



IN THE PRIVY COUNCIL **13 OF 1973**

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

DUNCAN HOLDEN Appellant

- and -

COMMISSIONER OF INLAND REVENUE Respondent

AND BETWEEN

MAURICE CAMPBELL MENNEER Appellant

10 - and -

COMMISSIONER OF INLAND REVENUE Respondent

CASE FOR THE APPELLANTS

RECORD

1. These appeals are brought from a judgment of the Court of Appeal of New Zealand dated 29 September 1972 dismissing appeals from a judgment of the Supreme Court of New Zealand dated 7 March 1972.

p.86

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2. In substance an earlier decision of the Court of Appeal is also under review on this appeal. It is Commissioner of Inland Revenue v. Hunter [1970] N.Z.L.R. 116. In that case the issues to be determined by the Courts were identical with those in the two cases now under appeal.

pp.66-67

3. The issues both in the present appeals and

RECORD

in Commissioner of Inland Revenue v. Hunter  
arise out of the following circumstances.

4. During the period from 1 January 1964 to 16 June 1966 persons resident in New Zealand who lawfully possessed funds in the sterling area and who wished to obtain New Zealand currency in New Zealand had open to them three courses of action, all of which were lawful under New Zealand law:

p.35 10A  
6-25  
p.71 .

16.16-31

(1) The foreign currency could be remitted to New Zealand through the New Zealand banking system and converted into New Zealand currency at the then official rate of exchange prescribed or approved by the Reserve Bank of New Zealand; 10

(2) The foreign currency could be sold to another New Zealand resident in return for New Zealand currency provided that the sale was effected at the then current official rate of exchange; and 20

(3) The foreign currency could be used to purchase foreign assets which were then sold for New Zealand currency in New Zealand. The most common type of asset used for that purpose was foreign securities in the sterling area.

p.52,  
pp.70-72

pp.53-54  
p.72

5. In the Holden case the taxpayer, who was a New Zealand resident, became entitled under his father's will to sterling funds and securities in the United Kingdom. Wishing to convert his United Kingdom assets from time to time into New Zealand currency the taxpayer instructed his sharebroker to take such steps as were considered appropriate for that purpose. In the Menneer case the taxpayer, who was then a recent emigrant from England, wished to remit funds from the United Kingdom to New Zealand in order to establish himself as a commercial market gardener. He took advice from a sharebroker and left all arrangements to him for remitting funds to New Zealand. 30 40

6. In both cases the sharebroker concerned arranged in New Zealand a price in New Zealand currency for United Kingdom Government securities on the day in question and instructed his agents in London to buy and sell those securities in order to ensure that the taxpayer concerned received New Zealand currency at the rate agreed on.

10 7. The result of those transactions was that in each case the taxpayer received in New Zealand more New Zealand currency than he would have received if he had remitted his United Kingdom sterling funds to New Zealand through the banking system at the then official rate of exchange or if he had exchanged his sterling funds to a New Zealand resident at the then official rate of exchange.

pp.71-72

20 8. During the period from 1 January 1964 to 16 June 1966 there was a very considerable volume of transactions whereby funds in the sterling area were remitted to New Zealand by means of dealings in United Kingdom securities. The transactions employed in each of the two present cases were in substance the same as the transaction employed by the taxpayer in the Hunter case as described by Turner J. ([1970] N.Z.L.R. 116, 123):

p.62 ll.  
35-42

30 The primary facts are in small compass. It is agreed that the Respondent, who lived in New Zealand, owned in England a substantial parcel of stock in a concern known as the British Shareholders Trust and Shield Unit Fund. She had owned this for some time before the events which I am now going to refer. On or before 18 July 1962 she had either sold or redeemed this stock in England for cash. We inquired from counsel if the date on which this transaction took place had been mentioned to the Court; it was not ascertainable. In the result no  
40 more can be said than that at some time before the events referred to in the case stated the respondent had sold her stock, or it had been redeemed, with the consequence that she legitimately held in England a

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sum of money totalling £5775.0s.5d. sterling. It was desired to remit £5750 sterling of this money to New Zealand. If this had been done by drawing a cheque on the English bank in which the moneys were held and paying this cheque into a bank in Wellington the respondent would have obtained for her moneys a credit in New Zealand pounds calculated at the New Zealand Reserve Bank's official rate as at the date in question. This rate was £100 sterling: NZ£100.7s.6d. The total New Zealand credit which would thus have been obtained in New Zealand in New Zealand pounds for £5750 sterling would have been NZ£5771.11s.3d. 10

pp.1-6 6-7  
pp.21-24

9. In each of the present cases the Commissioner of Inland Revenue assessed the taxpayer (as he had done in Hunter's case) on the basis that the difference between the amount which the taxpayer actually received in New Zealand currency as a result of remitting his sterling funds to New Zealand in the manner described and the amount which he would have received if those funds had been remitted to New Zealand at the official buying rate of sterling in New Zealand currency on the relevant date constituted assessable income. 20

