

34/83

IN THE PRIVY COUNCIL

No 16 of 1983

O N A P P E A L
FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

PAUL DOUGLAS LOWE, HERBERT MONTY LOWE,
and KEITH LOWE

Appellants

- and -

The COMMISSIONER OF INLAND REVENUE

Respondent

CASE FOR THE APPELLANTS

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II THE ISSUE

The question

1 The question on this appeal is:

Whether the Appellants' "profit" on the disposition of land, for the purposes of s 88AA(1)(d) of the Land and Income Tax Act 1954, is the arithmetical difference between the dollar amounts received and the dollar amounts outlaid; or whether it requires to be adjusted so that, as at the date of disposition, the cost is expressed in current terms which reflect the effect of inflation since the date of acquisition.

2 Roper J, of what was then called the Supreme
Court of New Zealand, at first instance; and
Cooke, Richardson, and McMullin JJ, of the Court of
Appeal of New Zealand: all held that it is that
arithmetical difference which is the taxable figure. It
is against their decision that this appeal is brought,
by leave of the Court of Appeal.

3 The Appellants will respectfully submit that s
88AA is an enactment in a special category, and
10 that the "profit" charged by s 88AA cannot be so simply
calculated as their Honours have held. In doing so,
the Appellants will submit that there can be no "profit"
within the scope of s 88AA unless the capital originally
outlaid is kept intact by a calculation which measures
the cost of the land in terms of money of the same value
as that in which the sale proceeds were measured.

4 It will be submitted that the course taken by
the Respondent, and upheld by the Court of
Appeal of New Zealand, is wrong because it is not based
20 on a comparison of like with like; and because it would
result in the Appellants being taxed on their wealth,
rather than on their true "profit".

Quantification not in question here

5 The parties are not seeking to trouble the
Courts with quantification of the inflation

RECORD
P lines

component at this stage. That may require a further hearing in the High Court, or it may be susceptible of agreement. For the present, only the principle is in issue; and the case has proceeded throughout on this basis.

Other points decided by lower Courts not now in question either

6 Of the four areas in contention before the lower Courts, only that involving this
10 inflation question remains in issue.

III THE CIRCUMSTANCES OUT OF WHICH THE APPEAL ARISES

Factual background

7 The Appellants purchased 10 acres of bare rural land in 1961. They were fruiterers and market gardeners. They were not traders in land. It was expressly not suggested by the Respondent that their purchase had been actuated by any purpose or intention of resale.

31 12-17

112 22-42
154 37/
155 11
[Cooke,
McMullin
JJ]

8 In 1963 the Appellants decided to subdivide,
20 and to sell the allotments thereby created. As a condition of consent to the subdivision, the local Council required them to construct roads, and to make provision for drainage and the other services usual in housing areas. The Appellants complied; and, from time

to time thereafter, sold a number of lots.

9 Until 10 August 1973 the proceeds of the various sales had not been treated as revenue receipts, and the profits thereon had not been treated as assessable income by the Respondent.

10 As from that date, s 88AA of the Land and Income Tax Act 1954 became effective, and extended the ambit of "assessable income" to include, inter alia,

10 (d) All profits or gains derived from the sale or other disposition of land where ---

20 (i) An undertaking or scheme, whether or not an adventure in the nature of trade or business, involving the development or division into lots of that land has been carried on or carried out, and the Commissioner is satisfied that that development or division work, not being work of a minor nature, has been carried on or carried out by or on behalf of the taxpayer, on or in relation to that land; and

 (ii) That undertaking or scheme was commenced within 10 years of the date on which that land was acquired by the taxpayer.

11 The New Zealand fiscal year is from 1 April to the following 31 March: Land and Income Tax Act 1954 s 2, definition of "year". Between 10
30 August 1973 and 31 March 1974 the Appellants sold a further 6 of the building lots into which they had

34 divided their land. Those sales were of Lots 9, 10,
35 11, 17, and 18 on Deposited Plan 27647, and of Lot 9 on
Deposited Plan 24271.

26 24-25 12 Relying on s 88AA(1)(d), the Respondent issued
30 5 Notices of Assessment dated 7 July 1975,
claiming income tax on, inter alia, the Appellants'
respective shares in what he treated as the "profit"
arising on those sales.

10 13 If the intervening costs of subdivision and
sale be disregarded, the Respondent calculated
that "profit" on the assumption that the cost of each
section was the number of dollars ascertained as
having been given for it on its acquisition 12 years
earlier.

20 14 After formal objection by the Appellants, and
his disallowance thereof; and in accordance
with the relevant statutory procedures: the Respondent
referred the assessments and the objections to the
Supreme Court by way of a case stated. The case was
heard by Roper J on 13 December 1978; and, on 8 June
1979, His Honour confirmed the Respondent's assess-
ments with costs. The Appellants thereupon appealed;
and the Court of Appeal of New Zealand, having heard
the appeal on 9 and 10 February 1981, rejected it with
costs on 13 March 1981.

15 On 3 August 1981 the Court of Appeal granted the Appellants leave to appeal to Her Majesty in Council from its decision upholding Roper J and rejecting the Appellants' objections.

16 The Appellants will respectfully submit that that decision should be reversed with costs; and that the orders as to costs made by Roper J and the Court of Appeal should be reversed in their favour: for the reasons hereinafter appearing.

10 **Expressed reasoning of the lower Courts**

17 Five main heads of reasoning appear to have led the Courts below to reject the Appellants' contentions that the expression "profits or gains," in s 88AA(1)(d), extends only to a real improvement in the position of the subject, and that it does not embrace arithmetical differences between historic cost and the proceeds of sale:

(i) "Historic cost is the established or traditional approach"

20

108 51-52

It would be "a bold step to depart" from the "accepted and well established basis:" per Roper J in the Supreme Court.

