

[HIGH COURT OF AUSTRALIA.]

FADDEN APPELLANT ;

AND

THE FEDERAL COMMISSIONER OF TAXA- } RESPONDENT.
TION }

Gift Duty (Cth.)—Sale of shares—Adequacy of consideration—Reference to financial capacity of transferee—Disposition of property to person connected with donor by ties of blood or marriage—Acquisition by donor of interest in other property—Right to receive payment for property disposed of—Gift Duty Assessment Act 1941-1942 (No. 52 of 1941—No. 17 of 1942), ss. 4, 16*, 17.*

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}
BRISBANE,
June 19.
—
Latham C.J.,
Rich and
Dixon JJ.

In 1941 a father executed certain instruments according to the terms of which he transferred to each of his four children certain shares in a company in consideration of a stated sum. No money having been paid by the children, the Federal Commissioner of Taxation, two and a half years later, caused an assessment to gift duty under the *Gift Duty Assessment Act 1941-1942* to be made in respect of the transactions. The bona fides of the transactions was not disputed.

Held that the transactions were not gifts within the meaning of s. 4 of the *Gift Duty Assessment Act*. A promise to pay, if genuine, is adequate consideration and no distinction can be drawn between such promises by reference to the financial position of the parties.

Held, further, that “any interest in any other property” in s. 16 of the Act does not include a debt or chose in action created by a promise to pay for the property disposed of. Section 16 applies only if it is possible to point to some property, other than that disposed of, in which an interest has been acquired by the disponor in one of the methods set out. *Seemle*, s. 16 is applied only after it has been shown that a disposition is a gift and is not a provision which itself prescribes that certain dispositions shall be gifts.

* The *Gift Duty Assessment Act 1941-1942* provides as follows :—Section 4 : “ ‘ Gift ’ means any disposition of property which is made otherwise than by will (whether with or without an instrument in writing), without consideration in money or money’s worth passing from the donee to the disponor, or with such consideration so passing if the consideration is not, or, in the opinion of the Commissioner is not, fully adequate.” Section 16 (1) : “ Where there is a disposition of property by any person to a person connected with him by ties of blood or marriage, and, in consideration or part consideration for that disposition, the

disponor . . . acquires any interest in any other property, by way of— (a) mortgage or charge ; (b) any annuity or other future payment, whether periodical or not ; (c) any contract for the benefit of the disponor ; (d) any condition or power of revocation or other disposition ; or (e) any similar interest, no deduction shall be made in respect of that interest for the purpose of determining whether the disposition is a gift for the purposes of this Act or in computing the value of the gift, and the gift shall be valued and gift duty shall be paid as if the disposition had been made without such consideration.”

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On 26th December 1941, Arthur William Fadden executed certain instruments by which he transferred to each of his four children 1,975 shares in A. W. Fadden Pty. Ltd., in consideration of the sum of £4,345 in each case. No money having been paid by the children, the Federal Commissioner of Taxation, on 26th July 1944, caused an assessment to gift duty under the *Gift Duty Assessment Act* 1941-1942 to be made in respect of the transactions. The bona fides of the transactions was not disputed.

The taxpayer lodged an objection to the assessment. On the objection being disallowed, the matter was treated as an appeal to the High Court. On the matter coming on for hearing before *Latham C.J.*, his Honour stated a case for the consideration of the Full Court. The questions arising on the case were—

- (1) Do any and which of the transactions constitute or involve gifts within the meaning of the *Gift Duty Assessment Act* 1941-1942?
- (2) Did Arthur William Fadden, by virtue of the transactions, acquire any interest in any property other than the shares by way of future payment or contract for the benefit of himself or other similar interest?
- (3) Is gift duty under the *Gift Duty Assessment Act* 1941-1942 payable in respect of any of the dispositions and, if so, in respect of which of them?

