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DEO NARAYAN SAHAY

v.

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COMMISSIONER OF INLAND REVENUE

[COURT OF APPEAL, 1975 (Gould V.P., Marsack J.A., Spring J.A.),
18th, 26th November]

Civil Jurisdiction

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Income tax—trust deed—lease of property at unrealistically low rental by settlors to trust company of which they were directors—subsequent lease by trust company of property at market rental—whether transaction classed as family dealing and not a means of avoiding tax—whether transaction void as against the Commissioner of Inland Revenue—Income Tax Ordinance (Cap. 176) s. 103—Australian Income Tax Assessment Act 1936 s. 260—New Zealand Land and Income Tax Act 1954 s. 108—whether settlors liable to be assessed for tax in respect of income received—Income Tax Ordinance (Cap. 176) ss. 10, 11, 15, 35.

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The appellant executed a deed of settlement in favour of a trust company of which he and his wife were directors and held a controlling interest, granting a lease to the trust company of his property at an annual rental of \$50.00. Subsequently the trust company leased the property at an annual rental of \$3,000.00. The respondent purported to set aside the deed as being void under the Income Tax Ordinance s. 103 upon the ground that it constituted a tax avoidance scheme.

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Both the Court of Review and the Supreme Court concluded that the deed was void as against the respondent and that a tax liability fell on the appellant.

It was argued on appeal that the transaction should be classed as family dealings and that its purpose was to provide maintenance, education and benefit for the children of the appellant and not to avoid tax—

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Held 1. The appellant was able and intended by the arrangements made to syphon off the income from the property into a trust fund and thereby decrease the taxable income. In these circumstances, the arrangements were a means to avoid tax and the deed was void against the Commissioner.

2. As the documents were void as against the Commissioner, there was no trust in existence and the appellant himself derived income from the lease of the property. The rent was, therefore, assessable as income derived by him.

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Cases referred to :

Newton v. Federal Commissioner of Taxation [1958] A.C. 450 ; [1958] 2 All E.R. 759.

Hancock v. Federal Commissioner of Taxation (1961) 108 C.L.R. 258.

Carlson v. Commissioner of Inland Revenue [1970] N.Z.L.R. 182.

Mangin v. Inland Revenue Commissioner [1971] 1 All E.R. 179 ; [1971] A.C.

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Wisheart, Macnab and Kidd v. Commissioner of Inland Revenue [1972] N.Z.L.R. 319.

Udy v. Commissioner of Inland Revenue [1972] N.Z.L.R. 714.

Duke of Westminster v. Inland Revenue Commissioner [1936] A.C. 1.

Deputy Federal Commissioner of Taxation v. Purnell (1921) 29 C.L.R. 464.
Commissioner of Taxation v. Kirk [1900] A.C. 588.
Commissioner of Inland Revenue v. Philips [1955] N.Z.L.R. 884.
Commissioner of Inland Revenue v. Ashton [1974] N.Z.L.R. 321.
Commissioner of Inland Revenue v. Gerard [1947] 2 N.Z.L.R. 279.

Appeal against the decision of the Supreme Court holding that a deed of settlement and the documents executed thereunder were void as against the Commissioner of Inland Revenue, and deciding that the rental from the property was properly assessable to the appellant.

D. N. Sahay, the appellant in person.

M. J. Scott for the respondent.

The following judgments were read :

SPRING J.A. : [26th November 1975]—

This is an appeal against the decision of the Supreme Court given at Suva on the 7th August 1975.

The Commissioner of Inland Revenue, the respondent, issued income tax assessments for the year ending 31st December 1971 to the appellant Deo Narayan Sahay and his wife Sugra Sahay which assessments included rental paid for a house property situated at Lami, Suva owned by the appellant and his wife.

The appellant and his wife were separately assessed for income tax and they both objected thereto. The outcome of this appeal will determine the fate of his wife's appeal as the points raised by each are identical. In this judgment reference to the appellant will therefore include reference to his wife Sugra Sahay.