150 51-54

Profit calculation according to the historic cost accounting convention, although attended by "deficiencies," because, admittedly, "a dollar spent does not measure the same value as a dollar subsequently received," is

"traditionally" done, and has "long been adopted in the calculation of profits ... of ... income earning activities:" per Richardson J in the Court of Appeal.

151 53-55

AS TO THIS, the Appellants will submit that the basis for the "traditional" approach disappeared with the onset of the current high inflation. Further, until this case, neither the New Zealand courts nor the Australian courts had been asked to deal with this

10 issue.

(ii) "Section 88AA was not intended to change the traditional approach"

"It is impossible to suppose that in the 1973 Amendment Act Parliament intended to introduce a radical departure from this ['traditional'] approach without signifying in any way that the point was even in mind:" per Cooke J in the Court of Appeal.

129 35-40

THE "PROFITS OR GAINS" formula for levying taxation on

20 the results of land dispositions made by non-traders, or made other than as trading transactions, dates from Land and Income Assessment Amendment Act 1912 s 54(a), so amending Land and Income Assessment Act 1908 s 79(c) that it brought within the scope of income, taxable as "income derived from business,"

[T]he profits derived ...

...

(c) From the purchase, sale, or other disposition of real property if the business of the taxpayer comprises dealing

in such property, or if the property was acquired for the purpose of selling it or otherwise disposing of it at a profit.

In Land and Income Tax Act 1916 s 85(c) the scope of "assessable income" was declared to include:

10 All profits or gains from the sale or disposition of land 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 at a profit.

That provision was re-enacted as Land and Income Tax Act 1923 s 79(1)(c). By Land and Income Tax Amendment Act 1951 s 10 it was replaced by an enactment bringing in, as "assessable income:"

20 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.

30 In turn, this was re-enacted as Land and Income Tax Act 1954 s 88(c), which, after Land and Income Tax Amendment Act (No 2) 1965 s 7, became s 88(1)(c).

When, by Land and Income Tax Amendment Act 1973 s 9(1), s 88AA --- the focus of this Appeal --- was enacted, s 9(2) provided that:

10 Section 88 of the principal Act is hereby consequentially amended by omitting from paragraph (c) [the expression "of subsection (1)" should have been, but was not, included] the words "real or personal property or any interest therein," and substituting the words "personal property or any interest therein not being property or any interest therein which consists of land within the meaning of section 88AA of this Act".

[Pp 22-23
post]

133 39-56 The effect of the amendments introduced by s 9 was to create an overlap between s 88AA(1)(d),(e) on the one hand, and the last "limb" of s 88(1)(c), on the other hand; and otherwise was to extend the tax net to gather-in the proceeds of more land transactions than previously had fallen under s 88(1)(c): per Richardson J in the Court of Appeal. In the process the "profits or gains" formula was repeated.

129 35-40
[Cooke J]

20 It is not the Appellants' case that the Court of Appeal was wrong in finding that, in enacting s 88AA(1)(d), Parliament had no intention of altering the scope of the "profits or gains" formula it had used consistently since 1912.

The Appellants will respectfully submit, however, that that finding does not determine the issue raised by their objection to the assessments. They will submit that, while the concept underlying this expression has remained unchanged, the manner in which that concept is

to be measured or evidenced, if it is to be expressed accurately, has been required to change.

(iii) "Underlying assumption"

153 22-23 Numerous other provisions of the Land and Income Tax Act 1954 "assume that constant dollar figures will be employed," and "assume the use of nominal dollars and the disregarding of any changes in the value of the dollar over time:" per Richardson J in the Court of Appeal.

153 41-43 10

153 23-28 THE FIRST PROVISIONS relevant in this context are those Richardson J mentions as being to the effect that the "charge for tax is in respect of income derived at any time during the particular income year. It assumes the use of nominal dollars even though particular items may be separated in time by almost 12 months." His Honour appears to have had in mind ss 77 and 78 of the Land and Income Tax Act 1954.

[Pp 25, 29 post]

153 29-30 20 The second type of provision, held by the learned judge to reflect the same assumption, is that which embodies the machinery relating to "payment and refund of taxes whatever time lapse is involved." This appears to have been intended as a reference to payment provisions such as s 208, and the PAYE provisions enacted in the Income Tax Assessment Act 1957; and to such refund provisions as ss 33, 223.

[P 30 post]

153 31-37 The third class of enactment mentioned is the "standard value" provision for some "trading stock." This reference, apparently, is to s 98.

[Pp 30-33
post]

153 37-38 Richardson J's fourth and fifth references, to "provisions for the spreading and recapture of revenue items", appear to have been to enactments such as ss 96, 96A, 97, and 97A, which are "spreading" provisions, and to s 119E, which is a "recapture" provision.

[Pp 33-38
post]

153 38-40 His Honour's sixth reference, to "provisions for retro-
10 spective adjustments to assessable income in various situations," appears to contemplate provisions such as ss 94 and 117(1).

[Pp 38-39
post]

The Appellants will respectfully submit that the provisions falling within these six categories create no context sufficient to include inflation in the charge enacted by s 88AA.

(iv) "Secretan v Hart and the absence of machinery"

20 In Secretan v Hart (Inspector of Taxes) [1969] 1 WLR 1599, in the context of a statute explicitly enacting a method of computation, Buckley J (as he was then) had seen the lack of inflation-adjusting machinery as an obstacle to paying any regard to inflation. Roper J referred to this as "reasoning I adopt;" and, in the Court of Appeal, Cooke J agreed, adding that he did so because "the complications of allowing for inflation are so formid-
109 1
130 6-10

142 51-55

10

152 2-4

able." In another part of the case before the Court of Appeal Richardson J had expressed the view that "Difficulty or complexity of calculation is insufficient to overcome the requirement...that any such profits or gains must be assessed." Yet, in respect of the inflation issue, His Honour saw it as indicative, that Parliament intended that inflation should not be allowed for, that "it would have been necessary to provide appropriate machinery for that purpose" and that has not been done.

