BETWEEN:

JOHN ARCHIBALD McLEAN .....APPELLANT;

1959
Apr. 20, 21, 22

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

1962
Jan. 16

Revenue—Income Tax Act 1948, S. of C. 1948, c. 52, s. 125(a)—Income Tax Act, R.S.C. 1952, c. 148, s. 137(2)—Income or capital gain—Failure to discharge onus of establishing Minister's assessment is wrong—Appeal dismissed.

In 1924, Prescription Optical Co. Ltd. (a British Columbia company) was incorporated by a number of ophthalmologists in Vancouver, its business being that of filling prescriptions for eye glasses. In 1931, all its tangible assets and the right to use its name were transferred to Imperial Optical Co. Ltd. which thereafter carried out all the operational functions of Prescription Optical Co. Ltd. The latter company, on certain conditions, had the right to re-purchase the tangible assets and, if it did so, Imperial Optical Co. Ltd. could no longer use the name of Prescription Optical Co. Ltd. Pursuant to an agreement then entered into with the individual doctor-shareholders, Imperial Optical Co. Ltd. thereafter paid the said shareholders a commission on all prescriptions referred to Prescription Optical Co. Ltd. by the shareholders. In 1936, the appellant was registered as the owner of one share in Prescription Optical Co. Ltd. and thereafter until March, 1946 received commissions on all prescriptions so referred by him and paid income tax thereon. In 1946, the *Medical Act* of British Columbia was amended and after April 11, 1946, it was illegal for any doctor in British Columbia to take or receive any such commissions.

In 1947, it was arranged that all the outstanding shares of Prescription Optical Co. Ltd. (24 in all) should be transferred to Standard Optical Co. Ltd.—a subsidiary of Imperial Optical Co. Ltd. Subject to certain conditions and adjustments it was agreed that Standard Optical Co. Ltd. should pay $320,000, that amount to be apportioned between the twenty then practicing shareholders of Prescription Optical Co. Ltd. in proportion to their referral of prescriptions to Prescription Optical Co. Ltd. during the three previous years, and that the payments so allotted should be made in ten equal annual instalments. The sum of $29,172.52 was allotted to appellant and it is admitted that in each of the years 1949 to 1953 he received $2,917.25, which amounts were added to his declared income for each of those years. An appeal to the Tax Appeal Board was dismissed and appellant now appeals to this Court. On behalf of the appellant it is submitted that the said sums were not income, but rather instalments of the purchase price of a capital asset, namely, the one share in Prescription Optical Co. Ltd.; and that all the shares were worth at least $320,000. For the Minister, it is submitted that the annual payments were taxable income on the alleged ground (*inter alia*) that part of the consideration for the price of the shares was the appellant's agreement to encourage his patients thereafter to have their prescriptions filled by Prescription Optical Co. Ltd.

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The Court was not satisfied that all relevant, available facts and documents relating to the transfers of the shares were put in evidence, particularly an agreement and letter signed by the appellant which formed "part of the consideration for the purchase and sale" of the shares. Other matters were not satisfactorily explained, such as (a) the agreement that if the appellant should die or retire from practice before the ten annual payments had been completed, Standard Optical Co. Ltd. would "pay one year's instalment plus *pro rata* for the number of months practiced since our previous payment", all the remaining instalments being cancelled; (b) the fact that the estates of three deceased shareholders, and one doctor who was about to retire, received no part of the purchase price.

Held: That the appellant had not discharged the onus which lies upon the taxpayer to establish that there is error in fact or in law in the assessments under appeal.

2. That the appeal must be dismissed.

APPEAL from the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cameron at Vancouver.

The Honourable J. W. deB. Farris, Q.C. and *J. L. Lawrence* for appellant.

C. W. Tysoe, Q.C. and *T. E. Jackson* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (January 16, 1962) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated September 25, 1957[1] dismissing the appellant's appeals from re-assessments dated May 13, 1955, for the taxation years 1949 to 1953, both inclusive. In re-assessing the appellant, the respondent for each of those years added to his declared income $2,917.25, stated to be "payment by Standard Optical Co. Ltd. re transfer of shares of Prescription Optical Co. Ltd." The appellant admits the receipt of that amount in each year and the sole question for determination is whether such receipts were taxable income in his hands, or, as he submits, they were merely instalments of the sale price of a capital asset, namely, one share in Prescription Optical Co. Ltd.

