IT 177 - Onus of proof - profit making scheme

TAXATION RULING NO. IT 177

ONUS OF PROOF - PROFIT MAKING SCHEME

F.O.I. EMBARGO: May be released

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PREAMBLE The decision of the Full High Court in McCormack v FC of T (1978) 143 CLR 284 contains important statements concerning onus of proof (section 190(b)), particularly in relation to section 26(a) cases. Three Judges (Gibbs, Stephen and Murphy JJ) expressed disagreement with the majority view of Barwick CJ and Jacobs J in a previous case concerning section 190(b), viz Gauci & Ors v FC of T (1975) 135 CLR 81. The three Judges specifically adopted as correct the reasons advanced by Mason J in his dissenting judgment in Gauci's case insofar as they relate to section 190(b). Relevant extracts from that judgment (at page 4261) are set out hereunder:

> 'Section 190(b) of the Act imposed on the appellants the burden of proving that the assessments were excessive. The appellants relied on their evidence and that of Graham in order to show that the assessments were excessive. Once that evidence was rejected, the appellants' case necessarily failed.
>
> The Act does not place any onus on the Commissioner to show that the assessments were correctly made. Nor is there any statutory requirement that the assessments should be sustained or supported by evidence. The implication of such a requirement would be inconsistent with sec. 190(b) for it is a consequence of that provision that unless the appellant shows by evidence that the assessment is incorrect, it will prevail.
>
> I am unable to discern any basis for declining to give effect to sec. 190(b), according to its terms. Nor, for that matter, does it seem to me that the provision, understood according to its terms, operates unjustly in cases which turn on sec. 26(a). There is nothing inherently unfair in a provision which places the onus on a taxpayer to prove his case when the purpose which an asset was acquired depends so much on his intentions and on circumstances of which he, rather than the Commissioner, has comprehensive knowledge.'

RULING 2. The crux of the matter is that when in a sec. 26(a) case an appellant seeks to overcome the onus created by sec. 190(b) by adducing evidence as to his intentions with a view to establishing the purpose of the acquisition was not a sec. 26(a) purpose and that evidence is not accepted, he has not discharged the onus which he bears. At best, from the appellant's viewpoint, the evidence stands in a situation in which it is equivocal, neither establishing a sec. 26(a) purpose nor denying the existence of such a purpose. At worst, the judge may, in the circumstances, be able to infer the existence of the sec. 26(a) purpose. In either event the appellant fails to discharge the onus and his appeal fails.

3. The following extract from the judgment of Gibbs J. in McCormack's Case is also relevant (at page 4121):

> 'The taxpayer bears the burden of proving that the assessment was excessive. To discharge that burden in a case such as the present he must prove affirmatively, on the balance of probabilities, that the property was not acquired for the purpose of profit-making by sale. The burden may be discharged by drawing inferences from the evidence. In some cases in which all the relevant facts are known, and there is no material upon which it might properly be concluded that the property was acquired for the relevant purpose, the inference may properly be drawn that the property was not acquired for the relevant purpose. But it is not enough, even when all the facts are known, that there is no material upon which it may be concluded that the property was acquired for the purpose mentioned in s.26(a). If a taxpayer can succeed, simply because there is no evidence from which it can be concluded that the relevant purpose existed, that must mean that the burden of proving the existence of that purpose lies on the Commissioner. That in my respectful opinion would be to invert the onus of proof. The taxpayer will succeed if the proper inference from the evidence is that the property was not acquired for the relevant purpose, but if there is no evidence as to the purpose for which the taxpayer acquired the property the appeal must fail.'

4. McCormack's Case also considered the question of whether section 190(b) applied in an appeal to a Court from a Board of Review decision. In a previous hearing of the McCormack Case before the Federal Court (77 ATC 4543; 8 ATR 227), Bowen CJ and Brennan J said that s. 190(b) applies only to the reference or appeal provided for in s. 187 and s. 188 of the Act, and not to the Appeal to the Supreme Court from a Board of Review decision as provided for in s. 196(1). Therefore, they concluded, a judge who is finding the facts on the evidence before him in an appeal from a Board of Review, may not rely upon s. 190(b), for that section has no application to the issues before him. The High Court has now overruled this view. Gibbs J held that although the introductory words of s. 190,

literally understood, suggest that the 2 limbs of that section apply only on a reference or an appeal under s. 187, that was not, in his opinion, the intention of the Parliament. He went on to state that there can be no doubt that on an appeal from the Supreme Court to the Federal Court or to the High Court (s. 200), the appellate Court is required to apply the same rule as to the burden of proof as that which governed the decision of the Court from which the appeal was brought. This was so also in the case of an appeal to the Supreme Court from a decision of a Board of Review.

5. Murphy J agreed with Gibbs J. He held that the legislative scheme, although not expressly stated, is that the provisions of s. 190 are applicable on appeal to the Supreme Court, the Federal Court, and the High Court. Further, the provisions of s. 190 applied to an appeal whether or not the Board of Review had varied the disputed assessment.

COMMISSIONER OF TAXATION