IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 391/87

BETWEEN HEALING INDUSTRIES LIMITED

Objector

A N D THE COMMISSIONER OF INLAND REVENUE

Respondent

Hearing 26th May 1988

Counsel G D Clews and P A McLeod for Objector
M J Ruffin for Commissioner

Judgement 8th June 1988

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JUDGEMENT OF TOMPKINS J

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The objector has objected to the Commissioner's assessment of bonus issue tax for the year ended March 1982. This assessment results from certain transactions that occurred in 1980 and 1981.

**The Sale Agreements**

By an agreement made on 15th December 1980, the objector agreed to buy from certain persons and companies ("the Avery Wood shareholders") all the shares in Avery Wood Limited ("Avery Wood"). The price was $3,875,000. It was to be paid in the following way.

1. $1,292,000 in cash on the date of settlement.

2. $1,293,000 either in cash or at the option of the objector in the manner provided in a supplemental agreement of even date.

3. The balance of $1,290,000 to remain owing by the objector to the Avery Wood shareholders and to be repaid at the times and in the manner specified in the agreement.

The supplemental agreement dated 15th December 1980 was also between the Avery Wood shareholders and the objector. Its effect was that the sum of $1,293,000 of the purchase price referred to in (2) above may at the option of the objector be satisfied by the objector issuing to the Avery Wood shareholders in such proportions as the Avery Wood shareholders may determine, ordinary shares in the capital of the objector, such shares to be issued as fully paid shares at such premium as the objector may determine, provided that the Avery Wood shareholders agreed to sell such shares on date of settlement on terms approved by and to persons nominated by the objector and that the objector agreed to arrange purchasers to ensure that the Avery Wood shareholders receive on settlement the sum of $1,293,000.

The objector elected to adopt the share issue option to pay the sum of $1,293,000.

The transaction was settled on the 9th February 1981. 490,000 ordinary shares of 50 cents each were issued by the objector in favour of two parties. 460,000 shares were issued to Warsand Nominees Limited ("Warsand") and 30,000 shares issued to George Elwyn Tom Wood who was one of the Avery Wood shareholders. Warsand was a nominee company of the sharebrokers engaged by the objector. It held the shares which were issued to it on trust for the Avery Wood shareholders. Mr Wood held the shares issued to him as trustee for himself and two of the Avery Wood shareholders. It was the intention that these three would retain 10,000 shares each in Healing.

Of the 460,000 shares issued to Warsand, all but 17,000 had been placed by the sharebrokers with other purchasers. The 17,000 shares were held by Warsand on behalf of the brokers who on-sold them later. The net proceeds from the issue of shares to Warsand and Mr Wood amounting to $1,190,560 was paid to the Avery Wood shareholders by the brokers. The difference represented the value of the 30,000 shares retained by Mr Wood on behalf of himself and the other two Avery Wood shareholders.

A result of these series of transactions was that the objector credited to its share premium account $1,023,635, being the difference between the par value of the shares issued ($245,000) and the market value of the shares issued ($1,268,635).

On 31st August 1981 by a shareholders' resolution duly

passed at its annual general meeting, the objector made a one for five bonus issue to shareholders of 1,305,053 fifty cent shares with a nominal value of $652,526.50. $483,530.50 of that came from the share premium account arising from the issue of shares in February 1981 when the objector acquired Avery Wood. It is that part of the bonus issue in respect of which the Commissioner has assessed bonus issue tax at 17.5 cents totalling $84,617.84.

**The Issue**

Bonus issue tax was imposed by s 259 of the Income Tax Act 1976 ("The Act"). That provision which I need not set out in detail was repealed the year following that with which this case stated is concerned. The section provided that bonus issue tax shall be payable on the amount of any bonus issue made by every company to which the relevant part of the Act applied.

For present purposes the crucial statutory provision is s 3 of the Act and in particular, subs (1) and (4). They provide

> "3. **Meaning of term "bonus issue" (1)** - For the purposes of this Act the term "bonus issue", in relation to a company, means a capitalisation of the whole or part of the amount for the time being standing to the credit of any of the company's reserve accounts or to the credit of the company's profit and loss account or of the whole or part of any amount otherwise available for capitalisation, being in any such case a capitalisation by way of-
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> (a) The allotment on or after the 11th day of June 1965 of fully paid-up or partly paid-up shares in the company; or
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> (b) The giving on or after that date of credit in respect of the whole or part of the amount unpaid on

any shares in the company.