In the course of this judgment, it will be necessary frequently to refer to three optical companies. For the sake of brevity, I shall refer to Prescription Optical Co. Ltd. as

[1] 18 Tax A.B.C. 43.

"Prescription"; to Imperial Optical Co. as "Imperial"; and to Standard Optical Co. Ltd. as "Standard". Imperial is a large optical company with headquarters at Toronto; its western manager at all relevant times at Vancouver was H. L. Boyaner. Standard is a wholly owned subsidiary of Imperial, its head office being at Toronto.

Prescription was incorporated as a private company under the *Companies Act* of the province of British Columbia in 1924 with a share capital of $10,000 divided into 10,000 shares of a par value of one dollar each. Its business at all times was mainly that of filling prescriptions for eye glasses; it did not, however, make or grind glasses, that being done by an optical company, presumably by Imperial. From the date of its incorporation until all the shares were sold in 1947 to Standard, the only shareholders were a number of eye specialists, or ophthalmologists in Vancouver. From 1924 to 1931 it would appear that such profits as were made were divided among the doctor-shareholders according to the number of shares each held and that the number of shares so held varied according to the number of prescriptions each had sent to Prescription.

In 1931, substantial changes took place. As shown by Exhibit D, the share capital was reduced to $3,565 divided into 3,565 shares of one dollar each and with "power to increase and divide into several classes, and to attach thereto respectively any preferential, deferred, qualified or special rights, privileges or conditions as to payment of dividends, distribution of assets, voting or otherwise". There is no evidence that the powers so conferred were ever exercised. Thereafter, all the issued shares were of the same class, namely, common shares of a par value of one dollar each. As of that date, there were fifteen doctor-shareholders, each holding one share, the remaining 3,550 shares being unissued.

On June 1, 1931, Prescription transferred all its tangible assets to Imperial (Exhibit 1) for the expressed consideration of $15,000. On June 3, 1931, an agreement was entered into between Prescription and Imperial (Exhibit 2). It contained certain provisions conferring on Imperial the right to use the corporate name of Prescription, but reserved to Prescription the right, by giving one week's notice, to re-purchase the tangible assets of Prescription at any time and on certain terms, and that "in the event of such re-purchase

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the leave and right to use the name Prescription Optical Co. Ltd. . . . shall immediately cease and determine". From that date until the sale of the shares to Standard in 1947, all the business operations of Prescription were carried on by Imperial.

On June 3, 1931, Imperial sent the letter, Exhibit 3, to each of the doctor-shareholders of Prescription. Thereby, Imperial covenanted in consideration of the agreement (Exhibit 2) to supply monthly to each shareholder a complete statement of all prescriptions such shareholders had "directed to us through the Prescription Optical Co. Ltd., disclosing the invoice price of Prescription Optical Co. Ltd. and the retail sale price, all repairs to be credited in the same manner, and that we will on or before the tenth day of the same month, send a cheque of the Prescription Optical Co. Ltd. to each shareholder respectively, representing the difference between the invoice price and the retail sale price." Imperial further guaranteed that the amount paid to each shareholder over a year should aggregate an amount at least equal to $4.50 for each prescription so directed, inclusive of all repair work and whether the prescription accepted was paid in cash or delivered on credit. Thereafter, until March 31, 1946, the doctor-shareholders of Prescription (who varied in number and name from time to time) received no dividends from their shares, but did regularly receive the commissions or payments and the statements provided for in the letter Exhibit 3.

The appellant is a leading ophthalmologist in Vancouver. In 1936 he was invited by Dr. Smith (president for many years of Prescription), and perhaps by Boyaner to become a shareholder in place of a doctor who had recently died, and agreed to do so. Accordingly, one share was transferred to him, and while he expected to pay one dollar therefor, it seems that he paid nothing and did not even receive a share certificate. While he did not see the 1931 agreements between Imperial and Prescription, he was made fully aware of their contents. Thereafter, until March 31, 1946, he regularly received the statements from Imperial, as well as the payments provided for in Exhibit 3, averaging for several years prior to 1946 about $5,000 anually. Such receipts, he states, were reported as part of his taxable income, and income tax paid thereon. Some of the other shareholders received more in commissions than the appellant, and others less.

