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*Burrows (NZ) Ltd*  
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IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY

M.485/82

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BETWEEN WALTER GODFREY BOWEN  
of Levin

OBJECTOR

AND THE COMMISSIONER OF  
INLAND REVENUE

COMMISSIONER

Hearing 20 June 1984  
Counsel D H Simcock and D R McLay for Objector  
P J H Jenkin for Commissioner  
Judgment 29 June 1984

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JUDGMENT OF DAVISON C.J.

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This case has been stated pursuant to s 33 of the Income Tax Act 1976.

At all material times the Objector was a partner in a partnership known as "Expo Sales" which carried on the business of souvenir retailers operating out of the Agrodome at Rotorua.

The balance date of the partnership is 30 June and the Commissioner accepts a return of income in respect of any year ended on 30 June as being in respect of the year ended on the preceding 31 March. In its return of income for the year ended 30 June 1978 the partnership claimed an increased export incentive deduction of \$23,503.

The Commissioner subsequently ascertained that the claim had been based on two types of sales:

- (a) Sales resulting from orders received from overseas.
- (b) Sales made in New Zealand to overseas tourists, which sales are paid for at the time of purchase and subsequently forwarded overseas by the partnership to the address provided by the purchaser.

The Commissioner considered that the (b) type sales did not qualify for the export incentive deduction in terms of s 156 of the Income Tax Act 1976. He adjusted the income returned by the partnership for the year ended 30 June 1978 as follows:

Income as returned	\$26,925.00
<u>Add back export incentive disallowed</u>	<u>23,503.00</u>
Total amended income	<u>\$50,428.00</u>
Objector's share	<u>\$25,214.00</u>

Subsequently, the Commissioner assessed the objector's liability for income tax for the year ended 31 March 1978, including in the objector's assessable income his share of partnership income of \$25,214 as adjusted.

The objector, through his accountants, objected to the said assessment by letter dated 28 March 1980. The Commissioner disallowed the objection and was required to state a case for the opinion of this Court.

#### QUESTIONS FOR COURT

The questions for determination by this Court are:

1. Whether the Commissioner in calculating the income of the partnership for the year ended 31 March 1978 acted correctly in disallowing a deduction in respect of the amount of \$23,503.
2. If the Commissioner was not correct then in what respect should the objector's income be amended.

#### OBJECTOR'S CONTENTIONS

Section 156 of the Income Tax Act 1976 applied in respect of the above transactions and in particular (but without limiting the generality of this contention):

- (a) The objector was included in the category of manufacturer, producer, processor or export merchant in section 156(1).

- (b) The goods were sold or disposed of to overseas purchasers in terms of the section.
- (c) The goods were exported from New Zealand.
- (d) The goods were not sold by retail to persons departing from New Zealand within the terms of paragraph (c) of the definition of "Non-qualifying goods" in section 156.

COMMISSIONER'S CONTENTIONS

- (a) that section 156 of the Income Tax Act 1976 was amended with effect from 1 April 1978. As a consequence the section was materially different during two periods of the income year applying to the objector, namely the period from 1 July 1977 to 31 March 1978 and the period 1 April 1978 to 30 June 1978.
- (b) that for the period from 1 July 1977 to 31 March 1978, and without prejudice to sub-paragraph (d) below:
  - (i) whether the objector was or was not a "manufacturer, producer, processor or export merchant" is irrelevant, as before 1 April 1978 section 156 made no reference to those terms;
  - (ii) it is accepted that sales resulting from orders received from, and sent to, overseas customers may give rise to a deduction under section 156, but despite the request by the Commissioner to supply a breakdown of figures (letter of 2 November 1979) no figures have been supplied to enable an apportionment to be made;
  - (iii) in relation to sales made in New Zealand to overseas tourists, these were not "export goods" as defined in section 156(1) in that

they were "non-qualifying" goods, being "goods which are sold by retail to persons departing from New Zealand".

