IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP No. 153/92

UNDER The Income Tax Act 1976

BETWEEN SHELL NEW ZEALAND LIMITED of Wellington

Objector

AND THE COMMISSIONER OF INLAND REVENUE

Commissioner

Hearing: 6 September 1993

Counsel: R J Cullen and J A Douglas for Objector
J R Eichelbaum and J D Collins for Commissioner

Judgment: 27 OCT 1993

JUDGMENT OF GREIG J

This case concerns the liability of the objector, Shell, to make tax deductions under s338(1) of the Act in respect of certain lump sum payments made to Shell's employees in relation to their personal residential accommodation.

The payments concerned were made between June 1984 and June 1989. They comprise some 28 payments, made to a number of employees. The payments all fall within the income years ended 31 March 1985 to 31 March 1989 inclusive. Each lump sum payment was made to an employee transferred at the request of Shell in the course of his employment. The payment was made in pursuance of a Shell policy for personnel. The purpose of the payment in each case was to meet or to compensate in part what was assessed to be a disadvantage to the employer, arising out of the sale of an existing house in the place in which he was formerly living and employed, and the purchase of a new house in the place to which he had been transferred. Shell did not treat these payments as salary, wages or other sourced deduction and made no PAYE deductions in respect of them.

In the course of perusing Shell's wages and deductions records, the Commissioner came to the conclusion that the payments were source deduction payments. He then proceeded to calculate tax on each of the amounts paid at the highest current marginal rate of tax, on the basis of adding to the actual payment the amount of tax that the Commissioner claimed ought to have been deducted from a hypothetical gross sum. Shell objected to this reassessment and required the Commissioner to state a case. The total amount of the assessments so made by the Commission is $219,941. The question for the determination of the Court is whether the Commissioner acted incorrectly in determining that the objector was liable to make tax deductions from those previous payments, and if so, how such assessments should be varied.

In explanation and support of the objection, I heard evidence from Mr D I Brown, the Director of Management Services at Shell, who gave an explanation of the policies and procedures of the Company, produced copies of the various manuals setting out the policies and other material showing detail of some of the payments that had been made and the circumstances in respect of each of the employees, or some of them, which had led Shell to make the payments.

Shell (New Zealand) Limited is part of the world-wide Shell organisation, employing a substantial number of people here and elsewhere in the world. It has developed a sophisticated policy and procedure for the administration of staff, which are incorporated by reference into the general conditions of employment. As is common in a large organisation such as this, the terms and conditions are set out in a staff manual and in other documents which express the general policies to be applied in individual cases. Parts of the staff manual are freely available to all staff but parts remain confidential, in particular where discretions are left to management or senior management. That is the case for the housing policy, certain parts of the documentation are not freely available to staff members.

As with any larger organisation with facilities and offices spread over the whole country and overseas, transfer from one place to another in the course of employment can be said to be an accepted feature of that employment. Transfer can occur because of the employee's promotion on his career path. It can occur on secondment to special particular duties for a specified time or thereafter. It can occur for other reasons in connection with the employment, including administrative readjustments in the structure of Shell.

In all cases transfer is voluntary, though no doubt in practical terms disadvantages or potential disadvantages from refusing a transfer may have strong persuasive effect. Since an amendment in 1989 to the General Conditions of Employment for Salaried Staff, there is a provision which advises the staff member of the possible requirement to relocate and the expectation that agreement to such requests will not be unreasonably withheld.

The general manual freely available to staff refers to some provisions about the expenses of transfer, but the provision as to housing and housing finance are disclosed only after a transfer has been agreed and questions of transfer and housing have been discussed. That part of the manual and the policy therein contained indicated that the Company provided a measure of assistance, leaving the initiative for sale and purchase of houses with the staff member. It is made clear that any additional financial commitment consequent upon a voluntary decision to upgrade the quality of a house would not be treated as a transfer cost referable to the Company. There is, in the manual, general advice as to the best way of undertaking a sale and purchase, clear provision is made for reimbursement of travel expenses, removal of effects and insurance, legal fees, valuation fees and commission, penalty interest on early repayment of a mortgage and some other specific transfer allowances. There is, however, no express provision in the manual as to the housing policy and that part of it which is in issue in this case. That is only obliquely referred to. First of all it is noted that a house may not sell quickly and it is suggested that it will be advisable to keep the immediate superior of a member "in the picture", and states:

> "Before Personnel Department can suggest a course of action, they will need to know details of the staff member's financial position and be provided with a copy of the independent property valuation."
>
> In the next section, it says that:
>
> "Generally speaking, the Company does not seek to become directly involved, but on occasions, staff members have found benefit in consulting Personnel Department prior to finalising arrangements which could be considered disadvantageous in the longer term."