10. In each of the present cases the Commissioner relied on s.88(1)(c) of the Land and Income Tax Act 1954, which at all material times was in the following terms : 30

(1) Without in any way limiting the meaning of the term, the assessable income of any person shall for the purposes of this Act be deemed to include, save so far as express provision is made in this Act to the contrary -

••••  
(c) All profits or gains derived from the sale or other disposition of any real or personal property or any interest therein, if the business of the taxpayer comprises dealing in such property, or if the property was acquired for the purpose of 40

selling or otherwise disposing of it, and all profits or gains derived from the carrying on or carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit:

RECORD

...

10 11. Each of the taxpayers objected to assessments made against him by the Commissioner of Inland Revenue, and those objections having been disallowed by the Commissioner, who at that stage had been successful in Hunter's case in the Court of Appeal on the identical point, each taxpayer required the Commissioner to state a case for the determination of the Supreme Court.

pp.5-6  
6-8  
pp.23-25

20 12. In Hunter's case it had been held in the Supreme Court by McGregor J. that, as the dominant purpose of the taxpayer was to transfer her sterling funds to her country of residence, New Zealand, and as that dominant purpose governed the stages of what was in reality one transaction whereby the proceeds of assets held in the United Kingdom were transferred to New Zealand by incidental machinery steps, the dominant purpose of acquiring the sterling securities was not the selling or disposing of it. McGregor J. went on to hold that the difference between the amount the taxpayer actually received and what she would have received if the sterling funds had been remitted through the banking system at the official rate of exchange was not in the nature of an income gain but rather in the nature of a capital gain.

1967  
N.Z.L.R.  
426-429

1967  
N.Z.L.R.  
426-429

30 13. The Commissioner of Inland Revenue appealed to the Court of Appeal against that judgment. All three Judges of that Court (North P., Turner and McCarthy JJ.) held that the taxpayer's purpose in acquiring the sterling securities was to sell it immediately and that any profit or gain which might have been derived from the sale of those securities was assessable. The consequence of that holding was that in the present cases, where the machinery employed by the taxpayers through their sharebrokers was not materially

1970  
N.Z.L.R.  
116,121,  
125,128

RECORD  
pp.64,65  
pp.72-73

pp.72-73

different from that used in Hunter's case, the taxpayers recognised that both the Supreme Court and the Court of Appeal would be bound to follow the decision of the Court of Appeal in Hunter's case. At the same time the taxpayers in the present cases expressly reserved the right to contest that decision in a higher Court.

14. The second question before the Court of Appeal in Hunter's case was the very question considered by the Court of Appeal in the present cases. Each of the members of the Court of Appeal in Hunter's case dealt with the question in a different way from that employed by the other members of the Court. North P. took the view that in order to secure the additional sum or premium which was available to those who remitted sterling funds to New Zealand by medium of sterling securities it was necessary for the taxpayer to engage in a commercial dealing. By adopting the course of purchasing United Kingdom stock and then immediately selling that stock in New Zealand for New Zealand currency the taxpayer brought herself, in North P's opinion, within s.88(1)(c) of the Land and Income Tax Act 1954. Turner J. approached the problem by posing the question: what was the worth of the sterling money in New Zealand money? If the official exchange system had been the only channel, or if, there being several channels legitimately available, that had been the one actually used, it would have shown the value of the sterling money in New Zealand money. But since the taxpayer used the stock exchange, as she was entitled to do, she thereby finished the transaction with no more in New Zealand currency than anyone could have realised on the available market for the asset with which she began. Consequently, in Turner J's view, there was no profit or gain. McCarthy J. considered that before it could be accepted that there was a legitimate commercial rate different from the official transfer rate, which should be applied to calculate the result of the transaction, there would need to be adequate evidence of its existence. The Commissioner had applied the official rate and had accordingly determined that the taxpayer had made a profit. It was for the taxpayer to prove

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1970  
N.Z.L.R.  
116,122

1970  
N.Z.L.R.  
116,126

1970  
N.Z.L.R.  
116,127

that the Commissioner's approach was wrong. There was no such evidence, the sole proof being of the transaction in issue which, on its face, seemed to be a commercial transaction producing a profit. The result, in McCarthy J's view, was that the taxpayer had not adduced the necessary evidence of the existence of some rate of exchange other than the official rate. In the result there was a majority of the Court of Appeal who favoured allowing the appeal of the Commissioner of Inland Revenue.

