COMPTROLLER OF STAMPS v. JOE WHITE MALTINGS PTY. LTD.[1]

Stamp Duty—Sale of Shares—Bona Fide Adequate Pecuniary Consideration

Joe White and Co. Pty. Ltd. carried on business as maltsters, indentors and graziers. It was decided to divide the business; a new company was to be created to take over the malting business, while the old company continued the business of indentors and graziers. On 2 April 1951 the old company changed its name to Joe White Indentors Pty. Ltd., and the new company Joe White Maltings Pty. Ltd., was incorporated. On 16 April 1951 the old company sold to the new company certain assets, including land and buildings. The consideration for the land was stated as £48,922, being the value of this property as listed in the books of the old company. On 25 May shares were allotted in the new company. The shareholders were substantially the same as the shareholders in the old company, except for six additional shareholders who held about two *per centum* of the shares. The new company valued the freehold land and buildings at £310,250, and on 9 July the directors wrote up the value of the land by £261,727. On 17 August the transfer was executed. The Comptroller of Stamps considered that in view of the inadequacy of the consideration, the instrument of transfer was taxable as a deed of gift under Division IX of the Stamps Act 1946 (Vic.).[2] The case stated was referred to the Full Court by Sholl J.

Faced with interpreting provisions which 'have often been described as confused, and almost unintelligible'[3] the court applied the decision of the High Court of Australia in the *Cuming Campbell* case,[4] and held that the instrument was not dutiable as a gift but dutiable as a sale under section VI (B) (4) of the Third Schedule.

The difficulty of reconciling the common law conception of a gift as a voluntary transfer of land without consideration with the requirements of Division IX that certain transfers for valuable consideration are chargeable as 'gifts' has resulted in a great deal of litigation. It is now established that not all transactions in which consideration is inadequate will attract duty as gifts. But there is no clear rule

[1] [1956] Argus L.R. 760. Supreme Court of Victoria; Herring C.J., O'Bryan and Hudson JJ.

[2] Division IX provides: Settlement or Gift, deed of—(1) Any instrument other than a will or codicil whether voluntary or upon any good or valuable consideration other than a *bona fide* adequate pecuniary consideration and whether revocable or not whereby any property is settled or agreed to be settled in any manner whatsoever or is given or agreed to be settled in any manner whatsoever or is given or agreed to be given or directed to be given in any manner whatsoever, such instrument not being made before and in consideration of marriage.

[3] *Collector of Imposts (Victoria) v. Cuming Campbell Investments Pty. Ltd.* (1940) 63 C.L.R. 619, 628, *per* Latham C.J.

[4] (1940) 63 C.L.R. 619.

indicating which transfers for valuable consideration do escape duty. The instant case illustrates the approach of the courts to commercial transactions.

The court reiterated the approach to the interpretation of Division IX established in previous decisions.[5] The inadequacy of consideration does not in itself bring the instrument within Division IX. The dominating words are 'gift'—'whereby any property is given or agreed to be given'. An element of benefaction in the transaction must be shown.

Arguing for the existence of this necessary element of benefaction, counsel for the Comptroller contended that the *Cuming Campbell* case[6] bound the court to look only at the instrument itself and to ignore the substantial coincidence of shareholders; that this instrument showed a purported sale at a gross undervalue from which the elements of benefaction could be implied. The court rejected this argument. The interest in the case lies in the varied reactions of the court to this submission.

Herring C.J. contented himself with a consideration of the nature of the transaction which the instrument effected. 'If it is a genuine (and not a sham) commercial transaction, the intention to give is necessarily excluded.'[7] . . . 'It becomes unnecessary to consider how far, if at all, you can in cases of this kind, where a transfer from one company to another, on completion of a genuine contract of sale between them, is under consideration, look behind the companies to their shareholders for the purpose of determining whether the transaction embodied in the transfer is one of gift.'[8]

Both O'Bryan J. and Hudson J. took a broader view. O'Bryan J. following the approach of Dixon J. and Starke J. in the *Cuming Campbell* case,[9] looked outside the transfer to the surrounding facts of the whole transaction, and in particular to the relationship of the parties to the instrument. Since the holdings of the shareholders in both companies were virtually the same, His Honour considered that the transfer was a *bona fide* commercial transaction and not a gift.

Hudson J. went further afield to define the purpose of the transaction. He inferred, from the whole series of transactions, that the transfer was executed for the purpose of allowing the old company 'to distribute capital profits in a form considered most advantageous to its shareholders'.[10]

It is submitted that the approach of O'Bryan J. and Hudson J.

[5] *Castlemaine Brewery Co. Ltd. v. Collector of Imports*, (1896) 22 V.L.R. 4; *Thompson v. Collector of Imports*, (1889) 25 V.L.R. 529; *Brette v. Collector of Imports*, (1896) 22 V.L.R. 29; *Atkinson v. Collector of Imports*, [1919] V.L.R. 105; *Collector of Imports (Victoria) v. Peers*, (1921) 29 C.L.R. 115.

[6] (1940) 63 C.L.R. 619.

[7] [1956] Argus L. R. 760, 764.

[8] *Ibid.*, 765.

[9] (1940) 63 C.L.R. 619.

[10] [1956] Argus L.R. 760, 780.

is to be preferred. As Dixon J. has said, 'to allow any transaction for value to be placed under the category of gift is to abandon a definite *discrimen,* and to make the classification depend upon matters of degree and perhaps compel an enquiry into that purpose'.[11] It is difficult to see how a court can decide whether a commercial transaction is sham or genuine without such an enquiry. Suppose in the instant case the shareholders of the new company had been the sons of the shareholders of the old company. Would so blatant a gift escape duty through the device of incorporation? Herring C.J. considered the issue of new shares a new step which the *Cuming Campbell* case prevented the court from penetrating. But in that case, the High Court had the comforting assurance that one of the additional steps (the instrument of transfer by which 75,000 shares went to the trustees at a nominal sum) was itself probably taxable. The approach of O'Bryan J. and Hudson J. suggests that courts may well look to the additional steps to show what colour they lend to the nature of the instrument itself.

It cannot be pretended that the law is satisfactory as it stands. The original fault lies with a legislature which adopted the words of the New Zealand Stamps Act 1882 and made inappropriate additions scarcely intelligible in this context. The most attractive approach to the interpretation of Division IX is that of Latham C.J. in his dissenting judgment in the *Cuming Campbell* case.[12] He considered that such an instrument should be taxed as a sale on the consideration shown in the instrument, and taxable as a gift to the extent of the inadequacy of the consideration.[13] This provides a just and simple rule. Amending legislation along these lines would relieve the courts of the difficulties encountered in the instant case.

N. R. McPHEE

CROFT v. ROSE[1]

Delegated Legislative Power—Sub-Delegation—Maxim Delegatus Non Potest Delegare

The respondent was charged before a Stipendary Magistrate with a breach of Motor Car Regulation 1954, 192 B. The magistrate dismissed the information on the ground, *inter alia,* that the regulation involved an attempted delegation of power conferred upon the Governor-in-Council by the Motor Car Act 1951, s. 91, and was there-

[11] *Collector of Imports (Victoria) v. Cuming Campbell Investments Pty. Ltd.* (1940) 63 C.L.R. 619, 642.

[12] (1940) 63 C.L.R. 619, 634.

[13] See Gift Duty Assessment Act 1947, s. 17 (Cth); Administration and Probate Act 1951, s. 4 (1) for a similar legislative approach to imposing duties.

[1] [1957] Argus L.R. 148. Supreme Court of Victoria; Herring C.J., Gavan Duffy and Hudson JJ.