The *Medical Act* of British Columbia was amended by s. 79 of c. 44 of the Statutes of 1946 (in effect April 11, 1946) and thereafter it became illegal for any member of the College of Physicians and Surgeons of that province to take or receive any remuneration by way of commission, discount, refund or otherwise, from any person who filled a prescription given or issued by such member, and penalties were provided for persons guilty of an offence thereunder. That section clearly applied after April 11, 1946 to commissions or payments such as had been paid by Imperial to the shareholders of Prescription, and Imperial, Boyaner and the shareholders were fully aware of the effect of the amendment.

Following the amendment to the *Medical Act,* the appellant continued to direct prescriptions to Prescription in about the same proportion as he had previously done, i.e., about 50 per cent. of those issued by him; about 15 per cent. were directed to another optical company which provided somewhat faster service, and the remainder were directed to other companies chosen by his patients. The appellant stated that his preference had always been in favour of Prescription as its services were excellent. He states positively that he received no commissions from Imperial or Prescription in respect to referrals made after April 11, 1946.

I turn now to the evidence relating to the transfer in 1947 of the 24 issued shares of Prescription to Standard, a wholly-owned subsidiary of Imperial. The only oral evidence is that of the appellant and it is indeed very limited. While he was a director as well as a shareholder of Prescription, he appears to have taken a relatively minor part in the negotiations with Imperial. He attended only one meeting and was unable to fix its date except that it was in the summer or late summer of 1947. He states that in view of the amendment to the *Medical Act,* the most important thing was to get out of Prescription entirely, preferably by sale of the shares if that could be arranged. Since 1931, Prescription owned no physical assets, all of which had been transferred to Imperial and that company had also operated the business, using the name Prescription. The doctor-shareholders of Prescription, however, had the right to terminate the agreement of 1931 by one week's notice, and had they done so, they would presumably have had the right to resume the

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operation of Prescription (as had been done prior to 1931), using the name of Prescription Optical Co. Ltd.; or they might have disposed of the business by sale.

The one meeting attended by the appellant was held from sixteen to eighteen months after the amendment to the *Medical Act* and while it is clear that the negotiations had previously been carried on by Dr. Smith and a small committee of the shareholders, with Boyaner representing Imperial, there is no evidence as to what took place in such negotiations.

Some fifteen shareholders met with Boyaner at the meeting referred to. The appellant states that it was then agreed as follows:

1. Imperial's offer of $320,000 for all the 24 issued shares in Prescription should be accepted.
2. That only the twenty shareholders then in active practice should receive any part of the compensation.
3. That the total amount of $320,000 should be divided among the twenty participating shareholders in proportion to the number of prescriptions each had sent to Prescription over the last three years; and that as Imperial alone had the records showing the referrals of each doctor, the apportionment should be as Boyaner might determine.
4. That special consideration should be given by Boyaner to doctor-shareholders who had served in the Armed Forces in the recent war.
5. That if any doctor who was entitled to share in the distribution should die or retire from practice, Imperial would pay only one further year's instalment "plus *pro rata* for the number of months practiced since our previous payment".

Dr. McLean stated that Boyaner's first offer was $200,000; that the shareholders asked for $400,000 but that finally the parties compromised at the sum of $320,000. Whether the condition that the payments would terminate in the event of death or retirement from practice formed part of Imperial's original offer, or only of the final offer, does not clearly appear. There was no discussion as to distributing the full amount of $320,000 between the shareholders according to their share holdings (i.e. equally) and Dr. McLean was of the opinion that any such suggestion would have been immediately rejected. Dr. McLean was unable to state why the doctors present had asked for $400,000, except that it was double the amount originally offered and seemed to be good bargaining procedure.

The appellant was of the opinion that it was proper to divide the agreed price among the twenty active shareholders in proportion to the referrals made in the previous three years, as by these referrals they had helped to build up the business of Prescription in varying proportions.

