Judgment 19 of 1972

No. 13 of 1972

IN ~~THE JUDICIAL COMMITTEE OF~~ THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N :

ANKER LIVINGSTONE WARTHO HANSEN
VERNER RICKARD WARTHO HANSEN
NORMAN GARFIELD WARTHO HANSEN
ARNOLD TARELTON SMITH
ESTHER NAOMI SMITH — Appellants

- and -

COMMISSIONER OF INLAND REVENUE — Respondent

CASE FOR THE APPELLANTS

Record

1. This is an appeal from an order of the Court of Appeal of New Zealand dated 16th July 1971 which dismissed the Appellant's appeal from part of a judgment of Woodhouse J. in the Supreme Court of New Zealand dated 2nd November 1970, and which affirmed that the Respondent had acted correctly in making an adjustment to the partnership income of the appellants for income tax purposes subject to an amendment concerning the method of valuation adopted by the Respondent. By an order dated 16th December 1971 the Court of Appeal of New Zealand granted the Appellants final leave to appeal to Her Majesty in Council.

2. These proceedings arose out of a contract for the sale of a farm of 4926 acres situated south of Auckland, New Zealand. On the 1st of December, 1964, the Appellants who had farmed this land in partnership, executed a written contract to sell the farm as a going concern to

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pp.6 7 8 8a 9 10

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Lochiel Cameron Limited (hereinafter together with Mr. R.H.T. Cameron, its director, referred to as "the purchaser"). The total price for the land, plant and livestock was £200,000. In the course of negotiating this price with the purchaser, the Appellants also negotiated the manner in which the total consideration was to

p.17.1-33 p.20.7-17 p.21.23-26

be apportioned between the land, plant and livestock. There were differences of opinion between the Appellants and the purchaser, and their respective advisers, as to the

p.21.44-p.22.2

consideration for which the livestock was to be sold but after negotiation, which it is not disputed was at arms length, the separate considerations for land, plant and livestock were agreed as follows:

pp.8.8a

Land	£168,450
Plant	3,800
Livestock	27,750
	£200,000

The main reason for the extensive negotiations as to the price for the livestock was its

p.17.47-p.18.17

taxation implications for Appellants and purchaser respectively, since the sale price for the livestock (being stock-in-trade) was assessable

p.21.26-p.22.29

to the appellants for income tax purposes, and the purchase price was a deduction to the purchaser for income tax purposes.

3. The negotiations took account of the system

p.23.29-34

of "standard values" for livestock in New Zealand provided for by Section 98 of the Land and Income Tax Act 1954. Under this system when a taxpayer purchases livestock to commence farming operations he may, with the concurrence of the Commissioner of Inland Revenue, adopt and fix, at the end of an income year, a "standard value" in respect of any class of livestock at which figure this livestock will then appear subsequently in the books of the taxpayer. The purpose of this system is to eliminate fluctuations in market prices which could otherwise result in unrealised profits or losses, having regard to the stock on hand at the beginning and end of a trading period.

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The Commissioner has power, however, under Section 98(9) of the Land and Income Tax Act 1954, to insist upon the adoption of the true value instead of the standard value. Consequently on any sale of livestock in New Zealand where the seller has previously adopted standard values the consideration to be paid and received for such livestock is of particular importance to seller and buyer. From the seller's point of view the difference between the "standard value" of his livestock and the sale price will form part of his assessable income for the year in question, while from the purchaser's point of view, although the purchase price will form part of his trading expenditure for that fiscal period, he will be entitled to adopt "standard values" for the same livestock for the next succeeding fiscal period and thereafter be assessable for the difference between those values and the actual sale prices as and when those livestock are sold.