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719707  
N.Z.L.R.  
116,129

15. The present cases having come on for hearing in the Supreme Court (Haslam J.) and after the conclusion of the evidence for both parties, an application was made by the taxpayers for an order that the two cases stated should be removed into the Court of Appeal pursuant to the provisions of s.64 of the Judicature Act 1908, but that application was declined on the ground that the relevant material should be selected from the evidence called. In his judgment Haslam J. recorded a statement of facts on which at his request counsel had agreed and referred to the various contentions of counsel for the taxpayers and of counsel for the Commissioners of Inland Revenue. After indicating that he could not usefully comment at length upon the contending submissions and that it would be inappropriate to embark upon a minute examination of the reasons upon which the majority decision was based in Hunter's case Haslam J. answered "No" to the question in each case stated, namely, "whether the Commissioner had acted incorrectly" in making his assessments.

p.60  
p.73

pp.61-64

pp.64-65

p.65

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65-67

16. Each of the taxpayers appealed to the Court of Appeal (Wild C.J., Turner P., and Richmond J.) and on 29 September 1972 judgment was delivered affirming by a majority (Wild C.J. and Richmond J., Turner P. dissenting) the decision of the Supreme Court and dismissing the appeals with costs.

p.86

17. All of the learned Judges considered that the Court of Appeal was not in the present cases bound by its previous decision in Hunter's case as to whether a profit or gain

RECORD

pp.75-76

pp.79-80

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pp.82-83

had been derived. In Wild C.J.'s judgment Hunter's case provided no clearly discernible ratio decidendi binding the Court in the present appeals. Turner P. expressed the view that in the present cases there was much more evidence than there was in Hunter's case and that since the other members of the Court had found themselves able to decide the case on principle, not constrained by anything that was said in Hunter's case, he left free to do the same. Richmond J. indicated his opinion that a ratio decidendi was not sufficiently discernible in Hunter's case to bind the Court of Appeal in the present appeals.

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18. The learned Judges in the Court of Appeal gave the following among other reasons for their judgments:

(1) Majority (Wild C.J. and Richmond J.)

pp.75-76

(a) Wild C.J. considered that in order to determine whether the taxpayers made a profit or gain it was a matter of valuing in New Zealand currency the sum of sterling used to acquire the sterling security. In his view the only evidence of the value of that sterling in New Zealand currency is the amount of New Zealand currency that the Bank would exchange for it, which depended on the official buying rate at the relevant date. The sum of sterling could not legitimately be acquired for New Zealand currency except at that rate. The taxpayers did not exchange their sums of sterling through a bank for New Zealand currency, but instead they used that sterling, as they were entitled to do, to purchase stock which they immediately sold for a greater sum of New Zealand currency than the Bank would have exchanged for the sums of sterling which they used to purchase the stock. Consequently, the taxpayers must be held to have derived a profit from the sale of property acquired for the purpose of selling it.

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pp.75-77

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10 (b) Richmond J. regarded the evidence as establishing that there was a very substantial volume of dealings similar to those engaged in by the taxpayers and that there were many persons in New Zealand who were prepared to pay more in New Zealand currency for the purchase of United Kingdom stock (in order to acquire sterling funds through the sale of that stock in the United Kingdom) than they would have been required to pay at the official rate of exchange to obtain an equivalent amount of sterling. In a broad sense he considered that sterling was at the material time worth more in a commercial sense than the value indicated by the official rate of exchange. Richmond J. pp.82-83

20 was not prepared to go the extra step and to hold that the particular sterling funds owned by the taxpayer were, as such, worth more than their value at the official rate. In his view the particular funds owned by the taxpayers (prior to their investment in United Kingdom stock) commanded no special value in themselves to any New Zealander anxious to acquire sterling. Those funds were inaccessible to him except at the official rate of exchange or in breach of the exchange control regulations. Richmond J.

30 considered that it was the United Kingdom stock which acquired a special value from the point of view of New Zealand residents anxious to obtain sterling funds and that the premium which was paid for such stock could not be translated into a "commercial rate" of exchange applicable to sterling funds not yet so invested.

(2) Minority (Turner P.)