Now if the agreements so arrived at were in fact carried out without amendment or addition, then in view of the appellant's emphatic statement that there was no agreement express or implied that the payments he so received were contingent upon his continuing to send prescriptions to Imperial and/or Standard, the conclusion might possibly be reached that he was doing nothing more than selling his own share at a price to be fixed by Boyaner, payable in annual instalments, but terminable, as stated above, in the event of retirement from practice or death. There is evidence, however, which indicates that the entire matter was not finally settled at the meeting attended by the appellant. That meeting, I think, was probably held on or about June 23, 1947, the date referred to in the Notice of Appeal, and which agrees with the evidence of the accountant, Mr. McIntosh, as being the date of the take-over by Imperial. Exhibit 7 indicates that the shares were registered in the name of Standard on August 4, 1947.

I refer particularly to Exhibit 4, a letter bearing the date November 1, 1947, addressed by Standard to the shareholders of Prescription, which is as follows:

Dear Dr.

This letter is to confirm the sale of your shares in the Prescription Optical Co. Ltd. to ourselves as of April 1st, 1946 on the following basis.

We are purchasing your shares in the Prescription Optical Co. Ltd. for the price of $ on the following terms and subject to following conditions.

10% of the total amount each year.

First payment will be made August 15th, 1947 and each successive payment will be made on August 15th of each year until the complete ten payments are made.

Should you retire from practice or pass away before these ten payments are completed, then we will pay one year's installment plus pro rata for the number of months practised since our previous payment. This final payment will be paid and accepted with the clear understanding that any outstanding balance is automatically cancelled and nothing further is due you or your estate.

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> As part of the consideration for the purchase and sale of your shares you have handed to us your agreement under seal of even date, releasing us from any demands, etc., as well as a letter confirming this sale and purchase and adding terms upon which we have agreed.

The appellant acknowledges having received a copy of that letter directed to him and stating his price to be $29,172.52. He agrees that he continued in practice, received the annual payment of 10 per cent. of that amount in each of the taxation years in question and thereafter until the full amount had been paid him. While he recalled that Boyaner had brought him that letter, he could not recall the date but thought it was in 1948. He did not know until then the amount that had been allotted to him and was not aware of the amounts allotted to the other nineteen shareholders until the Enquiry some years later by the Income Tax authorities.

At first, Dr. McLean did not admit that he had seen or signed the two documents referred to in Exhibit 4, but finally, and somewhat reluctantly, admitted that Boyaner had brought two documents for his signature, that he had signed them and given them to Boyaner; and that these were presumably his "agreement under seal of even date herewith releasing us from any demands, etc.", and "a letter confirming this sale and purchase and adding terms upon which we have agreed"—as referred to in Exhibit 4. He was unable to say what was contained in either the letter or the agreement, although he was sure that they contained no undertaking on his part, morally or legally, to continue sending prescriptions to Prescription.

In support of the appellant's case, J. E. McIntosh, a chartered accountant of Vancouver, was called to give opinion evidence as to the value of the shares sold to Standard as of June 23, 1947. He had had some experience in valuing shares of private companies and had access to the books of Prescription for some years prior to and after the sale to Standard or Imperial in June, 1947. In his opinion, they were worth $312,000. He considered that the provisions in the agreement of 1931 between Prescription and Imperial (Exhibit 2), giving Prescription the right to terminate that agreement on one week's notice, conferred on the shareholders of Prescription a valuable right, namely,

the right to again operate Prescription Optical Co. Ltd. as their own concern with all the goodwill that had been established between 1924 and 1947, or to sell it as a going concern.

His report, consisting of five schedules, was filed as Exhibit 22. As shown in Schedule 1, he found that the average net profit for the years 1943 to 1947 was $51,632 and that if income tax had been paid thereon (instead of diverting the whole of it to the doctor-shareholders as was done up to March 31, 1946), the average net profit after taxes would have been $33,561. Schedule 2 is a comparative statement of the operating results of Prescription (as operated by Standard or Imperial) for the years 1948 to 1954, and indicates an average annual net profit before taxes of $52,686, or substantially the same as for the years 1943 to 1947.