4. As a result of this system on the sale of a farm as a going concern the seller will commonly regard the tax payable as a result of the sale of the livestock as a deduction to be made from the total proceeds of sale which he will receive and naturally tends to be guided by his estimate of net tax-paid realisations when fixing the prices for the separate components of a farming business. Likewise the purchaser normally regards a high price for livestock as producing a form of tax relief which will tend to reduce, in a practical sense, the outlay which he will have to make in order to buy the farm as a going concern. p.21.26-44 p.21.44-p.22.29

5. In this case the farm was sold as a going concern, because in practice this was the best way to dispose of it. The Appellants valued the land at £180,000 before the sale and would not sell the farm at all unless a limit was placed upon the price for the livestock. p.17.37-47 p.25.22-24 p.19.1-6 p.19.43-p.20.1

6. All of the above aspects of the situation played their part in the final negotiation of the terms of sale between the Appellants and the purchaser, and in the fixing of price for the

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p.17.16-33 livestock at £27,750. This figure was reached by adding 9/- per head to the "standard value" of 21/- for sheep and by adding £5 per head to the p.21.23-26 "standard value" of £5 per head for cattle. In the final stage of the negotiations the Appellants p.22.3-12 indicated that they would only agree to a higher price for the livestock if the sheep were to be shorn before the sale and they were to receive the value of the wool. In the event the purchaser agreed to accept the above prices and later sold the wool which was growing on the sheep for p.18.25-35 £15,000.

7. Shortly after the purchaser took possession of p.25.11-14 the land, plant and livestock on the 2nd day of pp.76,77 June, 1965 he obtained a valuation of what the livestock would have realised if it had been sold in lots on the open market on that date. The total of these estimated prices was £82,645. This was a notional figure for the realisation of the livestock because an auction of 10,000 sheep and 1265 cattle at the country saleyards in the Appellants' farming district on one day would almost certainly have resulted in much lower prices being obtained than if the same livestock had been sold in yard lots over a period of time.

8. The Respondent obtained a copy of the valuation referred to above and subsequently assessed the Appellants to income tax on the income they would have derived if they had sold all their livestock pp.3,4 to the purchaser on the 2nd day of June, 1965, at a total price of £82,645 instead of the contract price of £27,750. The Appellants objected to this assessment on the grounds:

pp.4,5 (i) that there was no statutory power to substitute the market value of the trading stock for the actual contract price, and

(ii) that, in any event, the Respondent had adopted an incorrect concept of "market value" in that the values he had used represented estimates of the best prices for sheep and cattle sold on the date of the sale in yard lots at auction instead of estimates of the values they would have realised in the actual market which was comprised of such

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purchasers as were able and willing to buy 1265 head of cattle and 10,000 head of sheep in one transaction as part of the acquisition of a large sheep and cattle farm as a going conern.

9. On the first of the above grounds the Respondent contended in reply that he was not only empowered but directed, by section 101 of the Land and Income Tax Act 1954, to substitute the "market value" for the contract price. Section 101 (1) provides that:

> "Where any trading stock is sold together with other assets of a business, the part of the consideration attributable to the trading stock shall, for the purposes of this Act, be determined by the Commissioner, and the part of the consideration so determined shall be deemed to be the price paid for the trading stock by the purchaser."

There is no reported case in the 46 years since the enactment of this provision where it has been applied to any sale other than one for a global price. In this case however the Respondent has maintained that in addition to its function as a machinery section for separating trading stock components from a global price the section may also be applied as a charging section. The Respondent has contended that although he would be bound by an agreed contract price arrived at on an arm's-length sale of trading stock alone so long as any other asset was sold together with the trading stock the agreed contract price for that stock could be disregarded and replaced by a notional or deemed price fixed by himself.

10. Before Woodhouse J. evidence was given for the Appellants only. Woodhouse J. held that having regard to all of the provisions relating to the sale of trading stock and in particular to the words used in Section 98 (8) of the Act the Commissioner of Inland Revenue was empowered in the circumstances under consideration to substitute his own valuation of the trading stock for that agreed by the parties. Section 98 (8) states: pp.33-34 p.35.47-p.36.24

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"Subject to the provisions of Section 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."

Woodhouse J. held that there would have been no need to refer to section 101 in this sub-section if the interpretation contended for by the Appellants were correct because there would then, in section 101 cases, be no contract price at which trading stock is sold.