The facts briefly are as follows. The appellant was planning a trip overseas in 1971 and was desirous of making financial provision for his infant children in the event of disaster befalling him while aboard. Accordingly, he established a trust for the children by executing a deed of settlement dated 19th February 1971 between himself and his wife as settlors and Tower Investments Limited as trustee ; the relevant portions of the deed of settlement are :

" 1. THE Settlers will grant and the Trustee will accept an Agreement to Lease of that dwelling house comprised in Native Lease No. 9220 situate at Queens Road, Lami for a term of two (2) years with a right of renewal for a term of further two (2) years from the 1st day of March 1971 at a rental of \$50.00 (FIFTY DOLLARS) per annum the first of such rental to be due and payable on the 1st day of March 1971.

2. DURING the period aforesaid and the further period, if any, arising from the exercise of the right of renewal contained in the foregoing clause the Trustee shall sublease the said property at such rental and on such terms as it shall deem meet, and hold in trust the income for the beneficiaries in equal shares.

3. THE Trustee shall apply the whole or such part of each beneficiary's income arising out of the said property for or towards the maintenance, education or otherwise for the benefit of such beneficiary, and may either itself so apply the same or may pay the same to the guardian or guardians for the time being of the said beneficiary or the person or persons selected by it for that purpose without seeing to the application thereof. "

A On the 19th February 1971 the appellant (pursuant to the terms of the settlement) executed a lease of the house property at Lami in favour of Tower Investments Limited for 2 years (with a right of renewal for 2 years) with effect from 1st March 1971 at a rental of \$50 per year.

B On 27th April 1971 Tower Investments Limited executed a sub-lease of the said property in favour of Otis Elevator Company Limited for 2 years from 1st March 1971 at a rental of \$3,000 per year; it is to be noted that the appellant and his wife were both directors of Tower Investment Limited and held 200 of the 401 shares in the issued share capital thereof. The respondent purported to set aside the above three documents as being void, as against him, under Section 103 of the Income Tax Ordinance (Cap. 176), upon the grounds that they constituted a tax avoidance arrangement.

C The appellant's objection to the assessment was heard by the Court of Review at Suva which held that the respondent had acted correctly in purporting to set aside the 3 documents and declared them void as against the respondents, but decided that the rental for the house property was incorrectly assessed to the appellant. The respondent appealed against this determination to the Supreme Court where a decision was given in favour of the Commissioner of Inland Revenue; the learned judge holding that the rental paid for the house was properly assessable to the appellant. The Supreme Court considered the question whether the documents were void as against the Commissioner (although the appellant had not appealed in respect of the finding by the Court of Review); after considering the matter the Supreme Court concluded that the documents were void as against the respondent under Section 103 (supra).

D The appellant now appeals to this Court against that decision. By virtue of the Court of Appeal Ordinance this appeal must of necessity be restricted to questions of law alone.

E There are 6 grounds of appeal advanced by the appellant but they can be summarised as follows:

- F** 1. The Supreme Court erred in confirming the assessments of income tax as the appellant had not received the rental moneys; accordingly same were not assessable to him unless the learned judge filled in the lacunae created in the legislation when Section 103 of the Income Tax Ordinance was invoked which he was not entitled to do.
2. The Learned Judge erred in law in that he failed and/or refused to give due consideration to the fact that the transaction herein was a family dealing and not necessarily a means to avoid tax and on the authority of *Newton v. Commissioner of Taxation* (1958) A.C. 450 ought to have held that the arrangement did not come within Sec. 103 of the Ordinance.

I turn to consider the second ground of appeal first.

G It will be convenient to set out the provisions of Section 103 of the Income Tax Ordinance (Cap. 176).

“ Every contract, agreement or arrangement made or entered into, orally or in writing, on or after the thirteenth day of October 1961, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly—

- H** (a) altering the incidence of any tax;
- (b) relieving any person from liability to pay any tax or make any return;
- (c) defeating, evading or avoiding any duty or liability imposed on any person by this Ordinance; or
- (d) preventing the operation of this Ordinance in any respect.

be absolutely void, as against the Commissioner, or in regard to any proceeding under this Ordinance, but without prejudice to such validity as it may have in any other respect or for any other purpose."

The provisions of section 103 are identical with those of section 260 of the Australian Income Tax Assessment Act 1936 and similar to section 108 of the New Zealand Land and Income Tax Act 1954.

I mention this as I shall hereafter refer to decisions dealing with the Australian and New Zealand Counterparts of the Fiji Section 103 of the Income Tax Ordinance.