The facts of the case and the relevant statutory provisions are sufficiently set out in the judgment of *Latham C.J.*

Fahey, for the appellant. The entire beneficial interest in the shares has passed to the transferees. Even though no money has been paid, the transferees have promised to pay the full price of the shares. That is good and adequate consideration. The transactions were bona fide. The disponent did not acquire any interest in other property or any similar interest. [He referred to the *Gift Duty Assessment Act* 1941-1942, ss. 4, 16.]

Hutcheon K.C. (with him *Hart*), for the respondent. The taxpayer transferred the shares to his children and did not receive any equivalent of the shares. No money was paid and no provision was made for the payment of interest on the debt outstanding. The consideration was inadequate. The contract was for the benefit of the disponent within the meaning of s. 16. He acquired an interest in other property or a similar interest.

LATHAM C.J.—This is a case stated under the provisions of the *Gift Duty Assessment Act* 1941-1942 which raises the question whether certain transactions amounted to or involved gifts within the meaning of the Act.

The Act, in s. 4, defines a gift in the following words:—" 'Gift' means any disposition of property which is made otherwise than by will (whether with or without an instrument in writing), without consideration in money or money's worth passing from the disponent to the disponent, or with such consideration so passing if the consideration is not, or, in the opinion of the Commissioner, is not, fully adequate."

"Disposition of property" is defined to mean:—"Any conveyance, transfer, assignment, settlement, delivery, payment or other alienation of property and, without limiting the generality of the foregoing, includes—

- (a) the allotment of shares in a company ;
- (b) the creation of a trust in property ;
- (c) the grant or creation of any lease, mortgage, charge, servitude, licence, power, partnership or interest in property ;
- (d) the release, discharge, surrender, forfeiture or abandonment, at law or in equity, of any debt, contract or chose in action, or of any interest in property ;
- (e) the exercise of a general power of appointment of property in favour of any person other than the donee of the power ; and
- (f) any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of his own property and to increase the value of the property of any other person."

The facts stated show that Mr. A. W. Fadden owned shares in a company and that he sold 1,975 shares to each of his four children at a price of £2 4s. per share. A document was executed in each case in the following terms:—

"I, Arthur William Fadden in consideration of the sum of Four thousand three hundred and forty-five pounds paid by hereinafter called the Transferee Do hereby Bargain, sell, assign and transfer to the said Transferee One thousand nine hundred and seventy-five (1975) shares in A. W. Fadden Pty. Limited to hold unto the said Transferee his (or her) Executors, Administrators and Assigns, subject to the several conditions on which I held the same immediately before the execution hereof ; and I the said Transferee do hereby agree to accept and take the said subject to the conditions aforesaid.

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As witness our Hands and Seals this 26th day of December in the year of Our Lord One thousand nine hundred and forty-one."

The transfers of the shares were registered and the children, whose ages vary from 17 to 24 years, have become the registered owners of the shares. The children owned other property and the income from the investments representing that other property amounted to a sum of about £300 per annum in the case of each of the children. Each of the children has borrowed £3,046 from the company and the income from their investments has been applied, with their consent, towards paying off the debts to the company. The only dividend from the shares has also been applied with their consent towards a reduction of their liability to the company.

The documents state that a consideration has been paid in each case, namely, £4,345. In fact, no money has been paid. However, the transactions have been dealt with by the Commissioner on the basis that they were entirely bona fide and it has been expressly stated from the Bar that there is no contention that this was not the case. In the absence of any evidence which would justify a contrary finding, the Court must treat the matter upon the basis that these are transactions which are bona fide.

Two points have been argued on behalf of the Commissioner. The first is that under these transactions property was disposed of for a consideration which was not fully adequate. (See definition of "gift" already quoted.) The result of the success of such a contention would be that, if there were some consideration, but not a fully adequate consideration, s. 17 would be applicable and the value of the gift would be assessed on the extent of the inadequacy. There are no facts in the case which would enable the Court to determine the extent of any inadequacy suggested. It is not necessary, however, in my opinion, to examine that question because there is nothing to show inadequacy of consideration.