40 Turner P. adhered to the views which he had expressed in Hunter's case. In his view it was begging the question before the Court to say that the value of the sterling currency which the taxpayers gave for the securities, measured in New Zealand currency, must be its value at the

pp.78-79  
pp.78-80

RECORD

pp.79-80

official rate. He considered that the United Kingdom funds were worth in New Zealand what they would fetch on the market. There were two legitimate methods of realising the sterling funds and the value of those funds was the value in the market actually used. Turner P. referred to the evidence placed before the Court in the present cases, as showing that persons having in the United Kingdom sterling funds which they wish to remit to New Zealand who put themselves in the hands of a share-broker with instructions to remit to the best advantage found themselves almost automatically involved in transactions such as those before the Court in the present cases. The evidence met the difficulty which McCarthy J. had found in Hunter's case to be an effectual obstacle to that taxpayer's appeal. That evidence showed, in Turner P.'s opinion, that the taxpayer received in exchange for his sterling funds in the United Kingdom, simply what they were worth in New Zealand in New Zealand currency, if the market used by the sharebroker was in fact used by him - no more, no less. Consequently Turner P. considered that no "profit or gain" resulted, because the taxpayers received only what the sterling funds, realised in that particular market, were worth.

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pp.80-81

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19. On 2 April 1973 the Court of Appeal of New Zealand granted to the present Appellants final leave to appeal to Her Majesty in Council against the judgment of the Court of Appeal dated 29 September 1972.

20. The Appellants contend that the judgment of the Court of Appeal in Commissioner of Inland Revenue v. Hunter [1970] N.Z.L.R. 116 is erroneous and ought to be disapproved and that the judgment of the Court of Appeal in the present appeals is also erroneous and ought to be reversed and that an order should be made in each of the two cases stated for the determination of the Supreme Court of New Zealand that

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the Commissioner of Inland Revenue did act incorrectly RECORD  
in making his assessments, for the following  
among other

R E A S O N S

- (1) BECAUSE in each case the dominant purpose of the taxpayer was to remit sterling funds in the United Kingdom to New Zealand for New Zealand currency.
- 10 (2) BECAUSE the evidence establishes that in each case the taxpayer left entirely to his sharebroker the arrangements for the remitting of such funds to New Zealand and was neither aware of nor involved in the machinery employed by the sharebroker for the remitting of such funds.
- 20 (3) BECAUSE the evidence establishes that the sharebroker settled in New Zealand a price at which United Kingdom securities would be bought by a New Zealand resident wishing to acquire sterling funds and that thereafter that sharebroker gave instructions for the purchase and sale by London agents of appropriate United Kingdom securities.
- 30 (4) BECAUSE the evidence establishes that even if in the circumstances of the present cases the true test is to ascertain the purpose of the taxpayer in acquiring the United Kingdom securities the purpose of the taxpayer in acquiring those securities was not the selling or otherwise disposing of them.
- (5) BECAUSE the sterling funds employed by the taxpayer in the acquisition of securities had a value, measured in New Zealand currency, which depended upon the market on which they were put up for sale, and that in the circumstances the actual market in the present cases was the market legitimately employed by a large number of persons including the present Appellants.

RECORD

- (6) BECAUSE in that market the sterling funds had a value, measured in terms of New Zealand currency, represented exactly by what the present Appellants received in New Zealand as a result of the method employed for remitting their sterling funds to New Zealand.
- (7) BECAUSE with regard to the application of the provisions of s.88(1)(c) of the Land and Income Tax Act 1954 to the taxpayer's purpose the judgment of McGregor J. in Hunter v. Commissioner of Inland Revenue [1969] N.Z.L.R. 426 was right. 10
- (8) BECAUSE with regard to the question whether the taxpayers in the present cases made a "profit or gain" within the meaning of s.88(1)(c) of the Land and Income Tax Act 1954 the judgment of McGregor J. in the Supreme Court in Hunter v. Commissioner of Inland Revenue [1969] N.Z.L.R. 426 and the judgments of Turner J. in the Court of Appeal both in Commissioner of Inland Revenue v. Hunter [1970] N.Z.L.R. 116, 123-127 and in these cases are right. 20

pp.77-81

G.P. BARTON

13 OF 1973

IN THE PRIVY COUNCIL

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O N A P P E A L

DUNCAN HOLDEN Appellant

- and -

COMMISSIONER OF INLAND REVENUE  
Respondent

AND BETWEEN:

MAURICE CAMPBELL MENNEER Appellant

- and -

COMMISSIONER OF INLAND REVENUE  
Respondent

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CASE FOR THE APPELLANT

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