11. In the court of Appeal (North P. Turner J. and Haslam J.) the same conclusion was reached on this point. North P. held that the language of
p.50.8-p.51.13 Section 101(1) was wide enough to cover every case "Where any trading stock is sold together
p.55.34-p.60.45 with other assets of the business". Turner J. agreed with the result of the decision of Woodhouse J. and North P.: "I read s.101(1)... to give the
p.59.11-20 Commissioner the necessary power to apportion in every case in which in any transaction the parties have sold trading stock together with other assets whether they have sold them for an unapportioned global consideration or whether they have purported to apportion the consideration between the assets, or even have purported to fix separate prices without expressly adding them together in a total consideration."

p.68.39-p.69.1 Haslam J. considered, as did Woodhouse J., that the words "subject to the provisions of Section 101" in section 98 (8) was a sufficient reason to find in the Respondent's favour. He considered that within the sub-code dealing with
p.69.11-23 liability for taxation on the sale of trading stock the mischief aimed at was the avoidance of taxation. If the parties were free to attribute any price to the sale of trading stock they would avoid tax. The Stamp Duties Act 1954, which
p.69.24- makes it clear that for stamp duty purposes the Commissioner is not bound to accept any apportionment used in a contract of sale of land and chattels,was referred to together with the practice

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under that Act of apportioning consideration between realty and chattels as providing an explanation for the income tax stock valuation provisions. Finally section 101 was viewed and applied as an anti-avoidance measure. p.71.10-p.72.23

12. The Appellants contend, and have contended, that the provisions of section 101 (1) cannot, on their true construction, be invoked and applied by the Respondent on the facts of this case. They respectfully submit that section 101 (1) can only have a more restricted application to cases in which trading stock is sold together with other business assets for a global consideration. Alternatively if it does have a wider operation and can apply where trading stock and other business assets have been sold for separately agreed values it is respectfully submitted that on this true construction its provisions apply only where the value of such trading stock was agreed other than in the course of bona fide commercial dealings at arm's length. These contentions are based upon the following submissions as to the true construction of the provisions contained in section 101 (1).

13. First the words are to be given their ordinary meaning and "...one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. These is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used," Mangin v. I.R.C. [1971] A.C. 739, 746.

The context of section 101 is that it follows sub-sections 98(7) and (8) which bring into charge to income tax the value of trading stock realised when a tax-payer disposes of the whole or part of a business, and it precedes section 102 which enacts that where trading stock is sold or disposed of at an under value or for no monetary consideration it is to be deemed to have been disposed of at market value for income tax purposes. Section 101 enacts that where trading stock is sold with other business assets there is also to be a deemed disposal at, usually, market price. It does not by its terms, refer to circumstances such

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as those in this case where although there is a sale of trading stock with other assets the consideration for the sale of these items having been separately agreed, and stated, by the parties as a result of bona fide commercial dealings at arm's length between them.

14. If the Respondent's construction of sub-section (1) were correct on every sale of a business which included trading stock he would be required, by the use of the word "shall", to make a separate valuation of that trading stock. Alternatively on the Respondent's construction a discretion must be applied to intervene and make such a valuation, presumably whenever he may think fit to do so. The former construction would impose a very heavy burden upon the Respondent in practice, and one which was unnecessary in very many cases, and which would conflict with the provisions of section 98(7) and (8). The latter construction is equally unjustified. Section 101 refers to "the part of the consideration," which plainly means that the section is to apply where there is one consideration and one price for trading stock and other assets. But if separate considerations are by contract agreed to be paid in respect of the trading stock and the other assets then section 101, prima facie, has no application because the section refers to the consideration. The use of the words "part of" also suggests that it applies where there is one agreed whole consideration.

Further the language of section 101 compared with that of other provisions of the Act indicates that it was not intended to confer a discretion. For example sections 91 and 117 by their terms give the Commissioner of Inland Revenue power to substitute a different amount for that which, prime facie, would otherwise apply for specified tax purposes. Similarly Sections 100 and 102 by their terms provide for the substitution of a deemed price for an agreed price. Section 101 does not bear this construction.

15. Apart from the Appellants' contention that the words of section 101 do not bear the construction which the Court of Appeal has placed upon them from

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their plain, grammatical meaning such a construction should not be implied as a matter of principle. It has the effect of bringing into charge to tax sums which are not expressly charged by the statute. It may be appropriate or necessary in certain cases to deem a taxpayer to have received or paid market price in a particular transaction which took place on other terms, but such a practice is exceptional and should not be extended without strong justification: cf. Sharkey v. Wernher [1956] A.C. 58. and Jacgilden (Weston Hall) Ltd v. Castle [1971] 1 ch. 408. 427.