Section 4 refers to money or money's worth. I do not regard those provisions as excluding the ordinary law of the land that a promise may be good consideration for the transfer of property. In this case, the documents imply a promise to pay, that is, a promise to pay an amount of money which the case shows is the full value of the property. The promise to pay is immediately enforceable although it has not been enforced for a period of about three years.

If the appellant were at any time to release the debt so that the promise would no longer be enforceable, a quite different set of circumstances would arise, because the release of a debt is included in the definition of disposition of property and may therefore be a gift. But the present position is that the consideration for the transfer of

the shares is to be found in each case in a promise to pay the full value, such promise being immediately enforceable.

In my opinion, it is impossible to say that such a promise is an inadequate consideration and it has not hitherto been suggested that a distinction should be drawn between such promises as consideration by reference to the financial capacity of the promisor to pay. Entry into such matters to determine the "real consideration" or the "adequacy" of the consideration under such provisions as those now under consideration would open up an entirely new field of inquiry, an inquiry which there appears to be no authority for making.

The next point relied upon by the Commissioner depends upon s. 16 of the Act which provides:—“(1) Where there is a disposition of property by any person to a person connected with him by ties of blood or marriage, and, in consideration or part consideration for that disposition, the disponor retains any interest in that property or acquires any interest in any other property, by way of—

- (a) mortgage or charge ;
- (b) any annuity or other future payment, whether periodical or not ;
- (c) any contract for the benefit of the disponor ;
- (d) any condition or power of revocation or other disposition ; or
- (e) any similar interest,

no deduction shall be made in respect of that interest for the purpose of determining whether the disposition is a gift for the purposes of this Act or in computing the value of the gift, and the gift shall be valued and gift duty shall be paid as if the disposition had been made without any such consideration.”

The argument has proceeded on the assumption that if the transaction could be brought within that section it would be a gift. I think that the operative words of the section are those which provide that, in the circumstances referred to in *pars. a* to *e*, no deduction shall be made for the purpose of determining whether there is a gift or of computing the value of a gift. The section concludes with the words “and gift duty shall be paid as if the disposition had been made without any such consideration.” The section appears to be based on the view that, for reasons other than those referred to in the section, it may have been shown that a disposition is a gift, so that this section is applied only after that conclusion has been reached and is not a provision which itself prescribes that certain dispositions shall be gifts. However that may be, it is not necessary to determine that point in this case.

The particular provisions upon which the Commissioner relies in s. 16 (1) are *b*, *c* and *e*, the contention being that the disponor,

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although he did not retain any interest in the shares, did acquire an interest in other property by way of future payment, a contract for the benefit of the disponor, or at least a similar interest.

It is plain that the appellant did not retain any interest in the shares. Did he then acquire any interest in any other property by way of future payment, contract for his benefit, or a similar interest?

He did acquire a right to a future payment and a contract to pay him money in the future might well be held to be a contract for his benefit, but in my opinion it cannot be said that because he obtained a right to future payment he therefore acquired an interest in some other property. It is true that the transaction created a debt or a chose in action, but the section in my opinion should not be interpreted as meaning that any promise to pay for property disposed of is an "interest in any other property."

Upon such a view, any transaction which involved a postponed payment and was "within the family circle" would be included in the section, even though in fact it was an ordinary commercial transaction. In my opinion, before the provisions of the section alleged to be relevant can be applied, it must be possible to point to some other property than that disposed of by the gift in which property it can be said that an interest has been acquired by the disponor in one or other of the methods set out. It is not possible to do this in this present case.

Accordingly, in my opinion, the arguments of the Commissioner fail and all questions should be answered in the negative. Costs of the case costs in the appeal. Case remitted to me.

RICH J. I agree.

DIXON J. I agree.

Questions in case answered : No. Cost of case to be costs in the appeal. Case remitted to Chief Justice.

Solicitors for the appellant, *Macnish, Macrossan & Dowling.*

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

B. J. J.