AS TO THE lack of machinery, the Appellants will submit that, when s 88AA is to be invoked, the Act is silent, and inoperative, until the "profit or gain" first has been ascertained. Accordingly, the "profit or gain" is to be calculated in the light of appropriate accounting principles, and the mode of calculation is not governed by the legislation.

20

The reasoning of Buckley J in Secretan v Hart was directed to Finance Act 1965 s 19(1), which took the opposite approach: making tax exigible on "chargeable gains computed in accordance with this Act"

His Lordship therefore was faced with express statutory machinery for computation, which he summarised:

30

Section 22, the first of the sections in the part of the Act dealing with chargeable gains, provides in subsection (9) that 'The amount of the gains accruing on the disposal of assets shall be computed in accordance with Part I of Schedule 6 to this Act' subject to certain provisions in other schedules.

So one turns to Schedule 6 and finds that paragraph 4 provides as follows:

10 "Subject to the following provisions of
 this schedule, the sums allowable as a
 deduction from the consideration in the
 computation under this schedule of the
 gain accruing to a person on the disposal
 of an asset shall be restricted to --- (a)
 the amount or value of the consideration,
 in money or money's worth, given by him or
 on his behalf wholly and exclusively for
 the acquisition of the asset, together
 with the incidental costs to him of the
 acquisition or, if the asset was not
 acquired by him, any expenditure wholly
 and exclusively incurred by him in
 providing the asset, (b) the amount of any
 expenditure wholly and exclusively
 incurred on the asset by him or on his
 20 behalf for the purpose of enhancing the
 value of the asset, being expenditure
 reflected in the state or nature of the
 asset at the time of the disposal, and any
 expenditure wholly and exclusively incur-
 red by him in establishing, preserving or
 defending his title to, or a right over,
 the asset, (c) incidental costs to him of
 making the disposal."

30 Those are the matters which a taxpayer who has
 disposed of an asset is entitled to deduct
 from the consideration which he received upon
 the disposal.

Ibid 1602 E-H.
 [Counsel's emphases.]

 It will be respectfully submitted that these express
 statutory requirements, that the "gain" be "computed in
 accordance with" specific provisions, and that reduct-
 ions in the gross proceeds were to be "restricted to"
 the "sum" and "amounts" the taxpayer had "given" and
 40 expressly was "entitled to deduct:" clearly determined
 that the historic figure of cost, alone, was the
 starting-point in the profit calculation in that case.

(v) "Contractual principles govern"

There is "no legal principle which allows a debtor to calculate an internal debt by reference to changes in the value of money and there is no indication in the tax legislation that any different approach is to be taken here": per McMullin J in the Court of Appeal.

168 15-19

AS TO THIS, the Appellants will submit that the question
 10 of what constitutes performance of a contract raises an
 issue quite distinct from the question of whether one of
 the contracting parties has made a "profit or gain" by
 that performance.

IV CONTENTIONS TO BE URGED BY THE APPELLANTS**Appellants' case**

18 The Appellants will submit that, to the extent
 to which the arithmetical difference between
 their costs, calculated on the historic basis, and their
 realised proceeds, on the 6 dispositions between 10
 20 August 1973 and 31 March 1974, represents the effect of
 inflation, that difference is not part of the "profits
 or gains" reached by s 88AA (1) (d). That submission
 will be made on the basis of the reasons summarised in
 the following 7 paragraphs.

Scope of the charge to tax

19 Section 88AA stands outside the general scheme

of the Act: which is that specifically allowable deductions are subtracted from gross receipts to arrive at what, apart from exemptions and rebates, will be the taxable figure.

20 For the purposes of a provision such as s 88AA
 (1)(d), until the net figure is reached there is
 nothing to which the Act begins to apply: cf Investment
 and Merchant Finance Corporation Ltd v FCT (1971) 125
 CLR 249, 264 per Menzies J in the Full High Court, and
 10 FCT v Whitfords Beach Pty Ltd (1982) 56 ALJR 240, 250F,
 right-hand column, per Mason J, also in that Court, in
 each case construing s 26(a), appearing in the Third
 Schedule.

[P 39 post]

Commercial understanding of "profit"

21 Although this case is not concerned with trading
 profits, the Appellants will rely on the rule
 applicable to such profits, namely, that it is the true
 profit which is to be ascertained, and it is to be
 ascertained "in a sense which no commercial man would
 20 misunderstand:" Gresham Life Assurance Society v Styles
(Surveyor of Taxes) [1892] AC 309, 315 per Lord Halsbury
 LC.

37 40-49
 38 11-18
 39 9-16
 [Brash]

22 The commercial man of today well understands
 that, if costs are measured in historic terms,
 rather than in real, current, terms, the resultant

figure is not truly a "profit".

23 The Appellants will rely also on the principle underlying this dictum from the judgment of Lord Atkin in Absalom v Talbot [1944] AC 204:

10 To my mind, to treat money to be paid twenty years hence as producing a profit this year equal to money in fact paid this year is to produce a completely unreal conception of yearly profit, and I venture to think quite foreign to any commercial ideas on the subject. ...

Ibid 215.

In their respectful submission, it is equally true that to treat money paid --- as in this case --- in 1961, as having involved a "cost" of no more than the face value of that money, for the purposes of a "profit" calculation in respect of a sale in 1973: is to produce a completely unreal conception of the "profit" on the transaction. There is "no serious dispute among the members of the New Zealand business and commercial community" as to that.