16. The Appellants respectfully submit that the construction of section 101 adopted by the Court of Appeal was wrong for the above reasons, in that it fails to give the words of sub-section (1) their actual and grammatical meaning in their context. This provision says nothing which refers to the situation where a price is agreed for trading stock but the Court of Appeal, and Woodhouse J., interpreted it to apply in cases where (i) the parties have agreed upon an apportionment of the value of the component items of the sale, and (ii) where the Commissioner of Inland Revenue in his discretion may decide to intervene for this purpose. Neither of these extensions or implications can be supported from the words of section 101(1).

17. In addition it is respectfully submitted that the construction of section 101 by the Court of Appeal was wrong for the following reasons (i) It appears to have been based upon the assumptions that an element of tax avoidance was involved in this case, that section 101 is an anti-avoidance provision, and that a wider construction of its terms was justified for this reason. It is respectfully submitted (for the reasons stated more fully in paragraph 18 below) that the transaction under consideration was not concerned with tax avoidance, that section 101 is not an anti-avoidance section, and that in any event there is no authority to support a wider construction for this reason. (ii) It interprets the provisions of section 101(1) as imposing a charge to tax. It is submitted that this is wrong

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p.50.35-42
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because it could have been expected that in that event the method of the charge to be made by the Commissioner would have been detailed. On the interpretation which was accepted by the Courts the Commissioner has a complete discretion as to how the tax is to be assessed. The absence of appropriate machinery provisions tends to show that profits do not come within the charging provision and, by inference, that a charging provision was not intended: cf. Colquhoun v. Brooks [1889] 14 App. Cas. 493. 506. It is submitted that Turner J. was wrong in stating p.58.33-37 that this goes to the method of charge rather than the power to charge. It is submitted that section 101 provides the machinery for the Commissioner to determine in a global sale the amount which should be attributed to the trading stock. The charge to tax upon the sale of trading stock was enacted in 1924 in what is now Section 88 (1) (a) of the Land and Income Tax Act 1954. There was no provision in the 1924, 1926, 1929, 1939 or 1949 Acts and is none in the 1954 Act which provides that the Commissioner can substitute his determination of the value of trading stock for the parties' own price where this is arrived at at arm's-length.

The interpretation of the Court of Appeal would mean that in 1924 the legislature gave the Commissioner of Inland Revenue power to determine in an arbitrary manner the price of trading stock notwithstanding that the parties had agreed to sell at a different price. It is submitted that this is contrary to the general principle stated by Lord Wilberforce in I.R.C. v. Europa Oil (N.Z.) Ltd [1971] A.C. 760, at 772, that "it is not for the Court or the Commissioner to say how much a taxpayer ought to spend in obtaining his income, but only how much he has spent." In this case the Appellant's submission is that, in the absence of clear statutory authority, it is not for the Commissioner of Inland Revenue to say how much they ought to have obtained for their livestock but only how much in fact and law they received.

(iii) It dismisses the Appellants' interpretation of Section 101 (1) on the ground that it is said to make the opening words of section 98 (8)

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meaningless. It is submitted that:

(a) Sub-section (8) of section 98 refers back to sub-section (7), as can be seen by the use of the expression "as aforesaid" in sub-section (8). The purpose of sub-section (7) is to declare that proceeds of sale of trading stock will always form part of the calculation of the taxpayer's assessable income irrespective whether the trading stock is sold alone or whether it is sold along with other assets of the business, and whether the sale is in the ordinary course of business or otherwise. Sub-section (7) provides that the consideration received or receivable for the trading stock, or as the case may be, the "deemed" price of the trading stock (meaning "deemed" under sections 101 or 102) shall be taken into account as stated for tax purposes. Sub-section (8) describes the method of ascertaining the "consideration received or receivable" except where section 101 or section 102 applies, and that method is simply to take the price which has been specified by the parties in any contract of sale or arrangement. Sub-section (8) therefore re-states the fact already adverted to in sub-section (7) that in the sale of trading stock there can be either the actual price agreed by the parties or a "deemed price" prescribed by the legislature. All that the sub-section does however is to declare how the consideration for sale is to be ascertained in cases where there is no "deemed" price.

