



IN THE PRIVY COUNCIL

No.13 of 1973

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

DUNCAN HOLDEN Appellant

- and -

THE COMMISSIONER OF INLAND REVENUE Respondent

AND

MAURICE CAMPBELL MENNEER Appellant

10 - and -

THE COMMISSIONER OF INLAND REVENUE Respondent

CASE FOR THE RESPONDENT

RECORD

1. These are two appeals from the judgments of the Court of Appeal of New Zealand (Wild C.J., Turner P. and Richmond J.) given on 29 September 1972 dismissing in each case an appeal by the respective Appellant from a judgment of the Supreme Court of New Zealand (Haslam J.) given on 7 March 1972 in favour of the Respondent in respect of a case stated by the Respondent under section 32 of the Land and Income Tax Act 1954 (hereinafter referred to as "the Act"). The two cases have been treated by all concerned as raising identical questions and at all stages they have been heard together.

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2. The questions for determination in these appeals are whether the Respondent acted incorrectly in making amended assessments of income tax under the Act in respect of the Appellant

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p.9,L.1-5
p.7,L.8-25

p.25,L.25-29
p.24,L.1-11

p.6,L.27-
p.7,L.7
p.23,L.27-39

Holden for the income years ended 31 March 1965 and 31 March 1966 by increasing his assessable income for those years by the amounts of £534.6.3 and £3077.0.4 respectively and in respect of the Appellant Memneer for the income year ended 31 March 1966 by increasing his assessable income for that year by the amount of £989.18.0 which sums were the difference between the purchase price of certain United Kingdom securities purchased with sterling expressed in New Zealand currency at the then prevailing official buying rate and the sale price of those securities in New Zealand currency less expenses of realisation.

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p.52,L.17-36

3. The circumstances giving rise to these questions may be broadly outlined as follows : In the Holden case the Appellant became entitled through his father's estate to assets in the United Kingdom which included certain shares which he did not wish to retain and the proceeds of sale of which he wished to bring to New Zealand. He instructed his sharebroker to take such steps as he thought desirable for the purpose of bringing the money to New Zealand.

p.61,L.28-30
p.61,L.39-
p.62,L.28

4. At the time (and, as was common ground, at all times material to both these appeals) there were three ways in which this could legitimately be done:

(1) The sterling funds could be remitted to New Zealand through the New Zealand banking system at the official rate of exchange;

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(2) The sterling funds could be sold to another New Zealand resident at the current official rate of exchange. To convert sterling funds into New Zealand currency at any other rate was illegal;

(3) The sterling funds could be used to purchase foreign assets to be sold in New Zealand for New Zealand currency. The foreign assets most commonly used for the purpose were sterling area securities

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but subject to customs and other requirements the holders of foreign currency could bring other assets such as motor vehicles to New Zealand and subsequently sell them for New Zealand currency.

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10 It was also common ground that there was no evidence as to the existence of a "black market" for the direct transfer of overseas currency to New Zealand currency and accordingly there is no suggestion in this case of a commercial rate of exchange based on black market transactions.

p.62,L.
29-34

20 5. In the Holden case the sharebroker arranged in all for twelve separate purchases of United Kingdom securities to be made on behalf of the Appellant and paid for from his sterling funds. In the case of each purchase the securities were on the same day and virtually simultaneously sold in New Zealand for New Zealand currency. In the income year ended 31 March 1965 (which in the case of the Appellant, who had a 30 June balance date, covered the period 1 July 1964 to 30 June 1965) four such transactions were carried through. The sterling expended by the Appellant on purchases of securities totalled in amount £4616.15.0 and the New Zealand currency received on selling the securities amounted to £5168.7.6. The New Zealand pound was then at parity with sterling and the Respondent considered the difference between 30 the two sums to be assessable income under the Act and assessed the Appellant for income tax accordingly. Later the Respondent formed the opinion that the purchase price in sterling should be recalculated using the official telegraphic transfer buying rate in New Zealand currency of sterling that prevailed at the relevant date. In consequence he adjusted the profit to £534.6.3. and made a corresponding amendment to the assessment. In the income year ended 31 March 1966 40 eight exactly similar transactions were carried through and the amount assessed following a similar adjustment was £3077.0.4.

p.2,L.20
-p.5,L.41
p.81,L.28-38

p.2,L.1-5

p.3,L.24

p.5,L.42
-p.6,L.19

p.6,L.27-39

p.7,L.8-19

p.3,L.25-
p.5,L.30

p.7,L.1-25

6. In the Menneer case the Appellant who had not long since emigrated from the United Kingdom wished to bring assets to New Zealand

p.53,L.36-37

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p.54, L.2-14

p.21, L.27-
p.22, L.21

p.23, L.27-
p.24, L.9

to complete the purchase of a farm property. He saw his broker and left all the arrangements to him. One amount of sterling bonds and three parcels of stock were bought for the Appellant with his sterling and in precisely the same manner as in the Holden case these were sold the same day in New Zealand for New Zealand currency. The amount assessed following a similar adjustment to that referred to in paragraph 5 was £989.18.0.