As previously mentioned the appellant did not appeal to the Supreme Court against the declaration by the Court of Review that the said documents were void as against the respondent under Section 103.

The appellant in his second ground of appeal sought to argue the matter afresh before this Court; leave was given for him to do so pursuant to rule 19(3) of the Court of Appeal Rules (Cap. 8).

The appellant submitted that the transactions were to be classed as family dealings; that they should not necessarily be labelled as a means to avoiding tax, that he wished to provide for the maintenance education and benefit of his children; he claimed that this was his sole purpose and that the deed of settlement, lease and sublease were to be classed as an ordinary family dealing, albeit that the term of the trust was for a period of 2 years only and that the rental was unrealistic.

He relied on the decision in *Mangin v. Inland Revenue Commissioner* [1971] 1 All E.R. 179 at page 186 where the majority of the Privy Council said that Lord Denning in using the phrase "not be labelled as a means to avoid tax" means "a scheme.....devised for the sole purpose, or

at least the principal purpose, of bringing it about that (the) taxpayer should escape liability on tax for a substantial part of the income which, without it, he would have derived."

Counsel for the respondent sought to uphold the decision of the learned trial judge that the arrangement was caught by Section 103 and therefore the documents mentioned were avoided as against the respondent.

It is necessary to consider firstly under what circumstances should the arrangement be considered absolutely void against the respondent. The law on this aspect of the matter was explained by the Judicial Committee of the Privy Council when examining the Australian section 260 mentioned above in *Newton v. Federal Commissioner of Taxation* [1958] A.C. 450. Lord Denning in delivering the judgment said at page 465-6:

"The answer to the problem seems to their Lordships to lie in the opening words of the section. They show that the section is not concerned with the motives of individuals. It is not concerned with their desire to avoid tax, but only with the means which they employ to do it. It affects every "contract, agreement or "arrangement" (which their Lordships will henceforward refer to compendiously as "arrangement") which has the purpose or effect of avoiding tax. In applying the section you must, by the very words of it, look at the arrangement itself and see which is its effect—which it does—irrespective of the motives of the persons who made it. Williams J. put it well when he said: "The purpose of a contract, agreement or arrangement must be what it is intended to effect and that intention must be ascertained from its terms. Those terms may be oral or written or may have to be inferred from the circumstances but, when they have been ascertained, their purpose must be what they effect."

- A In order to bring the arrangement within the section you must be able to predicate—by looking at the overt acts by which it was implemented—that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section."

Fullagar J. in *Hancock v. Federal Commissioner of Taxation* (1961) 108 B C.L.R. 258 at page 270 said :

- " This is ultimately a question of fact, but it depends in no way on the credibility of witnesses. There is no conflict of evidence, and there is no witness whom I disbelieve. It is simply a matter of inference from the nature and result of the transaction itself and from all the surrounding circumstances. "

- C Kitto J. in the Full Court in *Hancock's case* said on the question of whether an arrangement was to be characterised as a means to avoid income tax said at page 283.

- " Whether it is to be so characterised is a question to be answered upon consideration of the overt acts by which the plan has been implemented. If those acts are capable of explanation by reference to ordinary dealing, such as business or family dealing, without necessarily being labelled as a means to avoid tax, the arrangement does not come within the section. "

- D In 1970 the Court of Appeal in New Zealand had to consider the New Zealand section 108 in *Marx v. Commissioner of Inland Revenue*; *Carlson v. Commissioner of Inland Revenue* [1970] N.Z.L.R. 182, and it is only necessary for me I think to cite North P's words at p. 194 : " Prior to the appellants entering into their arrangement they knew perfectly well that they would be liable to pay income tax on the whole of the net income they derived from their farming operations. What they did was to make an arrangement which relieved them of the obligation of maintaining and supporting their wives and the members of their family by diverting part of their income from the farm to trusts in favour of the members of their family, and thus obtain a tax advantage denied to others. Surely, simply as a matter of common sense it is plain that the arrangements were directed to altering the incidence of income tax for which they otherwise in due course would become liable and consequently