(b) Apart from the above consideration, it seems clear that it would be necessary on another ground for the legislature to make sub-section (8) expressly subject to sections 101 and 102. If the legislature had not done so, it would be possible for a taxpayer to argue that section 98 constitutes a separate code for the treatment of trading stock and that sub-section (8) declares that the only consideration received for trading stock within the meaning of section 98 is the consideration specified by the parties in their contract. It would follow from this that if no price were specified for trading stock in a

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contract then section 98 could not apply. It could then be submitted that there was a contradiction between sections 98 on the one hand and 101 and 102 on the other hand and that because section 98 purports to be a complete code its provisions should prevail. In order to avoid any such argument the legislature has both in sub-section (7) and sub-section (8) specifically preserved the operation of section 101 and 102.

(c) On practical grounds also it is submitted that section 98 (8) should be subject to section 101 because the section simply reads then, that "except in cases where there is a deemed price because the parties have not fixed one in the sale of trading stock together with other assets, or there is a deemed price when trading stock is sold at an undervalue, the contract price shall be deemed to be the price."

18. Secondly the object of the construction of the statute being to ascertain the will of the legislature it may be presumed that neither injustice nor absurdity was intended. If, therefore a literal interpretation would produce such a result, and the language is capable of an interpretation which would avoid it, then such an interpretation may be adopted: Mangin v. I.R.C. /1971/ A.C. 739. 746; Gartside v. I.R.C. /1968/ A.C. 553, 605.

This is not a tax avoidance case. The Appellants' selling price of the livestock became the vendor's opening price. The tax which might become due on any increase in the value of the livestock on its sale or other disposal at any time would still be collected. The values fixed in the transaction quantified the incidence of income taxation on the livestock as between the parties at that time but it had been and remained open to the Commissioner of Inland Revenue to take the same action vis-a-vis the Appellant and the purchaser respectively by an adjustment of the standard values of the livestock under section 98 (9).

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19. Acting on the previously accepted interpretation of the law the Appellants and the purchaser had negotiated the terms of sale at arm's length. Had the stock been valued at £82,000 the Appellants would not have sold the farm at all. If a higher price than £27,750 had been placed upon the livestock, they would have insisted upon themselves retaining the value of the growing wool and the purchaser would not have received the £15,000 paid for this. The party who must benefit if the action of the Respondent in this case is upheld is the purchaser. He will gain an enormous benefit. His position is that he can assume a purchase price for livestock of £70,713 for which he in fact paid £27,750 with a resultant tax advantage, in addition to the fact that he received the wool on the sheep which he later sold for £15,000, and the further advantage that he can take into his accounts land at the price which he paid for it, namely £168,450. He will be entitled to claim depreciation in respect of the land and at the latter figure. For the above reasons the Appellants respectfully submit that the Respondents' contentions lead to an unreasonable, unjust, and in commercial terms, an absurd result.

20. Thirdly the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction: Mangin v. I.R.C. /1971/ A.C. 739. In 1924 the New Zealand legislature enacted section 7 of the Land and Income Tax Amendment Act 1924, by which there were added to the definition of assessable income the following words (shown in brackets) which now appear as section 88(1)(a) of the Land and Income Tax Act, 1954:

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

As from that time the increase in value of trading stock was assessable income notwithstanding that the trading stock was not sold in the ordinary course of business.

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21. By Section 5 of the Land and Income Tax Amendment Act, 1926 the present section 101 was enacted. It has therefore been in existence in substantially the same form for the past 46 years. By section 13 of the Land and Income Tax Amendment Act 1929, more specific provisions were enacted relating to the assessments of tax in cases of sales of livestock. Section 16 of the Land and Income Tax Amendment Act 1939, enacted what is now section 98 of the Land and Income Tax Act 1954, providing a code for the treatment of trading stock and making it clear that the proceeds of the sale of all trading stock were assessable. What is now section 102 was introduced by section 9 of the Land and Income Tax Amendment Act 1949. This deals with the sale or other disposition of trading stock at an under value.