37 40-49
[Brash]

20

Contrary accountancy practice not paramount

24 The Appellants will respectfully submit that the business and commercial sense of the matter prevails over any amount of contrary accounting practice. They will refer to Sun Insurance Office v Clark [1912] AC 443, 454 per Earl Loreburn LC; Patrick (Inspector of Taxes) v Broadstone Mills Ltd [1954] 1 WLR 158, 173-174

per Singleton LJ; Ostime v Duple Motor Bodies Ltd [1961] 1 WLR 739, 747 per Lord Simmonds; Arthur Murray Pty Ltd v FCT (1965) 114 CLR 314, 318 per the Full Court (Barwick CJ and Kitto and Taylor JJ) of the High Court of Australia; and Odeon Associated Theatres Ltd v Jones (Inspector of Taxes) [1972] 2 WLR 331, 336 per Salmon LJ, 340 per Buckley LJ.

V THE REASONS OF APPEAL

Decisions below not in conformity with true principle

10 25 It will be respectfully submitted that this appeal should be allowed, and the decision of the Court of Appeal set aside, for the following, among other, REASONS, that:

20 i There is no statutory context requiring that, for the purposes of s 88AA, the "profit" should consist in the entire arithmetical difference between the number of dollars outlaid on acquisition and the number received on disposition. All that is laid down is the concept. The mode of measurement is at large.

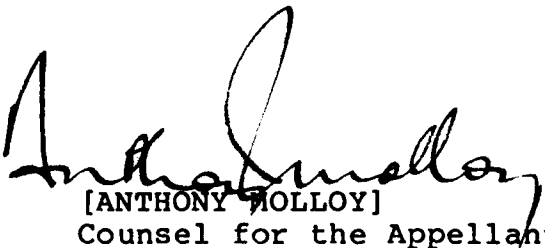
ii In a period of continuing monetary debasement, any mode of measurement which would calculate "cost" in terms of the "historic" figure cannot yield a true reflex of profit, where, as in this case, there is a significant time lag between purchase and sale.

30 iii To the extent to which the arithmetical excess of the Appellants' proceeds over "historic" cost is attributable to inflation, and a failure to compare like with like: it represents part of the very capital or wealth outlaid on the acquisition, rather than a surplus after recovery of that capital. On that account it is outside the statutory concept, because it is not the true "profit".

- iv Because the Respondent's assessment was based on the "historic" cost convention, and hence on that arithmetical difference, the judgments of the Courts below were wrong to have upheld it.
- v In the case of s 88AA, the means of measurement to be adopted is one which calculates the "cost" in terms of the money in which the proceeds of disposition are measured.

10

AND FOR THE REASONS advanced in this Case.


 [ANTHONY MOLLOY]
 Counsel for the Appellants

FIRST SCHEDULE: SECTION 88AA, PROVIDING THE IMMEDIATE CONTEXT OF SUBSECTION (1)(d)

88AA Profits or gains from land transactions --- (1)
 For the purposes of paragraph (cc) of subsection (1) of section 88 of this Act, the assessable income of any taxpayer shall be deemed to include---

- 20 (a) All profits or gains derived from the sale or other disposition of any land if the land was acquired for the purpose or intention, or for purposes or intentions including the purpose or intention, of selling or otherwise disposing of it:
- (b) All profits or gains derived from the sale or other disposition of any land where the taxpayer, or any other person where the taxpayer and that other person are associated persons,
 30 carried on, at the time the land was acquired, the business of dealing in land, and---
- (i) That land, which was sold or disposed of by the taxpayer, was acquired by that taxpayer for the purpose of that

business of dealing in land; or

(ii) That land was sold or disposed of by the taxpayer within 10 years after the date on which it was acquired by the taxpayer:

10 (c) All profits or gains derived from the sale or other disposition of any land, where the taxpayer, or any other person where the taxpayer and that other person are associated persons, carried on, at the time the land was acquired, the business of erecting buildings, and the taxpayer or that other person carried out, whether before or after the acquisition of that land by that taxpayer, any improvements, not being improvements of a minor nature, to that land (whether by way of erecting a building or otherwise); and---

20 (i) That land, which was sold or disposed of by the taxpayer, was acquired for the purpose of that business of erecting buildings; or

(ii) That improved land was sold or disposed of by the taxpayer within 10 years after the date on which those improvements were completed:

(d) All profits or gains derived from the sale or other disposition of land where---

30 (i) An undertaking or scheme, whether or not an adventure in the nature of trade or business, involving the development or division into lots of that land has been carried on or carried out, and the Commissioner is satisfied that that development or division work, not being work of a minor nature, has been carried on or carried out by or on behalf of the taxpayer on or in relation to that land; and

40 (ii) That undertaking or scheme was commenced within 10 years of the date on which that land was acquired by the taxpayer:

(e) All profits or gains, not being profits or gains which are included in the assessable income pursuant to any of the paragraphs (a), (b), (c), and (d) of this subsection, derived from the sale or other disposition of any land to the extent that those profits or gains are

10 derived from the carrying on or the carrying out of any undertaking or scheme, whether or not an adventure in the nature of trade or business, involving the development or division into lots of that land, and the Commissioner is satisfied that that development or division work (being work involving significant expenditure on earthworks, contouring, levelling, drainage, roading, kerbing, or channelling or on any other work, service, or amenity customarily undertaken or provided in major projects involving the development of land for industrial, commercial, or residential purposes) has been carried on or carried out by or on behalf of the taxpayer on or on relation to that land.

(2) [Omitted: provides that paragraphs (a), (b), and (c) of subsection (1) do not apply in certain cases involving the sale of a dwelling or of business premises.]

20 (3) Paragraphs (d) and (e) of subsection (1) of this section shall not apply to the sale or other disposition of any land by any taxpayer where that land is a lot resulting from the division into 2 or more lots of a larger area of land (being an area which before any division by the taxpayer did not exceed 4,500 square metres) which was occupied by that taxpayer primarily and principally as residential land for himself and any member of his family living with him.

