CURRENT DEVELOPMENTS

Duff v *CIR* *THE INTERPRETATION OF TAX STATUTES*

The traditional wisdom of the courts has been that taxation statutes will be construed strictly, and that where there is any doubt, the benefit will be accorded to the taxpayer rather than to the Commissioner. It might be thought that this approach would be subject to modification in New Zealand because of section 5(j) of the Acts Interpretation Act 1924 which states:

> "Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purpose is to direct the doing of anything parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large and liberal construction, and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit."

The dominant purpose of a general taxation statute such as the Land and Income Tax Act 1954 or the Income Tax Act 1976 must surely be to raise revenue for the Government's use in administering the country. It might therefore be expected that, in the light of section 5(j), the courts would lean towards a construction favouring this purpose. However, as long ago as 1938 Fair J in the course of a general discussion of section 5(j) in *United Insurance* v *R* [1938] NZLR 885, 914, remarked:

> "Statutes imposing taxation in the ordinary course of raising revenue for current expenditure, or statutes interfering with vested rights, will not be extended beyond their plain meaning."

This sentiment was echoed by Turner P in *CIR* v *International Importing Ltd* [1972] NZLR 1095. His Honour said:

> "The approach enjoined by s.5(j) is normally of little material assistance in the construction of revenue statutes. The 'object of the Act' which the section designates as a key to statutory construction is often only too clearly simply to swell the general revenues of the State. Courts. . .have consistently declined to read implications into such statutes to catch a taxpayer."

And as recently as 1979, Beattie J was able to say, in *Geothermal Energy* v *CIR* [1979] 2 NZLR 324, 338:

> "If I were in any doubt about the interpretation, which I am not, then because this is a taxing statute. . .I would construe the provision contra proferentem the respondent."

However, a contrary trend has begun to show itself during the last fifteen years. In *Elmiger* v *CIR* [1966] NZLR 683, Woodhouse J (as he then was), expressed the opinion that

> "Ingenious legal devices contrived to enable individual taxpayers to minimise or avoid their tax liabilities. . .have social consequences which are contrary to the general public interest".

This consciousness of the social utility of tax suggests the possibility of construction of tax provisions in a manner less weighted against the

Commissioner and the judgment of Cooke J in the Court of Appeal in the recent case of *Duff* v *C.I.R.* CA 88/79 seems to add an interesting new dimension to this.

The provision which fell to be construed in *Duff's* case was the last limb of s.88(1)(c) of the Land and Income Tax Act 1954, which has its present equivalent in s.65(2)(e) of the Income Tax Act 1976. Section 88(1) provides that "the assessable income of any person shall for the purposes of this Act be deemed to include. . .

> (c) . . .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."

In the case in question the Commissioner assessed as income compensation which was paid by the Crown to the objectors after land which they had purchased for development and sale as a residential subdivision had been compulsorily acquired. In 1979 Beattie J held that the Commissioner had correctly assessed that part of the compensation which represented profits. The objectors appealed.

In the Court of Appeal Woodhouse P concluded that "the gain or profit resulting as it did from the initiation of the profit-making scheme originally in contemplation must be regarded as 'derived from the carrying on of that scheme". Barker J, on the other hand, said that "there was no 'carrying on'. There was, however, a 'carrying-out' of a venture".

Cooke J, however, felt able to express doubt about both these interpretations. His Honour said:

> ". . .navigation is complicated here by the fact that the unexpected compulsory taking put an end to the scheme of the appellants. Notwithstanding the impressive support which the view has attracted, I must admit to doubt as to whether in these circumstances the profits can fairly be said to be derived from either the carrying on or the carrying out of an undertaking or scheme. On the natural and ordinary meaning of words, which there is every reason to grasp at, not least in the tax Act, I would be tempted to think that they were derived rather from the frustration of an undertaking or scheme".

His Honour however chose not to dismiss the other interpretations as untenable, preferring instead to examine the opening words of s.88(1). He concludes that the words

> "(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. . ."

must be seen as a general statement of the intention of Parliament to tax what is ordinarily thought of as income.

He continues:

> "On this approach the appeals would fail on the short ground that the lettered paragraphs [of s.88(1)] are not exhaustive but are intended to enlarge the ordinary concept of assessable income and in the ordinary concept that which is received as compensation for the loss of income should itself be regarded as income. *If this be alleged to be too bold an approach to statutory interpretation, I can only say that it seems to me manifestly in accord with the intention of Parliament evinced by the subsection as a whole*". (Italics added).

It is not clear whether His Honour adverted to the presence in s.88(1) of paragraph (g) which adds to the scope of the subsection

> "Income derived from any other source whatsoever"

and if so, what effect he thought this had on the introductory words. But what is clear is that he adopted an approach to the interpretation of the subsection which is quite consistent with that enjoined by section 5(j), although he did not mention this latter expressly.

Cooke J's construction is clearly less strict than that of Turner P in the *International Importing Case* cited above. It is too soon to say whether it heralds a new approach to the interpretation of tax statutes in New Zealand but does seem to be a clear instance of the spirit of section 5(j) being applied to an area which has previously been thought to be immune from it.

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A DIRECTOR'S DUTY TO CREDITORS

Permakraft (N.Z.) Ltd (in liquidation) v *Nicholson*[1]

It is a basic principle of company law that directors owe fiduciary duties to an entity commonly described as "the company as a whole."[2] This means, broadly speaking, that they must exercise the powers which they are given as directors with regard only to the interests of shareholders both present and future as a general body. When the courts use the term "the company as a whole", they do not generally maintain a rigid division between the corporate entity and its shareholders, notwithstanding the theory as to separate legal personalities. Thus, it has been said in one case that the directors in fulfilling their duties, are not expected to look only to the interests of the "corporate entity", disregarding the interests of the members.[3] They must instead strike a balance between the short-term interests of the present members and the long-term interests of maintaining the company as a going concern for the benefit of future members. Furthermore, if the directors are themselves shareholders, they are entitled to have regard to their own interest as such and not to think only of others, in exercising their votes as members of general meetings.[4] However, limits are placed on this latter proposition, for obvious reasons. For instance,

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[1] (1982) NZCLC 98, 358.

[2] See, for example, *Re City Equitable Fire Insurance Co. Ltd* (1925) Ch. 407.

[3] Evershed MR in *Greenhalgh* v *Arderne Cinemas* (1951) Ch. 286, 291.

[4] *North-West Transportation* v *Beatty* (1887) 12 App Cas 589 *Mills* v *Mills* (1938) 60 CLR 150, 164.