However, Mr Brown, in his evidence indicated that a Shell employee on transfer would be advised orally that there was a policy for housing assistance, that it was discretionary and might not result in any payment to the employee. He accepted that staff would know generally of the housing assistance policy but are

not made aware of the details of it. Although there is a discretionary element and it is a matter of decision in each case whether and to what extent any payment would be made, a formula has been fixed and exercised in the past. There are two particular elements to this policy, one in respect of capital loss and the other in respect of mortgage interest assistance.

In respect of the first, the requirement of the Shell policy is that for the present house, a benchmark selling price is established as an average of two valuations from registered valuers, although, as the evidence showed, Shell would sometimes accept only one valuation. On the sale of the house, there would then be a calculation of the shortfall, if any, between the benchmark selling price and the actual selling price. In deciding the appropriate amount to be paid, the Company may take into account any calculated benefit which the staff member may have obtained by buying his new property in the transfer location at a price lower than a benchmark purchase price for that property. The Company may also take into account any special factors which may affect the actual sale, whether in the individual case or arising out of the individual property or a market factor. The Company does not take into account any hypothetical loss or gain as against the original purchase price. It was made plain that not all transferees received payment on this policy. Of the 28 payments in issue, only 16 were described as capital loss reimbursement payments. The range of these payments was from $500 to $17,000. There was, in addition, another payment which had been treated by Shell as a capital loss payment; this was a payment in May 1985. Upon a transfer, the staff member lost the advantage of the right to convert a loan into a grant because of the failure to notify the lender in advance. The amount of that loss was reimbursed to the employee.

The other part of the housing policy is a mortgage interest assistance payment which is intended to safeguard the staff member from additional expense arising from the need to borrow a greater amount and consequently to make greater interest payments because of a transfer to an area with higher cost of housing.

In the period 1 April 1984 until July 1988, the Company allowed a maximum of the lesser of $5,000 or an amount equal to 2 years of the interest payable on the difference between the purchase price on the new property and the sale price on the old property. The Company took into account in some cases the quality of the house to which the employee had transferred so that he was not able to obtain the benefit of the system merely by improving the value of

his house. After 1988, the upper limit was increased to $30,000 as the aggregate of any capital loss compensation plus any mortgage interest compensation payment, and the amount that was paid on the mortgage interest assistance was thereafter calculated on the basis of calculated housing cost differentials for the various urban sectors based upon the Valuation Department's 6-monthly average price survey for freehold market properties on an age category basis. The interest was calculated for a period up to 5 years but within the overall ceiling that I mentioned.

Shell accepted that it was in the interests of the Company that its employees should accept transfers and that on transfer a staff member should not have to worry about the implications of relocation and thus have their attention diverted from their actual work. The system provided an incentive to transfer. It was clear, however, that Shell did not fix salaries with regard to this form of assistance or in relation to the transfer. Mr Brown accepted in cross-examination:

> "I believe that the fact that the staff member on transfer is out of pocket as a consequence of the requirements of Shell that he transfer and that Shell seeks to pay him back for that out-of-pocket expenditure is indeed reimbursement."

The liability to make tax deductions from source deduction payments is contained in s338(1) of the Act, as follows:

> "For the purpose of enabling the collection of income tax from employees by instalments, where an employee receives a source deduction payment from an employer, the employer or other person by whom the payment is made shall, at the time of making the payment, make a tax deduction therefrom in accordance with this Part of this Act:
>
> Provided that no tax deduction need be made from any source deduction payment made to any employee in respect of his employment as a private domestic worker:
>
> Provided also that if a tax deduction is not made by the employer in any such case section 355 of this Act shall apply to the employee."

A source deduction payment is defined at s6(1), as follows:

> "Subject to this section, for the purposes of this Act the term 'source deduction payment' means a payment by way of salary or wages, an extra emolument, or a withholding payment."

Salary or wages is defined in s2 as follows -

> "'Salary or wages', in relation to any person, means salary, wages, or allowances including all sums received or receivable by way of overtime pay, bonus, gratuity, extra salary, commission, or other remuneration of any kind, in respect of or in relation to the employment of that person."

The definition then continues to include a number of different particulars, the only one that was referred to in the course of this case was item (a):

> "Any payment made by an employer in respect of or in relation to any expenditure incurred or to be incurred by an employee of the employer....".

Extra emolument is defined in s2 as an exclusive definition, as follows:

> "'Extra emolument', in relation to any person, means a payment in a lump sum (whether paid in one sum or in 2 or more instalments) made to that person in respect of or in relation to the employment of that person (whether for a period of time or not), being a payment which is not regularly included in salary or wages payable to that person for a pay period, but not being overtime pay; and includes any such payment made."

