Again, the appellant did not sell the land quickly

but retained it for about seven years and even then he made arrangements which enabled him to continue to use it as a lessee until 1969. The evidence shows that although from a fairly early period the appellant was speaking to the bank managers about selling the property, yet in March 1960 he told Mr. Monger that he had had an offer of £28,000 but did not wish to sell "at the moment" because he had stud horses grazing on the property. There is also the fact, already mentioned, that he made no efforts to have the land re-zoned. He did seek to subdivide it but this was not sought until November 1963.

On the other hand, it is put for the respondent that it is highly improbable that a man in the financial position of the appellant would have bought this parcel of land solely or mainly for the purpose of grazing on it a fairly small number of horses kept by him as a hobby and without any prospect of financial gain from keeping them. It was said that the area was too large for that purpose. The property was, because it was located fairly close to the city and still closer to populated areas, less suitable for that purpose and more expensive than land further out in the country. Mr. Rogerson, a valuer, gave evidence of having considered what was the value of land in that district in 1957 and he expressed the opinion that the land which the appellant bought "appeared rather dear agricultural or grazing land" but the price then paid was a reasonable price for the land "with its potential". It was pointed out also that the appellant undertook a mortgage liability involving the payment of a substantial amount of interest not recouped by income derived from the property. It appears that in 1960 the payment of what was still owed to the vendor was financed by a mortgage arranged by the

appellant's solicitors to secure a loan of $6750 on which eight per cent interest was payable. This was a substantial outlay having regard to the amount of use which was being made of the property.

It seems probable on the evidence that in 1957 a purchaser might reasonably have expected that the land would increase substantially in value within a relatively short space of time. As Mr. Rogerson said in evidence "in a matter of time it was most likely that the land zoned rural, including the subject property, could be changed to something suitable for residential reserved living, which eventually did take place". As things turned out this did not take place until December 1966 when the land was re-zoned and designated "reserved living". But the land was so situated that in 1957 a prospective purchaser might well have foreseen that a re-zoning was likely to occur.

The considerations which I have mentioned as tending to make it more probable than not that the acquisition of this land was induced by the prospect of future profit on resale are significant. But, perhaps, they ought not to be regarded as sufficient in themselves to establish, in the circumstances of this case, that the appellant's dominant purpose was to make a profit by sale of the property. It could be argued that the circumstance that the buying of the land placed a substantial financial burden on the appellant operates in his favour rather than against him. One might have expected this to cause him, if his main purpose was to resell, to do his utmost to get rid of that burden by selling the property much earlier than 1964. It could be argued, if

the matter fell to be determined merely on the probabilities, that the sale in 1964 was not a fulfilment but a frustration of the appellant's original purpose and was forced upon him by the financial position in which he found himself. That view would agree with the contention put forward on behalf of the taxpayer in a letter written in April 1966 by his accountant, which reads in part: "He states his only reason for selling the property was to settle his financial obligations, and is at a loss as to the department's claim that he originally purchased same for resale". The reason so stated for selling is a plausible one, but curiously enough it was not the reason which the appellant put forward in his evidence in which he stated that because of increasing population in the neighbourhood, the worrying of his horses by dogs had become so frequent that the property was no longer suitable for them.

Whatever was the appellant's reason for selling at the particular time at which he did sell, a decision as to what his purpose was when he bought the land in 1957 does not have to be based simply upon inferences or upon the weighing-up of varying hypotheses. There is direct evidence, to which I must now refer, dealing with that question and upon the view that I have taken of that evidence I cannot be satisfied that the appellant's main purpose in acquiring the land was not the purpose of profit-making by sale.