(c) that for the period from 31 March 1978 to 30 June 1978, and without prejudice to sub-paragraph (d) below:

(i) the goods sold or disposed of by the objector were not "export goods" as defined in section 156(1) because:

(1) the objector was not a "manufacturer, producer or processor of the goods" nor an "export merchant";

(2) the goods were "non-qualifying goods" for the reasons set out in sub-paragraph (b)(iii) above.

(ii) even if some of the goods sold were "export goods" the objector has not supplied the Commissioner with sufficient information to identify such goods.

(d) that by section 36 of the Inland Revenue Department Act 1974, as applied by section 33(10) of the Income Tax Act 1976, the objector is limited to the grounds of his objection set out in or incorporated by the letter of 28 March 1980. He is therefore precluded from contending, in respect of both of the periods referred to in sub-paragraph (a) above, that he was a manufacturer, producer or processor of the goods in question and that he was an export merchant.

(This point was abandoned by the Commissioner at the hearing).

#### THE FACTS

The facts as I find them are these:

The partnership "Expo Sales" operates the "sheepskin shop" located in the Agrodome at Rotorua. The shop is managed by Mrs Harford, the wife of the objector's partner. The Agrodome attracts visitors from within New Zealand but caters particularly for visitors from overseas. Stage shows are provided daily for visitors and each show includes a shearing demonstration and an exhibition by top New Zealand sheep dogs. Commentaries are in English but there are also commentaries available, through head sets provided from a multi-track sound system, in languages which include Japanese, French, German and Spanish.

Visitors are encouraged to purchase New Zealand woollen goods and facilities for sending such goods overseas are provided.

Four types of sales are made from the shop.

They are:

- (a) Sales to New Zealand purchasers who take their purchases out of the shop with them.
- (b) Sales to overseas purchasers who take their purchases out of the shop with them.
- (c) Sales to New Zealand purchasers who arrange for the goods purchased to be sent to overseas persons.
- (d) Sales to overseas purchasers who arrange for the goods purchased to be sent overseas to addresses provided.

It is only in respect of sales of the types (c) and (d) that the objector claims to be entitled to receive export incentives provided for in the Act.

The method by which the shop sends goods overseas is as follows:

Goods are selected by the purchaser and paid for. The purchaser is then required to write into a book provided

for the purpose, the name and address of the person to whom the goods are to be sent and the shop then wraps, addresses and mails the goods to the addresses provided. It also insures the goods in its own name against damage or loss during delivery.

#### THE STATUTORY PROVISIONS

The tax year under consideration is that for the accounting year ended 30 June 1978. At the commencement of that accounting year, namely, 1 July 1977, s 156 of the Income Tax Act 1976 was in force. Section 156 is a provision giving an incentive deduction to taxpayers who fulfil the criteria set out in the section relating to export of goods from New Zealand. It provided:

- " For the purposes of this section -  
 'Export goods' means goods exported from New Zealand by a taxpayer, being goods -
- (a) Which were sold or disposed of by the taxpayer; and
  - (b) Of which the taxpayer was the owner at the time of the sale or disposal; and
  - (c) Which are not non-qualifying goods.

'Non-qualifying goods', in relation to export goods, means -

- (a) Goods exported by way of gift:
- (b) Goods taken or sent out of New Zealand with the intention that they will at some later time be brought or sent back to New Zealand:
- (c) Goods which are sold by retail to persons departing from New Zealand. "

During that accounting year, however, s 156 was amended by s 15 of the Income Tax Amendment Act 1978 with effect from 1 April 1978 by amending the definition of "Export goods" and adding a new definition of "Export merchant". The definition of "Non-qualifying goods" was not amended. The amended definition of "Export goods" is as follows:

- " 'Export goods' means goods exported from New Zealand by a taxpayer who is the manufacturer, producer, or processor of the goods or who is an export merchant, being goods -