- F resulted in their being relieved from their liability to pay income tax. "
- In 1971 the section was considered by the Judicial Committee in *Mangin v. Commissioner of Inland Revenue*, (supra) and Lord Donovan concluded the Committee's judgment by referring to Lord Denning's words in *Newton's Case* " without necessarily being labelled as a means to avoid tax " and saying " Their Lordships think that what this phrase refers to is, to adopt the language of Turner J in the present case ' a scheme.....devised for the sole purpose, or at least the principle purpose, of bringing it about that this taxpayer should escape liability on tax for substantial part of the income which, without it, he would have derived. "

- G Finally, there have been the decisions of *Wisheart, Macnab and Kidd v. Commissioner of Inland Revenue* [1972] N.Z.L.R. 319, where the Court of Appeal upheld the decision of Wild CJ declaring the arrangement void, and again of
- H Wild CJ in *Udy v. Commissioner of Inland Revenue* [1972] N.Z.L.R. 714. Wild CJ set out his view of the propositions to be gathered from the decisions in his judgment in *Marx's Case*, and re-stated them in *Udy's Case* following the decision in *Mangin's Case* (supra) and I quote :

"1. The section strikes at real transactions and not merely at shams : *Federal Commissioner of Taxation v. Newton* (1957) 96 C.L.R. 578 at 646 A and 655.

2. The word "arrangement" in the section is apt to describe something less than a binding contract. It comprehends 'not only the initial plan but also all the transactions by which it is carried into effect' (*Newton v. Federal Commissioner of Taxation* [1958] A.C. 450 at 465 ;

3. The word 'purpose' relates not to the motives of the parties but to the end in view. The word 'effect' means the end accomplished. The whole set of words denotes concerted action to the end of altering the incidence of income tax or effecting relief from income tax (ibid, 465). B

4. The purpose and effect is ascertained by examining the overt acts by which the arrangement was implemented. If on that examination it can be predicated that the scheme was devised for the sole purpose, or at least the principle purpose, of bringing it about that the objector should escape liability on tax for a substantial part of the income which without it, he would have derived, then it is within the section. If it can not be so predicated then the scheme is not caught. " C

It is true to say that Section 103 is not intended to strike at ordinary transactions capable of explanation by reference to normal business or family dealing which are not necessarily to be labelled as a means of avoiding tax. It would seem that a transaction falling into place as part of the ordinary and common flow of relationships in either family affairs or affairs of business calling for no particular remark and arising out of no special situation is not normally to be regarded as being caught by section 103. As was said by Lord Tomlin in *Duke of Westminster v. Inland Revenue Commissioners* [1936] A.C. 1 at page 149. D

"Every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. E If he succeeds in ordering them so as to secure this result, then however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. "

Applying the above principles to the present case here there was in my view an "arrangement"—a series of transactions i.e. the formation of the company with the appellant and his wife as directors both having a substantial F shareholding ; the leasing of the house to the company at the very inadequate rental of \$50 per year ; followed almost immediately by a subletting by the Company at a rental of \$3,000 per year.

Next—what was the purpose and effect of the arrangement ? The appellant contended that the steps taken were ordinary family dealings. It is clear however that the letting of the house at such an inadequate rental meant that the Company was able to make a very substantial profit by subletting the same G property at \$3,000 per annum ; on this profit the appellant paid no tax and the gain was passed on to his children thereby increasing their assets.

The appellant placed reliance on the Australian decision in *Deputy Federal Commissioner of Taxation v. Purcell* (1921) 29 C.L.R. 464. In that case the owner of certain pastoral holdings declared himself a trustee of them for himself, his wife and his daughter equally, but reserved to himself very wide powers H of management, control and investment, and it was held that the declaration created a trust which was valid and binding and not affected by the provisions of s. 53 of the Income Tax Assessment Act 1915-1916 (Com.) which was in terms similar to s. 260. Knox, C.J. said (at page 466) that the section

- A "does not extend to the case of a bona fide disposition by virtue of which the right to receive income arising from a source which theretofore belonged to the taxpayer is transferred to and vested in some other person."

In the instant case under appeal the appellant has not transferred the house—the income producing asset, but has retained ownership thereof.

- B I find the facts in *Purcell's case* clearly distinguishable from the facts in this case. In my opinion when one has regard to the whole series of transactions, the steps by which they were implemented, what was effected by those steps, it is not possible to describe what was done as an ordinary family or business dealing in the sense that those words are used by the Privy Council in *Newton's case* (supra)—they are not so capable of explanation. Therefore I am driven to the inescapable conclusion that the series of transactions must necessarily be labelled as a means to avoid tax. The appellant was able and intended by the arrangements made to siphon off the income from the house property into a trust fund and thereby decrease his taxable income. For these reasons this
- C ground of appeal in my opinion fails and I am in complete agreement with the Courts below that the three documents in question are void as against the respondent.