In 1963 an investigation of the appellant's affairs was being conducted and on 19th July of that year an officer of the department named Mr. O'Halloran went to see the appellant at his residence at West Preston. The officer

was not then particularly concerned to inquire about the property at Thomastown or the reasons for its purchase. His investigation arose from the fact that it was suspected that the appellant had not disclosed in his returns all his income. The property had not, of course, been sold by the appellant at that time, so that no question had yet arisen as to the application of s. 26(a). Mr. O'Halloran made a record of the interview as answers were given to the questions which were asked. This was intended as a summary and not as a verbatim report of what was said. At the end of the record Mr. O'Halloran wrote "As far as I am aware the above statement is true & correct & sets out the correct position of my affairs". At his request the appellant signed his name beneath that notation. This document was tendered in evidence. It includes the following passages:

> " In July 1957, I bought a farm at Lalor - David St. for £11,500 on deposit £2,000 & quarterly payts. This was paid by cheque through Home, Wilkinson & Lowry of High St. Preston to Brayside Stud Farms. This was all paid by cheque. I have 58 acres there & use it for grazing. I have run a few cattle there & have also agisted some horses for R. Percy of Richmond. I also have a few horses myself which I run there for a hobby. I do occasionally buy a horse & may sell it to pay for expenses. These would be bought & paid for by cheque".
>
> " I bought the farm originally as an investment to sell. I have kept it waiting to be re-Zoned. I did have an offer for the land soon after I bought it but I did not take it because I thought the price would increase. I have it on the market to sell at the moment. The land is not big enough to farm profitably & in any case it is too close to habitation & dogs worry the stock. The farming that I carry on is just incidental".

At first sight it may appear surprising that the appellant would have been willing at that time to make a statement to a taxation officer to the effect of the second of those passages and that the terms in which he is there reported to have spoken should be so apt to the use which the respondent has subsequently made of this statement, in order to bring the transaction within s. 26(a). But having attended carefully to the manner in which Mr. O'Halloran gave his evidence and having intervened myself to question him about that part of the interview of which the second passage quoted is a record, I am satisfied by the evidence that it was an honest and substantially accurate record of what the appellant said on that day. As to his reason for saying this, it may be that his concern was to dispel any notion that he had made income from the property which he had not disclosed and thought that an assertion that he bought it as "an investment to sell" and not to produce income from it would assist him. Whatever his reason I believe that he made this statement. He does not say that he made it although it was untrue because he thought then that this would be to his advantage. He was not prepared to deny on oath that he made such a statement in the course of the interview. But he did say in evidence that the question why he bought the property was put to him "more than once" and each time he answered that he bought it for his horses. I do not believe that this happened but was deliberately omitted from the record in order to prejudice the appellant. It is unlikely that it was omitted innocently either through inadvertence or because it was regarded as unimportant.

The appellant did not dispute that he signed the document. He said it was not read out to him and he did not read it. He did not suggest that he was not given an opportunity to read it but said that it "was getting late in the afternoon and I had things to do". Although Mr. O'Halloran had no actual recollection seven years after the event of reading out the document or of observing the appellant reading it, I think it is probable that the appellant read it or heard it read. I do not think that he signed it without any knowledge of what was in it. Even if I thought he did so, I should still find that the relevant part of it recorded correctly the substance of what the appellant said to Mr. O'Halloran.

The only other evidence to which I need refer is part of the evidence given by Mr. Philippe, an officer of the Taxation Department. He referred to an interview with the appellant in July 1967 when the record of the interview of July 1963 was discussed. I believe that this witness gave a truthful account of what then took place and that the documents, Exhibits 9 and 10, of which Mr. Philippe was the author, were honestly compiled. I need not set out their contents. I need say only that there was nothing in this evidence to cause me to doubt the evidence of Mr. O'Halloran or the substantial accuracy of his record of the interview of July 1963. In 1967 the appellant told Mr. Philippe that the property was bought "as a general farm proposition". He did not give any convincing explanation of the statement which he had signed in 1963. He said he had then been asked a lot of questions and could not remember what it was all about. Finally, it may be mentioned that

according to the witness Philippe the appellant said in 1967 that when he sold the property in 1964 he thought the price was good at the time so he accepted it. But he said also that it had been on the market for a good while before he sold it. I have no doubt that it was on the market for a considerable time before it was sold, although in evidence the appellant was not willing to make any frank admission of that fact.

For the reasons stated I am of opinion that it has not been shown that the assessment was wrong. I order that the appeal be dismissed with costs and that the assessment be confirmed.

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ORDER

Appeal dismissed with costs. Assessment confirmed. Usual order with respect to Exhibits.