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p.8, L.22-41
p.25, L.6-24

7. In the case stated in each case and at the hearings in the Supreme Court of New Zealand and the Court of Appeal of New Zealand the Respondent raised three separate grounds to support the assessments, namely :

(1) That the sums assessed constituted assessable income of the Appellant concerned under section 88(1)(c) of the Act, and in particular, constituted:

(i) profits or gains derived from the sale of personal property which was acquired for the purpose of selling it; and

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(ii) profits or gains derived from the carrying on or carrying out of an undertaking or scheme entered into or devised for the purpose of making a profit.

(2) That such sums constituted assessable income of the Appellant concerned under section 88(1)(g) of the Act being income derived from any other source whatsoever.

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(3) That such sums constituted assessable income of the Appellant concerned according to ordinary concepts.

8. Section 88(1)(c) and (g) provide as follows:

"88. 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:

10 (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 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.

(g) Income derived from any other source whatsoever."

20 9. In addition to section 88(1)(c) and (g) the following provisions of the Act are material:

(a) The definition of "assessable income" in section 2 which unless the context of the Act otherwise requires is as follows :

"'Assessable income' means income of any kind which is not exempted from income tax otherwise than by way of a special exemption expressly authorised as such by this Act."

30 (b) The definition of "taxable income" in section 2 which at the material times unless the context of the Act otherwise required was as follows :-

"'Taxable income' -

40 (a) In relation to ordinary income tax, means the residue of assessable income after deducting the amount of all special exemptions to which the taxpayer is entitled in respect of ordinary income tax:

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(b) In relation to social security income tax, means the residue of assessable income after deducting the amount of all special exemptions to which the taxpayer is entitled in respect of social security income tax."

(c) Section 77(1) and (2)(a) which at the material times provided as follows :

"77. Income tax imposed - 10

(1) Subject to the provisions of this Act, there shall be levied and paid for the use of Her Majesty... for the year commencing on the first day of April in each year, a tax here-in referred to as income tax, which shall consist of two parts, namely, ordinary income tax and social security income tax.

(2) Subject to the provisions of this Act: 20

(a) Income tax shall be payable by every person other than a subsisting company or public authority or a Maori authority on all income derived by him during the year...for which the tax is payable:"

(d) Section 78 which is as follows :

"78. Rates to be fixed by annual taxing Act: 30

(1) Income tax shall be assessed and levied on the taxable income of every taxpayer at such rate or rates as may be fixed from time to time by Acts to be passed for that purpose.

(2) The Act by which the rate of income tax is so fixed for any year is in this Act referred to as the annual taxing Act." 40

10. There are two issues which arise under the second limb of section 88(1)(c) referred to in (1)(i) in paragraph 7. The first is whether the property sold was "acquired for the purpose of selling or otherwise disposing of it". The second is whether there were any "profits or gains derived from the sale or other disposition".of that property. In
10 Commissioner of Inland Revenue v. Hunter
/1970/ N.Z.L.R.116 the Court of Appeal had held that United Kingdom stock bought in circumstances which in all material respects were the same as those in these appeals were acquired for the purpose of selling or otherwise disposing of it. Consequently it was agreed by counsel in the present cases both in the Supreme Court of New Zealand and the Court of
20 Appeal that the Court was bound by the judgment in Hunter with respect to that first issue. But counsel for the Appellants reserved his right to challenge Hunter in that respect on these appeals, if necessary. Because of the acknowledgment that in view of Hunter it could not be argued in the Supreme Court of New Zealand and the Court of Appeal that the transactions in question were not inherently taxable under the second limb of section 88(1)(c), the Respondent was not called on to advance any argument in either Court as to the taxability of the transactions under the other heads referred to in paragraph 7. Accordingly it is respectfully submitted that if these appeals are upheld on the first issue arising under section 88(1)(c) and are not upheld on the second issue arising under that provision the cases should be remitted for argument and determination of the other grounds raised to support the assessments.
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p.64,L.25-37
p.73,L.34-44
p.82,L.20-31
p.73,L.41-43

11. In Hunter the Court of Appeal by a majority (North P. and McCarthy J., Turner J. dissenting) held in favour of the Commissioner on the second issue arising under the second limb of section 88(1)(c) referred to in paragraph 10. When the present cases came

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p.80,L.16-34

p.60,L.34-39

p.61,L.28-

p.64,L.3

p.64,L.25-37

p.64,L.12-24

p.64,L.38-

p.65,L.27

p.65,L.28-38

before the Supreme Court of New Zealand the present Appellants moved for an order removing the cases into the Court of Appeal which was declined on the grounds that relevant material should be selected from the evidence called. At the request of the Judge counsel agreed on a statement of facts which was included in the reasons for judgment. Haslam J. also recorded counsel's agreement that Hunter was binding on the Supreme Court, and that each Appellant had so closely followed the procedure reviewed in that case that it was not arguable that the stock was not acquired for the purposes of sale within section 88(1)(c). He then referred briefly to the principal contentions of counsel on the second issue as to the deriving of profits or gains but considered it was inappropriate to embark upon a minute examination of the reasons for the majority decision in favour of the Commissioner in Hunter and gave judgment in each case in favour of the Respondent.