22. If it is correct, as suggested below, that section 5 of the 1926 Amendment was enacted only for the purpose of giving the Commissioner of Inland Revenue the necessary power to apportion a global price, then an amendment thirteen years later can hardly be used to infer a different legislative intention (the 1954 consolidation did not make any material alteration to the text of section 5 of the 1926 Amendment). It seems clear that the original legislative intention was preserved. The first and only enquiry therefore is whether section 5 of the 1926 Amendment was intended to apply to a case where the trading stock price was specified in the contract of sale. If so the consideration of sub-section 16(8) of the 1939 Amendment (now sub-section 98(8)) is unnecessary; if not its consideration is irrelevant. Turner J. in the Court of Appeal held that section 5 as originally enacted in 1926 meant that the Commissioner of Inland Revenue could disregard the contract price. It is, however, clear from the provisions of section 13 (2) of the Land and Income Tax Amendment Act 1929, that on the sale of livestock it is the actual proceeds of the sale which are to be the value of the livestock for the purposes of the assessment of tax.

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p.59.33

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23. The Court of Appeal accepted that the history of Section 101 suggests that the purpose of its enactment originally was to overcome the decision in Doughty v. Commissioner of Taxes [1927] AC. 327. In that case there had been a sale of assets and trading stock at one global price and the Privy Council held that the Commissioner of Inland Revenue was not entitled to attribute a separate price to the trading stock both because the trading stock was not sold in the ordinary course of business and because there was no machinery to allocate part of a global price to trading stock. It is submitted that, properly interpreted, the statute is not ambiguous because it does not say that where the parties have agreed their own prices the Commissioner of Inland Revenue may disregard those but if it be ambiguous the section should be interpreted on the basis of the meaning which it had when it was first enacted and as it has been used over the years. It is submitted that in construing the latest of a series of Acts dealing with a specific subject matter great weight would be attached to any scheme which can be seen in clear outline and amendments in later Acts should if possible be construed consistently with that scheme. The limitation upon that principle as expressed by Lord Simonds in Fendoch Investment Trust v. I.R.C. [1945] 2 All E.R. 140, 144, that it can easily be pressed too far in taxation cases is accepted because in such cases in which "if any prevailing motive can be found, it is in the attempt, as each loophole for escape from taxation is discovered, to close it as firmly as possible." But this motive of the legislature ought not to be read into the section when it was never designed for that purpose. The history of the section shows that the mischief at which it was aimed was that in a sale at a global price there was no method by which the Commissioner of Inland Revenue could determine what part of the consideration was attributable to the trading stock. The section provided that machinery. Neither at that time nor in 1929 or in 1939, did the Commissioner of Inland Revenue have the power to disregard a contract price. This power was not given until 1949 when section 102 was enacted for the purpose of dealing with sales or other dispositions of trading stock at an undervalue.

p.49.38-40
p.57.33-42
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p.67.7-28

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24. In practice section 101, and its predecessor, have been construed as applying only to transactions in which trading stock and other business assets are sold at one total price: see e.g. S's Trustees v. Commissioner of Taxes (1950) 8 M.C.D. 218. The section itself (or its predecessor) has come before the Court of Appeal in New Zealand only once before. This was in Edge v. Commissioner of Inland Revenue [1958] N.Z.L.R. 42, where the mortgagee of a farm had in exercise of his power of sale sold a farm including livestock as a going concern for a global sum at public auction for the sum of £21,000. There was no separate price for the livestock. The purchaser, who was the appellant, submitted that he had purchased the livestock for the market value of £6,471 but the Commissioner assessed tax on the basis that the value of the livestock was £4,711 having obtained separate valuations of the livestock and land which exceeded the sale price and reducing the value accordingly, (by the same process which was adopted by Woodhouse J. in the present case).