- D I turn now to deal with the 1st ground of appeal whether, when the transactions are avoided, a tax liability falls on the appellant. Section 103 is what is known as an "annihilating" section; the deed of Settlement, the lease to Tower Investments Ltd. and the sub lease to Otis Elevator Ltd. can all be disregarded as against the respondent in so far as they have the purpose or effect of avoiding tax.

Section 103 avoids transactions, as against the respondents, but it does not say that income which has not been derived by the taxpayer can be attributed to him for the purpose of taxation. This was stated in *Newton's case* (supra) at page 467 and I quote :

- E "This question then arises : What is the effect of section 260 on that arrangement ? It is quite clear that nothing is avoided as between the parties but only as against the commissioner. As against him the arrangement is "absolutely void" so far as it has the purpose or effect of avoiding tax. This is not a very precise use of the words "absolutely void" Ordinarily, if a transaction is absolutely void, it is void as against all the world. In this case what is meant is that the commissioner is entitled
- F completely to disregard the arrangement and the ensuing transactions—so far as they have the purpose or effect of avoiding tax. In the words of the courts of Australia, it is an "annihilating" provision—the commissioner can use the section so as to ignore the transactions which are caught by it. But the ignoring of the transactions—or the annihilation of them—does not itself create a liability of tax. In order to make the taxpayers liable, the commissioner must show that moneys have come into
- G the hands of the taxpayers which the commissioner is entitled to treat as income derived by them. Their Lordships agree with the way in which Fullagar J. put it in his judgment : Section 260 alters nothing that was done as between the parties. But for the "purpose of income tax, it entitles the commissioner to look at the end result and to ignore all the steps which were taken in pursuance of the avoided arrangement."

- H The question is whether upon the three documents being annihilated the respondent is entitled to assess the appellant for income tax on the moneys emanating from the occupancy of his house property ; this matter is as always, one of the correct application of the facts to the principles. The appellant argued

that he could not be assessed with these moneys and liable to pay tax thereon as he had not received the moneys; and, that if the respondent did so he was filling a gap or lacunae in the legislation which the majority of the Privy Council in *Mangin's case* (supra) said should not be done. At page 184 Lord Donovan said:

"The third contention of the taxpayer is that section 108 can have no application to any income which the taxpayer did not derive. Section 77(2) of the 1954 Act provided that income tax is to be payable on all income derived by the taxpayer; and in this case the taxpayer did not derive that portion of the income of the farm which went, under the 'paddock trusts', to the trustees. This contention throws into relief the difficulties caused by leaving a section such as section 108 completely silent as to what is to happen once the contract, agreement or arrangement has been declared absolutely void so far as its tax relieving purpose or effect is concerned. Is a vacuum left or is the taxpayer to be deemed to go on deriving the income? What is to happen if, simply in order to avoid tax, he has parted with the source of the income? Or receives money which is capital and not income? Section 108 gives no guidance at all on these points whether regarded alone or in conjunction with s. 77 of the 1954 Act or s. 78. In consequence, and in consequence also of some of the absurdities to which a strictly literal interpretation of s. 108 would lead, judges have been compelled to search for an interpretation which would make the section both workable and just. In doing so, they inevitably approach the line where interpretation ceases and legislation begins—a line which they may not cross. It is not that the problem confronting the legislator is insoluble. What is needed is simply a provision to the effect that where section 108 applies, the taxpayer shall be deemed to have derived the income which he would have derived but for the contract, agreement or arrangement avoided by the section: and that the commissioner might make assessment on him accordingly.

But if future cases may reveal lacunae in section 108 which (if that section be left in its present half-finished state) judges must refuse to fill, the present case does not. The taxpayer did derive the income. He sold the crop and received the proceeds. True, he then had to account for them to the trustees. But if this obligation has to be regarded as void under section 108, and the trusts non-existent, then one is left with the taxpayer receiving the income and accountable to nobody for it."