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12. Each Appellant appealed to the Court of Appeal of New Zealand from the judgment of the Supreme Court on the grounds that the judgment was erroneous in fact and law. Judgment of the Court of Appeal was delivered on 29 September 1972 when the Court by a majority (Wild C.J. and Richmond J., Turner P. dissenting) dismissed each appeal.

p.86

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p.73,L.34-44

p.82,L.20-31

13. Because of the agreement by counsel that on the appeals the Court of Appeal was bound by the decision in Hunter in favour of the Commissioner on the first issue under section 88(1)(c), namely whether the securities were acquired for the purpose of selling them, it did not enter on that issue. The argument in that Court and the judgments were thus limited to the second issue under the second limb of section 88(1)(c), namely whether the difference between the amount of New Zealand currency representing at the official buying rate the sterling

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expended in purchasing the securities and the amount of New Zealand currency received on sale of those securities was a profit or gain derived from those sales.

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14. Wild C.J. examined each of the judgments in Hunter. He considered it very doubtful whether the evidence in the present appeals of a great volume of transactions in overseas securities running into millions of pounds in worth provided the kind of evidence McCarthy J. had in mind in Hunter in establishing the existence of a legitimate commercial rate of exchange different from the official transfer rate. But bearing in mind the diametrically opposed opinions of North P. and Turner J. he considered that Hunter provided no clearly discernible ratio decidendi which must bind the Court in the appeals and therefore felt obliged to express his own opinion after consideration of the judgments in Hunter and the evidence in the present appeals. He held that it was necessary to determine the cost expressed in New Zealand currency of the stock acquired for the purpose of selling it and that it was a matter of valuing in New Zealand currency that sum of sterling as distinct from any piece of property that it might be used to purchase including the stock that it was in fact used to purchase. In his view the only evidence of its value in New Zealand currency as a sum of sterling was 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 Appellants had chosen to use their sums of sterling 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 they used to purchase the stock. He held that in so doing the Appellants had derived a profit from the sale of property acquired for the purpose of selling it.
- p.74,L.16-
p.75,L.20
p.75.L.24-44
- p.75,L.45-
p.76, L.6
- p.76,L.9-14
- p.76,L.18-22
- p.76,L.22-27
- p.76,L.29-36
- p.76,L.36-38

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- p.77,L.26-
p.79,L.5
- p.79,L.30-33
- p.79,L.39-
p.80,L.6
- p.80,L.9-
p.81,L.26
- p.80,L.38-41
- p.80,L.41-46
- p.81,L.13-26
- p.83,L.1-14
- p.83,L.15-18
- p.83,L.18-22
- p.83,L.29-33
15. Turner P. commenced his judgment by reviewing the reasoning of the judgments in Hunter. Turning to the present appeals he considered that to say that the value of the English currency involved, measured in New Zealand currency, must be its value at the official rate was to beg the question. He considered that there were two markets open to the Appellants namely (a) the official method of remission through the Reserve Bank and (b) the method followed by the Appellants and many other taxpayers which furnished an alternative market for the funds, and in such a case the value was the value in the market actually used. He referred to the evidence which he considered sufficient to meet the difficulty which McCarthy J. had faced in Hunter and in his view each Appellant received in exchange for English funds in England simply what they were worth in New Zealand in New Zealand currency if the market used by the sharebroker was used by him. It was the impossibility of remitting funds from New Zealand to England through the banking system and the confining of permission to the financing of licensed import transactions which produced the (perfectly legitimate) premium rate of realisation available to the present Appellants in the transactions before the Court.
16. Richmond J. delivered a short judgment. He referred to the evidence and concluded that in a broad sense it might be said that sterling was at that time worth more in a commercial sense than the value indicated by the official rate of exchange. But he considered the vital question to be whether the particular sterling funds owned by the Appellants were as such worth more than their value at the official rate and concluded that those funds commanded no special value in themselves to any New Zealander anxious to acquire sterling.

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p.83,L.38-42

p.83,L.44-45

p.83,L.45-

p.84,L.2

10 He found great difficulty in the notion of attributing to a particular fund of money a different value according to the way in which that fund of money was subsequently employed and he agreed with the view of North P. in Hunter. He held that in essence 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 paid for such stock could not be translated into a "commercial" rate of exchange applicable to sterling funds not yet so invested.