(4) To the extent to which the Commissioner is satisfied that any transaction referred to in subsection (1) of this section includes any amount that constitutes premiums paid to a company in respect of the issue of share capital by the company, the transaction shall be deemed not to be included in the term "bonus issue" for the purposes of this Act."

Put shortly, it was the objector's contention that the circumstances were within the exemption in subs (4) because the transaction resulting in the issue of the bonus shares included an amount that constituted premiums paid to the objector in respect of the issue of share capital by the objector. It was the Commissioner's contention that the exemption did not apply because there were no premiums paid. The submissions therefore centred on the expression "premiums paid" in sub s (4).

It was initially the Commissioner's contention that sub s (4) applied only where the premiums had been paid in cash. Mr Ruffin, in my view rightly, recognised that that submission could not be maintained on the authorities. But it remained his submission that in the circumstances, there was no "payment" of premiums to the objector in respect of the issue of share capital by the objector.

Counsel referred to a number of cases relating to payment and in particular to payment otherwise than by cash. Although these were helpful, it must be recognised that the precise meaning must in each case depend upon the context, and in particular, where the issue involved the interpretation of that

word in a statute, the statutory context and objective.

In White v Elmdene Estate [1959] 2 All ER 605, Lord Evershed, dealing with an issue whether a person had paid a premium for the grant of a lease in circumstances where that person had agreed to sell a house for L500 less than its market value in consideration for the grant of a tenancy over another property, observed that

> "...the word "payment" in itself is one which in an appropriate context may cover many cases of discharging obligations. It may even include a discharge not by money payment at all but by what is called "payment in kind"."

In Re Mataura Motors Limited [1981] NZLR 289 the Court of Appeal was concerned with whether the amount due under a debenture had been "actually advanced or paid" when the debenture had been entered into to secure a debt already owing. Richardson J at 292 referred to White's case to Re Matthew Ellis Limited [1933] 1 Ch 458 and to Re Roper (1882) 21 Ch D 543. In both of the last two cases reference is made to the attitude that businessmen would take to the transaction, and in particular whether they would regard the relevant amount as being paid. On those authorities, Richardson J expressed the opinion that the question of whether payment has been made is not entirely dependent on the physical passing of cash or a cheque.

In the taxation context, the issue was considered by the Federal Court of Australia in Whim Creek Consolidated N.L. v The Federal Commissioner of Taxation (1977) 77 ATC 4, 503.

The taxpayer had lent money to a subsidiary. Subsequently, the subsidiary allotted shares to the taxpayer as fully paid. The amount payable on the allotment was set off against the advances received from the taxpayer. The Federal Court held that the monies set off against the monies due on allotment were "monies paid on shares" for the purposes of the relevant taxing provision.

What in my view emerges from these and other cases is that in appropriate circumstances it can properly be held that a payment has been made by the release of a financial obligation or by the discharging of a contractual obligation. I can see no reason why this general approach should not apply in these circumstances. The premium was the difference between the par value and the market value of the Healing shares transferred to the Avery Wood shareholders. The "payment" for that premium was effected by the transfer of the Avery Wood shares by the Avery Wood shareholders to Healing. The value of the Avery Wood shares is fixed by the agreement of the 15th December 1980 at the purchase price set out therein of $3,875,000. Part of the value of those shares was the consideration that passed for the premium portion of the value of the Healing shares. I am left in no doubt that any man of business would regard that premium as having been "paid" by the Avery Wood shares transferred to Healing.

I find nothing in the statutory context of s 3 and in particular subs (4) to militate against that approach. Nor could

Mr Ruffin. The statutory purpose of subs (4) appears to be to exempt from bonus issue tax the amount of any valuable consideration received by a company in respect of the issue of share capital by that company. So I find no reason why what may generally be described as a shares for shares transaction should not result in premiums being paid for share capital issued by a company involved in such a transaction.

For these reasons I conclude that the Commissioner acted incorrectly in making the assessment of bonus issue tax.

The objector is entitled to costs which I fix at $2,000.

Solicitors

Russell McVeagh McKenzie Bartleet & Co, Auckland, for Objector
Crown Law Office, Wellington, for Commissioner