In the Supreme Court Henry J. had held ([1956] N.Z.L.R. 799) that, assuming that the proper enquiry was whether the livestock was sold at "market price", on the facts of the case, as the livestock had been sold at public auction, that was its market price. Accordingly it was proper to make the reduction even though if the livestock had been sold separately they might have fetched a higher price. He considered that if the purchaser were correct the vendor would be called upon to pay tax as if he had received £1760 more than he had actually received for the livestock. In the Court of Appeal it was held that section 101 stands by itself notwithstanding the argument of both the Commissioner and the purchaser that under section 101 the Commissioner determines first the proportion of the total price and thereupon resorts to section 102 to decide whether or not it is sold at less than the market value. Turner J. held that section 102 applied only in transactions which partake of the nature of a gift or such cases where a vendor, for reasons unconnected with the market or the exigencies of commerce, voluntarily accepts a price less than he would have received if sold in the market. He considered that though the transaction

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might literally fall within the words of the section it fell outside the spirit of the enactment. Furthermore he considered that in any event the market price had been properly determined.

25. For the purpose of the present case the Appellants say that it does not matter whether the reasons for the decision in Edge's case were correct or not. In its result it was obviously fair between the parties including the vendor. In so far as it decided that section 102 only applies in transactions in the nature of a gift it is submitted that this is also correct notwithstanding the literal meaning of the words. In so far as it decided that section 102 cannot be applied after section 101 has been applied it does not matter to the present Appellants whether that is correct or not. It is submitted that the absence in section 101 of any method by which the Commissioner of Inland Revenue is to arrive at his determination suggests that resort ought to be had to section 102. The absence of a method under section 101 was not adverted to in the Court of Appeal in Edge's case but Henry J. considered that the Commissioner had made the apportionment under then section 10(1)(a) of the Finance Act (No. 2) 1948, which is now section 117 (3) (b) and deals with allowances for depreciation. On the other hand it may be that section 101 does stand by itself and gives the Commissioner of Inland Revenue the power to determine the price at which the livestock should have been sold when it is sold together with other assets. In that case it must be for the purpose of dealing with a global sale price because there is no need where the parties have agreed the price of livestock in an arm's length transaction to resort to section 101. In this case it appears that in reality the Respondent made an assessment on the basis of the provisions contained in section 102 which he could not make under that section because he was prevented by the construction which that section has received in the Court of Appeal. If so however that should not be used to justify an incorrect interpretation of section 101.

26. In the alternative the Appellants' second submission is that the determination of the value of the livestock made by the Respondent and as reduced by the Courts is wrong. Woodhouse J. held

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p.40.11-23 that there was no evidence to show that large numbers of stock sold in a yard would fetch lower prices than if sold in small lots over a period of time. He accepted as evidence of the value of

p.40.24-35 the livestock an unsigned letter which stated that the purchaser's advisors in the sale valued the live-stock at £82,645 in preference to the sworn evidence of a stock valuer who had been familiar with the appellants' stock since they bought the property. He held that the livestock should be valued at the date possession was given and not the date the contract was made. Finally he considered

p.41.8-p.42.18 that the respondent ought to have reduced the valuation of the trading stock because £200,000 was a fair overall value for the whole business and accepting the evidence of a valuer as to the market value of the land at £147,500 and accepting the valuation of the stock at £82,555 the total value would be £233,745 which when related to the consideration of £200,000 would lead to a reduction in the amount to be attributed to the livestock $\frac{200,000}{233,745}$ x 82,555 = £70,713. He accordingly ordered that the assessment be amended by reducing the amount attributable to the livestock to £70,713. The Court of Appeal affirmed the decision of Woodhouse J. on this issue also.

27. It is respectfully submitted that the approach adopted by Woodhouse J. and the Court of Appeal is wrong. The Respondent applied the provisions of section 101 with regard to the valuation as meaning that once he had determined the market value of the livestock that amount should be deemed to be the price paid for it by the purchaser. The Courts varied this interpretation so that the market value obtained by the Respondent was related to the market value of certain of the other assets and reduced in amount appropriately as a proportion of the total consideration. The section does not, in its terms, provide for the implementation of either method.

In Edge's case (Supra) the ratio of the decision was that in section 101 cases the Commissioner of Inland Revenue does not have to fix the market value but, even if he did, he had in that case done so. Hutchison J. stated that the Commissioner of Inland Revenue must make the determination on a basis which

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is fair to him as well as to the vendor and purchaser. If so in the present case the Respondent should work out an appropriate apportionment on a basis which ought to be fair to all the parties and not just to his own interests. Assuming that the Respondent and the Courts had the power to disregard the contract price it is submitted that the wrong amount has been attributed to the livestock in this case for the following reasons.