30 (4) Paragraphs (d) and (e) of subsection (1) of this section shall not apply to the sale or other disposition of any land in any case where ---

(a) That land is a lot resulting from the division into 2 or more lots of a larger area of land which, immediately before that division, was occupied or used by the taxpayer primarily and principally for the purposes of a farming or agricultural business carried on by the taxpayer; and

40 (b) The Commissioner is satisfied, after, if he considers it necessary, consultation with the Director-General of Agriculture and Fisheries or any other person, that that land is of such an area and nature that it is then capable of being worked as an economic unit as a farming or agricultural business: and

(c) Having regard to the circumstances of the sale or other disposition of that land (including the value of the consideration for which that land is sold or otherwise disposed

10 of, current prices paid for land in the vicinity of that land, the terms of the sale or other disposition, any zoning or other classification relating to that land, the proximity of that land to any other land used or being developed for uses other than farming or agricultural uses) the Commissioner is satisfied, after, if he considers it necessary, consultation with the Director-General of Agriculture and Fisheries or any other person, that that land was sold or otherwise disposed of primarily and principally for the purposes of the use of that land in any farming or agricultural business.

(5) For the purposes of paragraph (e) of subsection (1) of this section the Commissioner may ascertain the value of any land at the date of the commencement of any undertaking or scheme referred to in that paragraph in such manner as he thinks fit.

20 (6) For the purposes of this section, the expression "land" includes ---

(a) Any estate or interest in land, whether legal or equitable, corporeal or incorporeal, freehold or chattel; and

(b) Any option to acquire land or any such estate or interest in land,

but does not include a mortgage.

30 (7) This section shall apply where the land sold or otherwise disposed of constitutes the whole or part of any land to which this section applies or the whole or part of any such land together with any other land.

(8)-(11) [Omitted: deal with transactions between "associated persons."]

SECOND SCHEDULE : THE GENERAL CONTEXT AND SCHEME OF THE ACT

Context of the "underlying assumption" reasoning

The "underlying assumption" head of reasoning of the Court of Appeal, on which the submissions to be made are set out at pages 13 and 14 ante, appears to require consideration of a substantial number of provisions in

the Land and Income Tax Act 1954. The salient part of the enactments apparently in the mind of that Court are now cited, together with the provisions which appear to be necessary to place the terminology of those enactments in perspective.

The charge for tax

10 77 Income tax imposed --- (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 1st day of April in each year, a tax herein referred to as income tax... .

(2) Subject to the provisions of this Act income tax shall be payable by every person on all income derived by him during the year for which the tax is payable.

20 (3) The year in which income is so derived is in this Act referred to as the income year, and the year...for which income tax is payable is in this Act referred to as the year of assessment.

"All income"

The charge on "all income" in s 77(2) is "subject to the provisions of [the] Act," and, apart from a number of provisions each making certain types of income wholly exempt from income tax [eg s 86C makes dividends derived from other companies, by a New Zealand resident company, so exempt], s 86 is a general provision providing that a wide range of
30 incomes [eg that of the Governor-General in respect of his office; of building societies; and of charities] "shall be exempt from taxation."

Apart from this general exemption, applying to those categories of income, there are also classes of expenditure which qualify the taxpayer for a limited exemption, of a corresponding amount of income, called a "special exemption." For example, subject to an upper limit, charitable donations and school fees qualify for this purpose by virtue of s 84B, as do life assurance premiums by virtue of s 85.

"Assessable income"

10 Against that background, the interpretation section, 2, enacts that

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

Section 88 sets out the main categories:

20 88 Items included in assessable income --- (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,---

(a) All profits or gains derived from any business (including any increase in the value of stock in hand at the time of the transfer or sale of the business, or on the reconstruction of a company):

30 (b) All salaries, wages, or allowances (whether in cash or otherwise), including all sums received or receivable by way of bonus, gratuity, extra salary, compensation for loss of office or employment, or emolument of any kind, in respect of or in relation to the employment or service of the taxpayer:

(bb) All payments of earnings related compensation (as defined in section 2 of the Accident Compensation Act 1972) and of compensation under subsection (4) of section 121 of that Act, not being payments ---

(i) Which are recovered or recoverable by the Accident Compensation Commission under paragraph (a) of subsection (3) of section 131 or subsection (4) of section 134 of that Act; or

10 (ii) In respect of which an amount equal thereto is refunded to the Social Security Commission by the Accident Compensation Commission under subsection (3) of section 134 of the Accident Compensation Act 1972:

20 (c) All profits or gains derived from the sale or other disposition of any personal property or any interest therein (not being property or any interest therein which consists of land within the meaning of section 88AA of this Act), 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:

(cc) All profits or gains derived from the sale or other disposition of any land within the meaning of section 88AA of this Act, being profits or gains to which that section applies:

30 (d) All rents, fines, premiums, or other revenues (including payment for or in respect of the goodwill of any business, or the benefit of any statutory licence or privilege) derived by the owner of land from any lease, licence, or easement affecting the land, or from the grant of any right of taking the profits thereof:

(e) All royalties or other like payments dependent upon production from or the use of any real or personal property, whether or not they are instalments of the purchase price of any property:

40 (ee) All payments for the supply, in connection with the carrying on of a business, of scientific, technical, industrial, or commercial knowledge, information, or assistance, not being payments which the Commissioner is satisfied constitute wholly reimbursement of expenditure that is ---

(i) Of a kind that is deductible under this Act; and

50 (ii) Is incurred, in relation to the payments, by the persons to whom the payments are made:

(eee) All payments to members or contributors of superannuation schemes, being payments to which section 88BB of this Act applies:

(f) All interest, dividends, annuities, and pensions:

10 Provided that where any securities have been acquired by purchase or otherwise during the income year, the Commissioner may, where he considers it equitable so to do, apportion between the transferor and the transferee any interest due or accruing due at the date of the transfer and not then paid:

20 (ff) The amount received by a taxpayer on the redemption of a commercial bill owned by him to the extent to which that amount exceeds the cost to him of that bill, or, where the bill is not redeemed by the taxpayer but is disposed of by him, whether by way of sale, gift, conversion, or otherwise howsoever, the value of that bill on the day of disposal to the extent to which that value exceeds the cost to the taxpayer of that bill:

(g) Income derived from any other source whatsoever.