Richmond J. in *Commissioner of Inland Revenue v. Gerard* [1947] 2 N.Z.L.R. 279 at page 288 said:

"The principle is now well established that s. 108 is of no assistance to the Commissioner unless the avoidance of an arrangement and of steps taken to carry it out reveals a notional situation in which it can properly be said that the taxpayer has derived income. It also seems clear, particularly since the decision of the Privy Council in *Mangin v. Commissioner of Inland Revenue* [1971] N.Z.L.R. 591; that the section does not entitle the Court to construct some relationship between the taxpayer and other parties involved. It can only deal with the matter on what remains of the factual situation after avoidance of all transactions having the purpose or effect of avoiding tax."

In the present case one must ask what is the position revealed when the settlement deed, lease and sub-lease are stripped away; regard must be had to the factual position remaining that the house property owned by the appellant is

- A producing the sum of \$3,000 per annum. Does the appellant "derive" income or become entitled to the moneys coming from this source? If so then he is clearly liable to be assessed for tax in respect thereof. The provisions of section 35 of Fiji's Income Tax Ordinance (Cap. 176) says:

" ASCERTAINMENT OF CHARGEABLE INCOME AND PERSONAL ALLOWANCES

- B 35. For the purposes of this Ordinance "chargeable income" for any year means in respect of a person other than a company or an absentee, the total income of that person for that year whether accruing in, derived from or received in Fiji or elsewhere, subject to the deductions specified in the four next succeeding sections."

Mr Scott urged upon us that "derived" and "received" are not synonymous. The word "derived" was considered in *Inland Revenue Commissioner v. Philips* [1955] N.Z.L.R. 880 at page 884 where Gresson J. says:

- C "It appears to me that in interpreting s. 87 (n), proper regard must be paid to the word "derived"; it should not be read as "received". The word "derived" means more than received; it connotes the source or origin, rather than the fund or place, from which the income was taken. It means flowing, springing, emanating from, or, as was said in *Commissioners of Taxation v. Kirk* [1900] A.C. 588, 592) arising from or accruing.

- D In sections 10, 11 of the Income Tax Ordinance it is provided that tax is to be paid on all income derived by the taxpayer. Section 15 of the Fiji Ordinance defines total income as follows:

- E "For the purposes of this Ordinance "total income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary or other fixed amount, or unascertained as being fees or emoluments or as being profits from a trade or commercial or financial or other business or calling or otherwise howsoever, directly or indirectly received by a person from any office or employment or from any profession or calling or from any trade....."

However the section goes on to say:

- F ".....Provided that, without in any way affecting the generality of this subsection, total income, for the purpose of this Ordinance, shall include—

- G (b) (i) Subject to the provisions of the two next succeeding subparagraphs all rents, fines, premiums or other revenues (including payments for or in respect of the good wills of any business or the benefit of any statutory licence or privilege) derived by the owner of land from the grant of any lease, licence or easement affecting the land, or from the grant of any right of taking the profits thereof....."

It is to be noted that in the basic charging sections and the definition of chargeable income (sections 10, 11 and 35 of the Income Tax Ordinance (Cap. 176) the word "derived" is used in relation to a person's chargeable income.

In section 15, which is a definition section as to total income, the words "received" and "derived" are both used as above mentioned.

- H In *Craies on Statute Law* 7th Edition at page 214 it is stated: "In *Jobbins v. Middlesex County Council*, *Scott L.J.* said that a definition section ought to be construed as not cutting down the enacting provisions of an Act unless there is absolutely clear language having the opposite effect."

Bearing in mind the provisions of the Ordinance the question now arises—can it be said that the sum of \$3,000 per year arising from the occupation of the appellant's house is derived by him. It must be acknowledged that the arrangement is null and void so far as the respondent is concerned; accordingly there is no trust in existence; the infant beneficiaries are not entitled in law to the moneys; there is no lease or sub lease existing by or through which they are entitled to the moneys arising from the occupation of the house: in my view the appellant is the only one entitled thereto. Therefore the appellant is to be regarded as "deriving" income or at the very least entitled beneficially to these moneys.

The Appellant relied strongly on *Gerard's case* (supra) and it is necessary to examine the facts therein.