- (a) Which were sold or otherwise disposed of by the taxpayer to an overseas purchaser; and
- (b) Of which the taxpayer was the owner at the time of the sale or disposal; and
- (c) Which are not non-qualifying goods; and
- (d) In respect of which, in the case of goods exported by an export merchant, the export merchant has entered into a contract (otherwise than through the agency of the manufacturer, producer, or processor of those goods) with an overseas purchaser for the sale or other disposal of those goods, under which contract the export merchant is required to export those goods to or to the order of that purchaser, and is responsible to that purchaser for the quality and quantity of those goods, and is entitled to receive from that purchaser the consideration for the sale or other disposal of those goods. "

The new definition of "Export merchant" was:

- " 'Export merchant' means a person who, in the opinion of the Commissioner, is -
- (a) Carrying on, as a business, the activity of exporting goods (not being goods manufactured, produced, or processed by him) from New Zealand; and
  - (b) As part of that business, actively engaged in seeking opportunities or creating or increasing a demand for the export of goods from New Zealand. "

In the accounting year under consideration there were therefore the old statutory provisions of s 156 applicable from 1 July 1977 to 31 March 1978, and the amended provisions of s 156 applicable from 1 April 1978 to 30 June 1978.

#### DECISION

I propose to deal with this case by taking the two periods of the tax year separately, naming the period from 1 July 1977 to 31 March 1978 for convenience Period A; and the period from 1 April 1978 to 30 June 1978 Period B.

PERIOD A

In order to qualify for incentives during this period the objector must establish that the goods for which he claims were "export goods" i.e. they were goods exported from New Zealand by him being goods:

- (a) which were sold or disposed of by the taxpayer and
- (b) of which the taxpayer was the owner at the time of the sale or disposal and
- (c) which are not non-qualifying goods.

It was accepted by the Commissioner that the requirements of (a) and (b) were met. The issue was whether the goods were "non-qualifying goods". Goods fail to qualify, in the context of this case, if they were :

- (a) Goods exported by way of gift.
- (b) ...
- (c) Goods which were sold by retail to persons departing from New Zealand.

GOODS EXPORTED BY WAY OF GIFT

For the objector it was argued that "goods exported by way of gift" means goods exported by the taxpayer by way of gift and not goods sold by the taxpayer to a person departing from New Zealand who makes a gift of those goods to some third person overseas. The objector claimed that what the buyer does with the goods which he has bought to have sent overseas for him by the shop - whether he has them sent to himself at his own address, or whether he has them sent to some of his family or other persons overseas by way of gift - is irrelevant when considering whether the goods were exported for tax purposes.

I think the objector is correct in this contention. Reference to the definition of "export goods" indicates that this is so. The two requirements of the definition of "export goods" (a) and (b) are that the goods are sold or disposed of by the taxpayer who must be the owner of the goods at the time of sale or disposal.



By reason of the definition of "non-qualifying goods", "goods exported by way of gift" are then excluded from export goods disposed of by the taxpayer which may qualify for the export incentive. It is the making of the gift of the goods by the taxpayer which takes them out of the category of "export goods". None of the goods claimed by the objector were goods exported by him by way of gift.

GOODS SOLD BY RETAIL TO PERSONS DEPARTING FROM NEW ZEALAND

It was this category of goods which raised the main issue in the case. It was the issue remaining after two other issues had been disposed of. The issues disposed of were:

1. Were the goods posted overseas by the shop, in the manner set out earlier in this judgment, exported from New Zealand by the objector?
2. Were they excluded from qualifying for the export incentive as "non-qualifying goods" being "goods which are sold by retail to persons departing from New Zealand"?

For the Commissioner, Mr Jenkin accepted that the goods were exported from New Zealand. Mr Simcock for his part accepted that the goods were sold by retail. That left outstanding the question of whether they were "sold ... to persons departing from New Zealand".

The question raises two issues:

1. When were the goods sold?
2. At the time of such sale were the purchasers departing from New Zealand?

WHEN WERE GOODS SOLD?