(2) [Repealed.]

(3) For the purposes of paragraph (ff) of subsection (1) of this section ---

30 (a) Where a registered Treasury Bill is disposed of to a person by sale, gift, or otherwise howsoever, that person shall be deemed to have purchased it at a cost equal to its value on the day of disposal:

(b) Where a person who owns a registered Treasury Bill dies,---

(i) He shall be deemed to have sold the Bill on the day of his death; and

40 (ii) The trustee of that person, or where the Bill is owned by that person jointly with any other person or persons, the person or persons on whom it devolves by reason of the death, shall be deemed to have purchased it on the day of the death at a cost equal to its value on that day.

(4) For the purposes of paragraph (ff) of subsection (1) of this section and of subsection (3) of this section, the terms "registered

Treasury Bill" and "Bill" include an interest in any such Bill.

"Taxable income"

Once any applicable special exemptions have been calculated and deducted, the result is defined by section 2:

10 "Taxable income" means the residue of assessable income after deducting the amount of all special exemptions to which the taxpayer is entitled.

Quantification

It is that residue figure to which the rates are applied.

78 Rates to be fixed by annual taxing Act ---
(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.

20 (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.

The "annual taxing Act" each year specifies a rate of tax applicable to every dollar falling within each of a number of specified steps of taxable income.

Payment of taxes

Various payment dates are enacted in respect of different categories of taxpayer. One sanction for not meeting the relevant rate is found in section

30 208 If default made in payment of tax, additional tax to be charged --- (1) Subject to the provisions of this section, if any tax remains unpaid at the expiration of 1 month after the due date thereof (whether already

assessed or not), or after the date of demand, as the case may be, 10 percent on the amount of the tax unpaid shall be and be deemed to be added thereto by way of additional tax, and shall be payable accordingly.

Refund of taxes

10 33 Obligation to pay tax not suspended by objection or appeal --- The obligation to pay and the right to receive and recover any tax shall not be suspended by any objection, appeal, or case stated; but, if the objector succeeds, the amount (if any) of the tax received by the Commissioner in excess of the amount which, according to the decision on the hearing of the objection, appeal, or case stated, was properly payable shall forthwith be refunded to him by the Commissioner.

20 223 Refund of excess tax --- (1) In any case where the Commissioner is satisfied that tax has been paid in excess of the amount properly payable, he shall refund the amount paid in excess:

30 Provided that, subject to subsection (2) of this section, no refund shall be made under this section after the expiration of the period of 8 years immediately after the end of the year in which the assessment was made or, in any case where the original assessment has been altered (whether once or more than once), after the end of the year in which the original assessment was made, unless written application for the refund is made by or on behalf of the taxpayer before the expiration of that period.

...

"Standard value" for some "trading stock"

40 98 Valuation of trading stock, including live-stock. Standard values --- (1) For the purposes of this section the term "trading stock" includes anything produced or manufactured, and anything acquired or purchased for purposes of manufacture, sale, or exchange; and also includes livestock; but does not include land.

...

(2) Where any taxpayer owns or carries on

any business, the value of his trading stock at the beginning and at the end of every income year shall be taken into account in ascertaining whether or not he has derived assessable income during that year.

10 (3) The value of the trading stock of any taxpayer to be taken into account at the beginning of any income year shall be its value as at the end of the last preceding income year:

Provided that where the taxpayer's business is commenced and his trading stock is acquired during the income year the value of the trading stock as at the beginning of the income year shall be deemed to be an amount equal to its cost price.

20 (4) The value of the trading stock of any taxpayer to be taken into account at the end of any income year shall be, at the option of the taxpayer, its cost price, its market selling value, or the price at which it can be replaced:

...

(5) Where the value of the trading stock of any taxpayer at the end of the income year exceeds the value of his trading stock at the beginning of that year the amount of the excess shall be included in his assessable income for that year.

30 (6) Where the value of the trading stock of any taxpayer at the beginning of any income year exceeds the value of his trading stock at the end of that year the amount of the excess shall be allowed as a deduction in calculating the assessable income of the taxpayer for that year.

40 (7) Where in any income year the whole or any part of the assets of a business owned or carried on by any taxpayer is sold or otherwise disposed of (whether by way of exchange, or gift, or distribution in terms of a will or on an intestacy, or otherwise howsoever, and whether or not in the ordinary course of the business of the taxpayer or for the purpose of putting an end to that business or any part thereof), and the assets sold or otherwise disposed of consist of or include any trading stock, the consideration received or receivable for the trading stock or, as the case may be, the price which under this Act
50 the trading stock is deemed to have realised

10 shall be taken into account in calculating the taxpayer's assessable income for that year, and the person acquiring the trading stock shall, for the purposes of calculating his assessable income for that year or for any subsequent income year, be deemed to have purchased it at the amount of that consideration or price. The foregoing provisions of this subsection shall, with the necessary modifications, apply in any case where a share or interest in any trading stock is sold or otherwise disposed of by any taxpayer.

20 (8) Subject to the provisions of sections 101 and 102 of this Act, the price specified in any contract of sale or arrangement as the price at which any trading stock is sold or otherwise disposed of as aforesaid shall be deemed for the purposes of this section to be the consideration received or receivable for the trading stock.