His computation of value is found in Schedule 3. He capitalized the annual net profits after taxes for the years 1943 to 1947 of $33,561 at 12½ per cent. or 8 × earnings, resulting in a capitalized value of $268,488. From that he deducted $15,000 as the amount estimated to be necessary for purchase of fixtures and inventory; he then added an interest factor calculated at 5 per cent. to convert the value of the shares payable in cash to a price payable one-tenth down and the balance in nine equal annual instalments without interest ($59,158), arriving at a capitalized value for all shares of $312,646 which he rounded to $312,000.

In his opinion, considering the gross income and the net profits for the years 1943 to 1947, the small amount of capital that would have been required, the stability of the optical business as a whole and the simplicity of the operations involved, a buyer would have been willing to pay $312,000 for all the shares even if he had had no previous experience in that business. He was also of the opinion that it would have been worth even more to a wholesale optical company such as Imperial which would have a continuing and assured outlet for its manufactured products. In addition, he said that the net profits actually realized by the purchaser in the years 1947 to 1954, inclusive, confirmed his estimate of value.

In cross-examination, Mr. McIntosh admitted that he had had no previous experience in valuing shares of an optical company, nor in any transaction such as the present

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one where payments ceased on death or retirement. He was also referred to his evidence before the Income Tax Appeal Board.

> Q. Do you mean to say that a man, any reasonable business man would pay out $300,000 odd in the pious hope that these few people on whom he absolutely had to depend would continue to send him business without any payment?
>
> A. No, sir. I think that any astute and prudent business man would not have bought these shares had he not every reasonable expectation of receiving custom from the very people from whom he was buying the shares. And further, I think that he would have been most prudent, if he had made a purchase on the same basis as Mr. Boyaner was able to do for his people. That is, on a ten-year payment basis, because I think that the sellers would have had more of an interest in continuing to refer business to the operation if they were being paid over a ten-year period, than if they received their cash all at once.
>
> Q. It is the psychological picture you are talking about now?
>
> A. I think it is a very important psychological aspect.

I take that statement to mean that no prudent and reasonable person would have paid $320,000 for the shares if he had only a "hope" that the former doctor-shareholders would continue to send prescriptions to Prescription without any payment therefor; but that such a purchaser would pay that amount only if he had *every reasonable expectation* of having referrals made thereafter by the former doctor-shareholders.

As stated in *Johnston v. M.N.R.*[1], the onus is on the appellant, and the taxpayer must establish the existence of facts or law showing an error in relation to the taxation imposed upon him. In that case, Rand J. said at p. 489:

> Notwithstanding that it is spoken of in section 63(2) as an action ready for trial or hearing, the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted. For that purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, *but the onus was his to demolish the basic fact on which the taxation rested.*

[1] [1948] S.C.R. 486.

After a most careful examination of the evidence, I have come to the conclusion that the appellant has not satisfied the onus cast on him to establish error in fact or in law in the assessments. That decision has been reached mainly because of the failure of the appellant to adduce material evidence which I think was available, which constituted part of the whole transaction and which would have disclosed the true nature of the contract finally entered into with Imperial and/or Standard. In reaching that conclusion, it is quite unnecessary to cast any doubt on the honesty or integrity of the appellant which was admitted by counsel for the respondent. Further, I make no finding that anything done by the appellant could be considered as a breach of the *Medical Act* of the province of British Columbia.

As shown by the Minister's reply to the Notice of Appeal, his main submission was that the annual sums so received by the appellant for the taxation years in question were properly included in the computation of the profit from his business or calling. In the re-assessments in appeal, the Minister assumed

(*a*) that as of June 23rd, 1947, the date referred to in paragraph 5 of the "Statement of Facts", there was due, owing and unpaid by Imperial Optical Company to the Appellant and other shareholders of Prescription Optical Company Limited under and by virtue of the undertaking of Imperial Optical Company referred to in paragraph 3 hereof divers sums of money;

(*b*) that the sum of $29,172.52 referred to in paragraph 6 of the "Statement of Facts" was the sum that the Appellant could expect to receive over a period of ten years by annual instalments of $2,917.25 under and by virtue of an understanding expressed or implied whereby it was understood between the Appellant and Imperial Optical Company, inter alia,