(a) The Respondent and the Courts in making their apportionment are not empowered to reduce the price fixed by the parties for the "other assets", in this case £172,250, so that the apportionment should be $\frac{82,655}{254,905}$ x 200,000 = £64,800 instead of £70,713. Even if, by implication, section 101(1) gives the Respondent power to substitute a deemed market price for the actual agreed price of livestock it cannot make any similar provision with regard to the price of the land. The latter price also is agreed and accepted by the purchaser and he is liable to pay stamp duty on it. p.76

(b) The Court of Appeal accepted that the date at which the value of the trading stock has to be fixed was the date of the payment of the money but it is submitted that if the Respondent is to act fairly between the parties and that if the evidence shows that the purchase price was fixed six months before the end of the trading period and that as in this case, the whole of the increment in value between the date of the contract and the date of payment was to belong to the purchaser, the valuation should take place as at the date of the contract of sale. If this submission is accepted the only evidence of the market value as at that date is £46,265.

(c) The value was fixed as if this were a sale in the ordinary course of the Appellants' business. It was in fact a sale of a large quantity of sheep and cattle on one day and a sale not in the ordinary course of trading but in final clearing sale. It is submitted that there is a difference in kind between such sales and that

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any deemed value in the present case should be determined by reference to the latter.

(d) If the function of the Respondent in this case was to determine the market price then in this instance that price was the price fixed by the parties. In this case there was a vendor willing to sell and a purchaser willing to buy upon the terms and conditions of a contract made at arm's length. The "market" was the market for the sale and purchase of 4926 acres and 10,000 sheep and 1295 cattle. If this was not the market for the purposes of section 101 the Respondent should have produced evidence to show either, that there were purchasers who were prepared to pay more for the whole concern or, vendors who were prepared to sell the livestock for more. The exigencies of commerce including the tax repercussions gave rise to the actual market price for the livestock in this case.

(e) It is submitted that Woodhouse J. was wrong in accepting an unsworn statement of the value of the livestock as against the sworn testimony of the valuer. In the Court of Appeal only

p.52.40 North P. dealt with this submission and he
p.53.1 dismissed it because he considered that he had to accept the finding of fact of Woodhouse J. on the point. The appeal was however one on

p.45 fact also. There was no question of credibility
pp.76,77 in this case. On the one hand there was an unsworn statement as to the value of the livestock

p.25.11-14 made by the same firm which represented the purchaser in the negotiations for the sale and on the other the evidence given in Court of the Appellants. Although there has been a dispute as

p.32 to value throughout yet no evidence was given to contradict the Appellants' evidence on this issue.

28. The Appellants respectfully submit that this appeal should be allowed, that the judgment of the Court of Appeal should be reversed, and that the amended assessments to income tax made upon the Appellants by the Respondent should be cancelled, for the following (among other)

REASONS

(1) BECAUSE section 101 of the Land and Income Tax Act 1954 applies only to cases where the parties have not allocated a specific price to trading stock and other assets, but have sold trading stock and other assets at one global price;

(2) BECAUSE section 101 does not apply to any transaction involving the sale of trading stock where its value has been agreed on the basis of commercial dealings at arm's length between the parties;

(3) BECAUSE on its true construction section 101 does not empower the Respondent to assess the appellants to income tax in respect of a notional or deemed receipt of income;

(4) BECAUSE the amount determined by Woodhouse J. and the Court of Appeal as being attributable to the value of the livestock sold is wrong;

(5) BECAUSE the judgment of the Court of Appeal of New Zealand was wrong.

M.A. PICKERING

No. 13 of 1972

IN ~~THE JUDICIAL COMMITTEE OF~~
THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF
NEW ZEALAND

B E T W E E N :

ANKER LIVINGSTONE WARTHO HANSEN
VERNER RICKARD WARTHO HANSEN
NORMAN GARFIELD WARTHO HANSEN
ARNOLD TARELTON SMITH
ESTHER NAOMI SMITH

Appellants

-and-

COMMISSIONER OF INLAND REVENUE

Respondent

CASE FOR THE APPELLANTS

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Solicitors for the Appellants