(8A) Notwithstanding anything to the contrary in subsection (4) of this section, where any taxpayer, or any person acting on behalf of the taxpayer, is the holder of a grape wine licence granted under Part IV of the Sale of Liquor Act 1962 or of a licence to distil spirits granted under Part II of the Distillation Act 1971, and the assets of the taxpayer include trading stock, being -

- 30 (a) Wine; or
 (b) Brandy; or
 (c) Whisky ---

which is manufactured in New Zealand and is held as reserve stock for maturity purposes, the taxpayer may, with the concurrence of the Commissioner, adopt and fix a standard value in respect of that trading stock or in respect of any class of that trading stock:

40 Provided that in any case where a standard value has been so fixed, the taxpayer may adopt or the Commissioner may require the adoption of the true value instead of the standard value or the taxpayer may, with the concurrence of the Commissioner, adopt another standard value instead of the standard value fixed as aforesaid:

Provided also that the adoption of a standard value, or the adoption of the true value

instead of a standard value, or any alteration in the standard value as herein provided shall first take effect at the end and for the purposes of the income year or other period to which any return of assessable income relates.

...

10 (9) Notwithstanding anything to the contrary in subsection (4) of this section, any taxpayer who derives income from livestock (other than livestock used in dealing operations) may with the concurrence of the Commissioner adopt and fix a standard value in respect of that livestock or in respect of any class of such livestock. In any case where a standard value has been so fixed the taxpayer may adopt or the Commissioner may require the adoption of the true value instead of the standard value, or the taxpayer may, with the concurrence of the Commissioner, adopt another standard value
20 instead of the standard value fixed as aforesaid:

Provided that the adoption of a standard value, or any alteration in the standard value as herein provided shall first take effect at the end and for the purposes of the income year or other period to which any return of assessable income relates.

...

Spreading of revenue items

30 96 Spreading of income derived from sale of timber from farms --- (1) Where a taxpayer derives income in any income year from the sale of timber from trees planted to provide shelter or to prevent erosion or otherwise for agricultural or pastoral purposes on farming land owned or occupied by the taxpayer or from trees planted or maintained under a forestry encouragement agreement under the Forestry Encouragement Act 1962, the Commissioner may,
40 upon application made in writing by or on behalf of the taxpayer not later than 12 months after the end of that income year, apportion that income between that income year and any number of subsequent years not exceeding 4, and in every such case the amount of income so apportioned to any income year shall be deemed to have been derived in that year.

...

10 96A Spreading of income derived by land dealers
 on acquisition of land by Crown --- (1) Where a
 taxpayer derives income in any income year from
 the disposition to the Crown of any land owned
 by the taxpayer, whether the land is taken under
 the Public Works Act 1928 or otherwise acquired
 by the Crown, the Commissioner may, upon
 application made in writing by or on behalf of
 the taxpayer within 12 months after the end of
 that income year or within such further period
 as the Commissioner in his discretion allows,
 and, if required by the Commissioner, upon the
 taxpayer making arrangements to the satisfaction
 of the Commissioner for the payment of all
 income tax that is or may become payable in
 respect of that income, apportion that income
 between that income year and any number of
 subsequent years not exceeding 3, and in every
 such case the amount of income so apportioned to
 20 any income year shall be deemed to have been
 derived in that year.

...

30 97 Sums received from sale of patent rights
 ---(1) Where any taxpayer sells any patent
 rights, any sum received by him or owing to
 him in respect of the sale, after deducting
 the appropriate amount specified in subsection
 (2) of this section (so far as that amount has
 not been otherwise allowed as a deduction from
 his assessable income for that or any other
 income year), shall be deemed to be assessable
 income and shall be deemed to be derived by
 the taxpayer during the income year in which
 the sum is received by or becomes owing to
 him:

40 Provided that the Commissioner may, upon
 application made in writing by or on behalf of
 the taxpayer not later than 12 months after
 the end of that income year or within such
 further period as the Commissioner in his
 discretion allows, apportion that income
 between that income year and any number of
 subsequent years not exceeding 5, and in every
 such case the amount of income so apportioned
 to any income year shall be deemed to have
 been derived in that year.

50 (1A) Any apportionment made under subsection
 (1) of this section may be at any time
 cancelled by the Commissioner, and in every
 such case the whole of the income so appor-
 tioned shall be deemed to have been derived in
 the income year immediately preceding the year
 in which the apportionment is cancelled,

except to the extent to which the income has been apportioned to and assessed for any earlier income year.

(2) The total amount that may be deducted from any such sum shall, ---

10 (a) Where the taxpayer actually devised the invention to which the patent relates, be the amount of the expenditure incurred by the taxpayer in connection with the devising of the invention, or (where the sale does not include the whole of the patent rights in respect of the invention) such proportion of that expenditure as the Commissioner thinks just:

20 (b) Where the taxpayer acquired the patent rights, be an amount bearing to the total cost of the patent rights to the taxpayer the same proportion as the unexpired term of the patent rights at the date of the sale bears to the unexpired term thereof at the date of their acquisition by the taxpayer.

30 (3) For the purposes of this section the sum received by or owing to any taxpayer in respect of the sale of any patent rights shall be deemed to include the value of any consideration received or owing in respect of the sale otherwise than in cash; and the value of that consideration shall be determined in case of dispute by the Commissioner.

(4) [Repealed.]

(5) The foregoing provisions of this section shall, as far as they are applicable and with the necessary modifications, apply in any case where the sale is in respect of a share or interest in any patent rights.

40 **97A Spreading of income derived from the assignment of or grant of an interest in copyright --- (1) For the purposes of this section ---**

"Author" includes a joint author:

"Lump sum payment" includes an advance on account of royalties:

"First publication", in relation to a work, means the first occasion on which the work or a reproduction of it is

published, performed, or exhibited.

(2) Where ---

(a) A taxpayer being an author of a literary, dramatic, musical, or artistic work assigns the copyright therein wholly or partially, or grants any interest in the copyright by licence; and

10 (b) The taxpayer was engaged on the making of the work for a period of more than 12 months, ---

the following provisions of this section shall apply.