(i) that the sums referred to in subparagraph (*a*) that were due, owing and unpaid to the Appellant should not be paid,

(ii) that the Appellant would transfer his share in Prescription Optical Company Limited to Standard Optical Company Limited, the nominee of Imperial Optical Company,

(iii) that the Appellant should receive from Standard Optical Company Limited on August 15th each year for a period of 10 years from April 1st, 1946, or so long as he should not retire from practice or die, whichever was the shorter, a sum of $2,917.25,

(iv) that the Appellant would continue to encourage his patients to have their prescriptions filled by Prescription Optical Company Limited.

The assumptions referred to in paras. (*a*) and (*b*)(i) were not challenged in any way and must therefore be accepted as facts. They refer to the commissions for referrals which under the agreement of 1931 had accrued to the

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doctor-shareholders between April 11, 1946 and June 23, 1947, and which on the evidence would amount to about $60,000. The assumption in para. (*b*)(ii) is admittedly correct as is also that found in para. (*b*)(iii), with unimportant variations earlier referred to.

The assumption found in para. (*b*)(iv) is of the greatest importance. In the appeal, Dr. McLean was referred to certain evidence given by him before the Tax Appeal Board and also at the Enquiry before Mr. MacLatchy. At the Enquiry he answered certain questions as follows:

Q. What were they getting assuming now, as the evidence shows, that this company had no assets of any kind, had not been in existence for sixteen years, what was the value they were buying that would justify paying you $29,000.00?

A. They were buying goodwill.

Q. What goodwill?

A. Goodwill of the men dispensing glasses.

Q. Which?

A. The goodwill of the man dispensing glasses, the oculist dispensing glasses.

Q. That is your goodwill personally?

A. That is right.

* * *

Q. That is the logical conclusion, and that is what I wanted you to give me, but actually you were being paid for your own goodwill that you would continue to send these prescriptions.

A. Yes, I imagine that is true.

At the Enquiry, he was also questioned regarding the allotment made by Boyaner to Dr. Galbraith who became a shareholder in June, 1946.

Q. But were increased periodically; I am merely trying to get the pattern. Dr. Galbraith had received no money. He had in this period of 1946 a credit considerably smaller than yours, about half of the amount, and he received approximately the same amount you did; do you think that was a proper division?

A. I would accept it as a proper division, yes.

Q. On the basis, I take it, Doctor, that again they were buying Dr. Galbraith's goodwill, that he was going to increase sending in prescriptions?

A. Yes.

Before the Income tax Appeal Board, the appellant admitted having made those answers, but endeavoured to qualify them to some extent, particularly in regard to the nature of the goodwill which gave value to the shares. There he admitted that his statement at the Enquiry, that he was

being paid for his own goodwill that he would continue to send them prescriptions, was true, but added, "They wanted us to send prescriptions, but we didn't have to send prescriptions". He did not attempt, however, before the Board, to qualify his answers at the Enquiry in regard to the allotment to Dr. Galbraith. In this appeal, he admitted having made the above statements at the Enquiry and before the Income Tax Appeal Board, but endeavoured again to qualify them further by saying that they were only partly correct. In reference to the goodwill being sold, he said:

> We feel that the goodwill of the men dispensing glasses was only a part and a minor part of it. The other parts were the goodwill of the public and the patients that you refer. They gave good service, good quality and prices; they were satisfied that the Prescription Optical Company were doing a good job towards the public and towards the doctors.
>
> And we were not paid for our goodwill if we continued to send the prescriptions, we were not being paid for any future purpose in any way. We had no obligation. The thing we were selling was a share, and that share represented goodwill of the patients, the public and the doctors.
>
> They (i.e., the purchasers) hoped we would continue to feel kindly towards them and send prescriptions to them, but at no time was there any compulsion or any agreement or any moral or legal obligation, or any form of obligation to send prescriptions. That is the part I want to emphasize.

Then, in reference to Dr. Galbraith's allotment, he said:

> Dr. Galbraith was paid for the purchase of a share, for the sale of a share which represented his goodwill, the public's goodwill and the patients' goodwill.
>
> The patients that he had sent to the company and the public who were not necessarily patients of his.