Evidence on this topic was given by Mrs Harford, the Manageress of the shop. She said:

" They (the purchasers) bring the article that they have purchased up to the counter. We then list them in what

we call our Export Mailing Book and then get the purchasers to write their own names and addresses in the book.

....

When they have done that we ring up on our cash register what their purchases are. Then we hand them a receipt with our name and address on the receipt so that if they have any problems with their overseas parcels exported to them they can contact us at a later date.

....

At the time of purchase we do all our overseas exporting in the disposable bags. At the time of purchase the articles are put in those bags and then a reference on that coincides with the reference in the Export Book and then they are put aside until such time as the crowds have gone. Then the members of the staff do these parcels up - staple them, address them, put on customer's declaration and then they are entered with the name and country where that parcel is going and the amount of the purchase is entered on to the Insurance Company sheets and then they are put into canvas bags and taken to the Post Office.

....

(Q) In your opinion Mrs Harford, when do you see the goods as becoming the property of the purchaser?

(A) When they leave our premises and go to the Post Office. "

Earlier, Mrs Harford had said:

" Each day between shows the parcels are done up for overseas exporting and taken to the Post Office that day or the following day. "

There can be little doubt on that evidence that goods are sold and the property in them passes at the time the transaction is completed in the shop when the purchaser hands over the goods purchased, has them set aside in a separate bag identified with the purchaser's name, pays for them and receives a receipt. The subsequent mailing of the goods to the purchaser is a matter agreed upon for the convenience of the purchaser. This view of the transaction is consistent with the provisions of the Sale of Goods Act 1908 and the intention of the parties. It is also

consistent with the ordinary meaning of "sold" - see Schollum v Barripp [1916] NZLR 1050, 1055. I do not think that Mrs Harford's view given in evidence that the goods become the property of the purchaser when they leave the shop premises and go to the Post Office is strictly accurate.

The fact that the insurance on articles sold is taken out in the name of the partnership ("Expo Sales") does not evidence any contrary intention on the part of the parties to the interpretation of "sold" in the context of the transactions. The full details of the insurance arrangement were not given in evidence but it appears that the partnership replaces or refunds money to purchasers of goods lost or damaged during delivery and the insurance policy indemnifies the partnership against any losses so resulting.

WERE PURCHASERS DEPARTING FROM NEW ZEALAND?

The answer to this question involves the interpretation to be given to the word "departing". All the purchasers of goods from the partnership shop for which export incentives were claimed were overseas residents visiting New Zealand so that all of them at some point of time in the future would be departing from New Zealand.

Mr Simcock for the objector, however, argued that the expression means purchasers who are immediately departing from New Zealand and he instanced the case of persons who purchase goods from Duty Free shops at airports who make their purchases and have them delivered to them as they board the aircraft a short time later. The provision, he said, is aimed at shops where sales are made to purchasers where goods actually leave New Zealand with the purchaser. If Mr Simcock is correct, then it is only goods sold to such persons i.e. those immediately or presently departing from New Zealand that are to be regarded as non-qualifying goods and goods sold to purchasers from the partnership shop, being sales to persons who are not departing immediately, do qualify as "export goods".

The obvious difficulty in the adoption of Mr Simcock's interpretation is - where is one to draw the line? Is a purchaser departing immediately if he leaves New Zealand within minutes, hours, days or weeks?

Mr Jenkin for the Commissioner argued that the interpretation contended for on behalf of the objector adds an unjustified gloss to the word "departing" in the statute. He advanced three propositions:

1. The definition, he said, should not be "read down". If the Legislature had meant to catch only Duty Free shops, it would have said so.
2. "Departure" is an action and until it actually occurs it is looking to the future.
3. The purpose of the exclusion appears to be the elimination of small purchases at retail as contrasted with the larger more co-ordinated business of exporting.