17. The Court of Appeal of New Zealand on 2 April 1973 granted each Appellant final leave to appeal from the judgment of the Court of Appeal to Her Majesty in Council.

p.87

20 18. The Respondent respectfully submits that (i) the stock in question in these appeals was acquired by the Appellant concerned for the purpose of selling it and (ii) the sums in question in these appeals were profits or gains derived from the sale of such stock and accordingly that the assessments appealed from are supported under the second limb of section 88(1)(c) of the Act.

30 19. On the first issue (i), the Respondent submits that the Court of Appeal of New Zealand in Hunter was right in holding that the matter for consideration was whether the particular property was acquired for the purpose of selling it, which is different from the ultimate object. The sole inquiry is, was the property sold acquired for the purpose of selling it, and if there was more than one purpose it is the dominant purpose which is material (Commissioner of Inland Revenue v. Walker 1963 N.Z.L.R. 339 and Hunter). It is irrelevant why the taxpayer sold or wished to sell the property or how he proposed to use the proceeds of sale or whether he

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expected or intended to make a profit on sale or why he bought and sold the property.

20. On the second issue (ii), the Respondent submits that in a case such as the present it is necessary to express both elements of the transaction, namely the cost price of the stock and the net proceeds of sale, in New Zealand currency and that on the evidence the appropriate rate for expressing in New Zealand currency the value of the sterling used to buy the stock was the official telegraphic transfer buying rate for sterling ruling at the material time. It is the rate for the direct conversion from sterling to New Zealand currency which is material, rather than the ultimate benefit obtained through entering into commercial transactions. The additional sums obtained above the amounts in New Zealand currency that would have been received on a direct sale or conversion of sterling depended on the purchase and sale of other property and to some extent on what particular property was bought and sold. Any difference between the amount of New Zealand currency obtainable through buying and selling property is derived from and attributable to the purchase and sale transactions. 10 20
21. The Respondent respectfully further submits (i) that in the case of each Appellant the sums in question constituted profits or gains derived from the carrying on or carrying out of an undertaking or scheme entered into or devised for the purpose of making a profit under the third limb of section 88(1)(c) of the Act. In each case there was a plan formulated by a sharebroker as adviser for the Appellant which was designed to yield more in New Zealand currency for the Appellant than direct conversion of the sterling into New Zealand currency and the same pattern was followed in twelve separate transactions for the Appellant Holden and in four separate transactions for the Appellant Menneer. 30 40

The activities were planned and organised, and as was the object, secured profits for the Appellants. These features give it the character of a business deal and if the reasoning in McClelland v. Commissioner of Taxation of the Commonwealth of Australia [1971] 1 W.L.R. 191 in relation to a similar provision under the Australian legislation is applicable that requirement is satisfied on the facts of the case, (ii) that, alternatively, in the case of each Appellant the sums in question constituted income derived from any other source whatsoever under section 88(1)(c) of the Act or income according to ordinary concepts included in the definition of assessable income in section 2 and subject to income tax under section 77 and 78 of the Act. It is submitted that these alternatives raise similar considerations and it was common ground in McClelland and it is submitted correctly so, that profit is income according to ordinary usages and concepts if what the taxpayer did was an adventure in the nature of trade. It is contended on the evidence that that is the case in both these appeals.

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22. The Respondent contends that these appeals should be dismissed with costs for the following among other :

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R E A S O N S

1. BECAUSE the additional sums on which each Appellant was assessed for income tax were profits or gains derived from the sale of property acquired by him for the purpose of selling it and constituted assessable income of the Appellant concerned under the second limb of section 88(1)(c) of the Act;
2. BECAUSE the decision of the Court of Appeal of New Zealand in Commissioner of Inland Revenue v. Hunter was correct and ought to be upheld;

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3. BECAUSE the decision of the Court of Appeal of New Zealand in these appeals was correct and ought to be upheld;
4. BECAUSE the additional sums on which each Appellant was assessed for income tax were profits or gains derived from the carrying on or carrying out of an undertaking or scheme entered into or devised for the purpose of making a profit and constituted assessable income of the Appellant concerned under the third limb of section 88(1)(c) of the Act; 10
5. BECAUSE the additional sums on which each Appellant was assessed for income tax were income from any other source whatsoever and constituted assessable income of the Appellant concerned under section 88(1)(g) of the Act;
6. BECAUSE the additional sums on which each Appellant was assessed for income tax were income according to ordinary concepts and constituted assessable income of the Appellant concerned under the definition of assessable income in section 2 of the Act. 20

I.L.M. RICHARDSON

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ALLEN & OVERY,
9 Cheapside,
London, EC2V 6AD.