(3) To the extent that the consideration for the assignment or grant consists of a lump sum payment the whole amount of which would, but for this section, be included in calculating the taxpayer's assessable income for any 1 income year, the Commissioner may, upon
20 application made in writing by or on behalf of the taxpayer not later than 6 years after the end of that income year, apportion the amount of the payment equally between that income year and ---

(a) The income year immediately preceding that income year, in any case where the period for which the taxpayer was engaged on the making of the work did not exceed 24 months:

30 (b) The 2 income years immediately preceding that income year, in any case where the period for which the taxpayer was engaged on the making of the work exceeded 24 months, ---

and in every such case the amount so apportioned to any such income year shall be deemed to have been derived in that year.

(4) To the extent that the consideration for the assignment or grant consists of any payments to which subsection (3) of this section does not apply, of or on account of royalties or otherwise, that have been received by the taxpayer within 2 years after the first publication of the work and the whole amount of which would, but for this section, be included in calculating the taxpayer's assessable income for any one
40

10 income year, the Commissioner may, upon application made in writing by or on behalf of the taxpayer not later than 8 years after the first publication of the work apportion the amount of those payments equally between that income year and the income year immediately preceding that income year, and in every such case the amount so apportioned to any such income year shall be deemed to have been derived in that year.

(5) Notwithstanding anything to the contrary in section 24 of this Act, the Commissioner may, for the purpose of giving effect to this section, amend any assessment or assessments of the taxpayer at any time.

20 (6) The foregoing provisions of this section shall, with all necessary modifications, apply with respect to any income derived by an author from the publication by him of his own work, being income that, in the opinion of the Commissioner, it is equitable to apportion, in the same manner as those provisions apply with respect to any payments to which subsection (4) of this section applies.

Recapture of revenue items

119E Expenditure on farming or agricultural land sold within 5 years after acquisition ---

30 (1) Where any land together with the improvements thereon is sold by a taxpayer within 5 years from the date of his acquisition of that land, and the taxpayer has been allowed as a deduction in calculating his assessable income expenditure in respect of that land which, but for section 119 of this Act (or the corresponding provisions of this Act that were in force before the commencement of section 7 of the Land and Income Tax Amendment Act 1961) or section 119D or section 119G of this Act, would not have been allowable as a deduction,

40 the amount by which the selling price of the land and improvements exceeds the aggregate amount consisting of the original purchase price and any expenditure on improvements for which no deduction has been allowed under this Act in calculating his assessable income shall be deemed to be assessable income derived by the taxpayer in the year in which the property is sold, to the extent of the total deductions allowed under section 119 of this Act (or the corresponding provisions of this Act as

50 aforesaid) or section 119D or section 119G of this Act since the acquisition of the land:

10 Provided that, if the taxpayer so elects, the Commissioner may, notwithstanding anything to the contrary in section 24 of this Act, make a revised assessment or assessments in respect of any year in which a deduction has been allowed under section 119 of this Act (or the corresponding provisions of this Act as aforesaid) or section 119D [[or section 119G]] of this Act without allowing that deduction or without allowing such portion thereof as he thinks fit, and may recover the additional amount of tax accordingly.

...

Retrospective adjustments to assessable income

20 **94 Amounts remitted to be taken into account in computing income ---** (1) Where the amount of any expenditure or loss incurred by a taxpayer has been taken into account in calculating his assessable income for any income year, and subsequently the liability of the taxpayer in respect of that amount is remitted in whole or in part, the assessable income derived by the taxpayer during that year shall be deemed to be increased by the amount so remitted, and the taxpayer shall be assessable and liable for income tax accordingly.

(2) [Repealed.]

30 (3) For the purposes of this section a liability in respect of any expenditure or loss shall be deemed to have been remitted to the extent to which the taxpayer has been discharged from that liability without fully adequate consideration in money or money's worth.

(4) For the purposes of giving effect to the provisions of this section, the Commissioner may at any time alter any assessment, notwithstanding anything to the contrary in section 24 of this Act.

40 **117 Revised assessments where assets sold after deduction of depreciation allowances ---** (1) Where the Commissioner has, for any year of assessment (whether before or after the commencement of this subsection), allowed a deduction in respect of the depreciation of any asset (including a building), and the taxpayer at any time afterwards sells or otherwise disposes of that asset at a price or for a consideration in excess of the amount to

which the value of the asset has been reduced by that allowance, the Commissioner may make a revised assessment for that or any subsequent year without allowing that deduction or without allowing such portion thereof as he thinks fit, and may recover the additional amount of income tax accordingly:

10 Provided that in any case where the asset comprises a building (other than a temporary building) the foregoing provisions of this subsection shall not apply in respect of any deduction allowed by way of depreciation under section 113 of this Act or the corresponding provisions of any former Act or under section 113AA of this Act.

...

THIRD SCHEDULE : THE AUSTRALIAN LEGISLATION INVOLVED
IN THE AUTHORITIES CITED AT PAGE 18 OF THIS CASE
FOR THE APPELLANTS

20 The legislative context of the dicta referred to in paragraph 20 at page 18 of this Case for the Appellants comprised the 2 following enactments from the Income Tax Assessment Act 1936 (Cth):

25(1) The assessable income of a taxpayer shall include ---

(a) Where the taxpayer is a resident ---
the gross income derived directly or indirectly from all sources whether in or out of Australia

30 26 The assessable income of a taxpayer shall include ---

(a) profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale, or from the carrying on or carrying out of any profit-making undertaking or scheme
... .

IN THE PRIVY COUNCIL

No 16. of 1983

O N A P P E A L
FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

PAUL DOUGLAS LOWE, HERBERT MONTY LOWE,
and KEITH LOWE

Appellants

- and -

The COMMISSIONER OF INLAND REVENUE

Respondent

CASE FOR THE APPELLANTS

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