It continues with various inclusive payments but none of these are relevant in this case. It is relevant to note the provisions of s65(2) of the Act which included an assessable income, in para(b), before 1 April 1985:

> "All salaries, wages, or allowances (whether in cash or otherwise), including all sums received or receivable by way of bonus, gratuity, extra salary, compensation or loss of office or employment or emolument of any kind in respect of and in relation to the employment of service of the taxpayer"

After 1 April 1985 that sub-paragraph was substituted by the Income Tax Amendment Act 1985, s34(7), which deemed as assessable income, "all monetary

remuneration". That expression was inserted in the definition clause at the same time, and it reads:

> '"Monetary remuneration' means any salary, wage, allowance, bonus, gratuity, extra salary, compensation for loss of office or employment, emolument (of whatever kind), or other benefit in money, in respect of or in relation to the employment or service of the taxpayer; and includes any expenditure on account of an employee; but does not include any employer superannuation contribution."

There were some submissions made drawing attention to the difference in the wordings used in the various definitions and in the amendments made to them. The words "remuneration", "emolument" and the use of the term "other benefit in money" figured in the definition of monetary remuneration but not in salary, wage or extra emolument. I think for the purposes of this case, however, nothing turns on these distinctions. It must be remembered that remuneration and emolument are words of general use which mean reward, recompense and include, among their meanings, salaries or wages and other kinds of benefits or payments which are received by individuals. There is no relevant distinction in the meanings of these words which might affect the construction of the sections and the obligation of a taxpayer in a case such as this.

The objector placed considerable reliance on the decision of the House of Lords in *Hochstrasser* v *Mayes* [1960] AC376. That case concerned a housing assistance policy operated by ICI in favour of its employees. In that case, as cited in the head note, although the fact of employment was the causa sine qua non, it was not the causa causans of the payment to the employee and it did not therefore arise from that employment. That case, however, was decided upon in its own statutory context in which tax was to be charged on "the profits or gains arising or accruing in respect of any office, employment or pension". That is a far cry from the much wider and detailed provisions contained in the present legislation in this case. I find little help can be had from a decision on such a distinct case.

The payments that were made here were not salary or wages. There is clearly a distinction between salary or wages and extra emolument, and that arises out of the regularity or irregularity of the payment. Apart from the definition of extra emolument, it could well be said that a payment such as this could fall within the definition of salary or wages as being other remuneration of any kind.

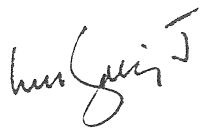
It is not, I think, within the extension of salary or wages to money paid on account of the employee. That is, it is not money paid to or on his account but to him directly, arising out of the circumstances which pertained to him. It is not the third party or indirect payment which is contemplated by the money paid on account. Extra emolument, however, divides and separates the payments which fall within its definition from those which are regularly included in the salary or wages. Clearly these housing policy payments were not regularly included in salary or wages as normally understood and must fall, if they fall at all, within the terms of extra emolument. Plainly enough, it was a payment in a lump sum.

The question in this case is whether the payments were made in respect of or in relation to the employment of that person. I think the answer to that must be "yes". The payment was not made unless the person involved was an employee, as only employees were entitled to participate in this policy and to receive the payments. The payment was not made unless the employee was first transferred. That transfer was made at the request of the employer. The employer perceived some advantage and benefit out of the transfer and out of the incentive of the scheme as part of the transfer arrangements. The payment was not made unless the transfer was completed, that is to say, unless and until the employee took up the new employment or new position and had sold and purchased another house. The payment was made not only for the benefit of the employer as well as the employee, but to facilitate the transfers, to provide an incentive to these and to overcome the difficulties. It is not a question of profit or capital or income or reimbursement, it is a question whether the payment in a lump sum is in respect of or in relation to the employment. If Latin be useful in this case, then it is a question of sine qua non rather than a question of causa causans. The connection, the relationship between the payment and the employment is so close that it cannot be otherwise than characterised as being in respect of or in relation to it.

The Commissioner was not incorrect in determining that the objector was liable to make tax deductions from the payments referred to, and the answer to that question must therefore be "no". There was a challenge to the amount of the assessment. Mr Eichelbaum accepted that the extra emolument rate should have applied and agreed that the adjustments should be made accordingly. I understood that it was agreed that the question of further adjustment could be resolved without any formal need to make any further investigation on the part of the Court into the payments made and indeed, there was no material available for

the Court to do that. I reserve leave to the parties to apply further if that be necessary.

The Commissioner ought to be entitled to costs, which I find in the sum of $3,000, together with disbursements costs and necessary expenses to be fixed by a Registrar.



Solicitors: Rudd, Watts & Stone, Wellington, for Objector
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