The word "depart" is defined in Webster's International Dictionary as: "To go forth or away, to quit, leave", and the adjectival phrase "departing from New Zealand" qualifies "persons" so as to limit the provision to those who are going away or leaving New Zealand. It appears to me that persons who are overseas residents, and who arrive in New Zealand as visitors with the intention of leaving New Zealand at the end of their visit, must be persons who at some point of time are persons who are departing from New Zealand in the ordinary meaning of the word "departing". If any other meaning was intended then the word should have been expressly qualified in a temporal sense, or the word must be given a meaning other than its ordinary meaning. I see no warrant for adopting that course.

Mr Simcock in support of his argument that "departing" must be qualified and interpreted so as to cover only persons purchasing before immediate departure, e.g. from Duty Free shops at airports, referred to International Importing Ltd v Commissioner of Inland Revenue [1972] NZLR 1095

where the Court held that export incentives were available to a Duty Free shop because its sales to its customers were conditioned upon export of the goods sold from New Zealand. The 1973 Amendment to the Act (Land and Income Tax Amendment 1973, s.22) was, he said, passed as a direct consequence of that decision and included within the definition of "non-qualifying goods" "goods which are sold by retail to persons departing from New Zealand". However, Mr Simcock's interpretation of "departing" as being immediate or contemporaneous with the sale of the goods, although it would probably cover sales from Duty Free shops at airports, would not cover sales from Duty Free shops in cities where goods are purchased often weeks or months before the purchaser's departure.

But the Amendment is far wider than necessary to cover only sales from Duty Free shops. It appears that the Legislature has deliberately taken the opportunity to include in the definition all retail sales (not only duty free ones) to persons departing from New Zealand.

I am aware that in International Importing Ltd v Commissioner of Inland Revenue (ante) Turner P. said that s 156 should be given a fair, large and liberal interpretation which will best bring about the result which the Legislature desired. Although the Legislature desired exports, it placed some limits on the exports which qualified for incentives. If it meant to qualify the word "departing" it should have done so.

The result is that on the facts of the present case the partnership shop was selling goods by retail to persons departing from New Zealand and such goods are non-qualifying goods in terms of the Act.

#### PERIOD B

This period covers 1 April 1978 to 30 June 1978. On 1 April 1978 the definition of "export merchant" earlier referred to was introduced into the Act and the definition of "export goods" was widened to include goods -

" In respect of which, in the case of goods exported by an export merchant, the export merchant has entered into a contract (otherwise than through the agency of the manufacturer, producer, or processor of those goods) with an overseas purchaser for the sale or other disposal of those goods, under which contract the export merchant is required to export those goods to or to the order of that purchaser, and is responsible to that purchaser for the quality and quantity of those goods, and is entitled to receive from that purchaser the consideration for the sale or other disposal of those goods. "

Mr Jenkin made no issue of the objector's claim to be an export merchant. But even an export merchant must still export "export goods" which are subject to the exclusion of goods sold by retail to persons departing from New Zealand.

It is unfortunate that the partnership which is playing such a large part in promoting the wool industry of New Zealand is not able to claim export incentive deductions on the sales of goods from its Agrodome store. The reason simply is the exclusion of such sales by the definition of "non-qualifying goods". It may well be, however, as Mr Jenkin submitted during the course of argument that following the decision in International Importing Ltd v Commissioner of Inland Revenue (ante) the Legislature decided to eliminate from the scheme all small sales of goods at retail and to limit it to the larger more coordinated business of exporting. Such a general policy was bound to remove from the benefits of the incentive scheme what might be thought to be deserving cases such as that of the present objector.

I find that the Commissioner in calculating the income of the partnership for the year ended 31 March 1978 acted correctly in disallowing a deduction in respect of the sum of \$23,503. Costs reserved.

Solicitors for the Objector Bell Gully Buddle Weir  
(Wellington and Auckland)  
Solicitors for the Commissioner Crown Law Office (Wellington)