The head note reads:

"In each of four years the objector agreed to lease various portions of his farm to trustees of a family trust at the full rental value. In each year the objector was employed by the trustees to sow and cultivate the leased portion of the farm in wheat and linseed, and to manage the same, at the usual rate charged by agricultural contractors. The trustees paid for the cost of seed and fertiliser and top-dressing, and paid a contractor to harvest the crops. The trustees arranged for the sale of the crops and received the proceeds thereof. The nett income so derived was distributed among the infant beneficiaries and paid to the objector's wife for their benefit. It was conceded that the arrangement was a device for avoiding tax, but disputed that the income derived from the leased land was attributable to the objector and subject to income tax in his hands."

In my view *Gerard's case* (supra) can be distinguished from the instant case. In *Gerard's case* (supra) the four agreements to lease the contracts between the trustees of the trust and the taxpayer for the cultivation, sowing and management of the land and crops were treated as void; the trust deed and the harvesting contracts and the contracts for sale of the crops, both arranged by the trustees, were not avoided. The trustees harvested the crop, growing on the taxpayers land, sold it and received the proceeds. There was as against the Commissioner no agreement in existence between the taxpayer and the trustees authorising them to take the crop and the question is posed was it a gift, a conversion, a trespass. The Court would not speculate and held that the Commissioner could not fill in the gap in the legislation which existed and assess the moneys validly received by the trustees as income of the taxpayer. In *Gerard's case* (supra) Speight J. said at page 291.

"Emphasis has already been laid on the fact the Commissioner did not challenge the sale of the crops and receipt of the proceeds by the trustees. The crux of the matter is that no sure conclusion can be drawn as to the true situation whereby this money was in their hands. Was it a gift? A conversion? The subject of a resulting trust? There are a number of possibilities which come to mind—it is not the function of this Court to fill the vacuum."

In this case the sum of \$3,000 per annum was obtained from the occupants of the appellant's house and no one had any right to the moneys, in law, other than the owner of the house: There is no trust in existence; the Company has no contractual rights in respect of the house; there is no landlord other than the appellant; hence in my view the respondent quite properly assessed the moneys arising from the occupancy of the house to the appellant as being income derived by him.

A There is one further matter to which I should refer although it was not mentioned in argument. The appellant was not a party to the sublease between Tower Investments Ltd. and Otis Elevator Co. Ltd. and the question arises whether a document to which the taxpayer is not a party can be attacked under section 103. In my view the document can quite properly be attacked by the Commissioner under section 103 if it can be shown to be part and parcel of the arrangement made, or undertaken, by the taxpayer. I respectfully adopt what was said recently by the Court of Appeal in New Zealand in *Commissioner of Inland Revenue v. Ashton* [1974] N.Z.L.R. 321 at page 329 :

B "But the argument is advanced, once again, in relation to the deed of trust and to the revocation of the old appointment, that the only arrangements, contracts or agreements which may be set aside under s. 108 are those to which the objecting taxpayer is a party in the strict sense, and as neither of the respondents here was a party to the deed of trust relating to his own family group or to the revocation, those steps cannot be annihilated. We see no reason to restrict its operation, in cases when documents are involved, to those documents to which the objector is a party. We read it as extending to others, if it be shown that the document was procured by or with the connivance of the taxpayer and as a step in the whole scheme."

C Finally the appellant urged upon the Court that as he had not physically handled the money it was not therefore assessable to him and submitted that the Court of Review was correct in its judgment when it said :

D "In the instant case of course the trust was so framed that the appellant here would not handle any of the income arising from the trust property and is therefore not assessable."

E If the arrangement is void as against the Commissioner it is void ab initio and there is no reason and no necessity to speak of the implication of a trust, lease or sublease. How the trust was framed, can be of no importance once it is accepted that the trust is void as against the respondent ; the affairs of the appellant are left exactly as they are prior to the said documents being executed. The argument of the appellant therefore fails. I would hold that the learned judge in the Court below was correct and that the moneys obtained from the appellant's house for the occupancy thereof during the period in question was assessable as income derived by him.

F I would dismiss the appeal with costs to the respondent.

GOULD V.P.

G I have had the advantage of reading the judgment of my brother Spring J.A. and am in agreement with his reasoning and conclusions.
The members of the court being unanimous the appeal is dismissed with costs.

MARSACK J.A.

I concur.

Appeal dismissed.

H