I find it difficult to reconcile the obvious inconsistencies between the earlier statements of the appellant and those given at this hearing, although they may possibly be due to the fact that the events occurred in 1947.

I am satisfied in this case that all the details of the transaction have not been presented to the Court. It is undoubtedly true that the transaction involved the sale of the appellant's one share to Standard, but it is equally clear that that was not the only matter agreed to and that other considerations were involved, the nature of which was not disclosed to the Court. I refer to the release and letter mentioned in Exhibit 4 and which were signed by the appellant at the time he received Exhibit 4 and his first payment. If, as stated in Exhibit 4, they formed *part* of the consideration

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for the sale of the appellant's share, the Court is entitled to know their contents and could not without such information come to the conclusion (as the appellant requests) that the *whole* of the consideration was for the transfer of the share. What was the nature of the "release from any demands, etc.?" There is nothing to suggest that the appellant had previously any dealings with Standard which would require a release. Does the release refer to the accumulation in the hands of Imperial of commissions or referrals between April 11, 1946 and June 23, 1947? Again, what were the terms of the letter confirming the sale and purchase "and adding terms upon which we have agreed"?

On these important matters no information whatever is given to the Court except that the appellant, after stating that he was wholly unaware of their contents, did say that they contained no undertaking on his part to send further prescriptions. That, of course, was not the best evidence available. Dr. McLean contented himself by saying that he had made a search in his own papers and could not find them—a result to be expected in view of his statement that he had previously delivered them to Boyaner. Presumably, all twenty shareholders had signed similar documents and given them to Boyaner. The appellant, however, admits that he had made no further effort to secure them or to ascertain their contents from Boyaner or Imperial and he did not require them to produce them to the Court as he could and should have done to complete his case. The Court, in endeavouring to ascertain the true and complete nature of the transaction, must be fully informed by the production of all relevant, material and available documents, and here the burden of producing such information was upon the appellant and has not been satisfied.

Other matters, also, are not satisfactorily explained. In his evidence, Dr. McLean on two occasions stated that when Boyaner brought Exhibit 4 to him, he, the appellant, had handed over a cheque, but nothing was said as to the purpose of that payment. If the terms of the sale were fully agreed upon at the meeting of June 23, 1947, why was the settlement delayed until at least November of that year, and what further negotiations took place during that time which led up to "the new terms upon which we have agreed?" Why was the share sold "as of April 1, 1946" when there is no evidence to suggest that it was so agreed at the

meeting of June 23, 1947? If each shareholder was legally entitled upon a sale of the business to receive one-twenty-fourth of the sale price, why were the estates of three deceased shareholders allotted nothing and why was one doctor who was about to retire also allotted nothing? Was it because they were no longer in practice? Why would six doctors who became shareholders only in 1946 be allotted a total of almost $75,000 (Exhibits A, F and G) and why would one of these (Dr. Galbraith) receive an amount almost comparable to that of the appellant who became a shareholder in 1936, and another receive only about $4,500? If the shares were in fact worth $312,000, as estimated by the witness McIntosh, why would the shareholders consent to an arrangement under which all remaining annual instalments of the purchase price, save one, would be forfeited upon death or retirement from practice?

What happened to the accumulation of commissions or referrals between April 1, 1946 and June 23, 1947, which may have amounted to as much as $65,000 to $70,000? Was Imperial released from its liability to make such payments and if it did so, was that amount part of the purchase price? And if the agreement was fully settled on June 23, 1947, why was not Boyaner called to establish that the allotment of the purchase price between the twenty practicing doctors, as shown by Exhibit A (and in which the amounts allotted vary from a low of $1,795.23 to a high of $54,754.48) was in fact according to the number of prescriptions referred to Prescription by the shareholders in the last three years, with special consideration to doctors who had served in the Armed Forces? There is no evidence on that matter. Why was the sale made to Standard rather than to Imperial, with which latter company the matter was discussed in June, 1947? These matters, which are either wholly unexplained or in which the explanation is unsatisfactory, strongly suggest that after the meeting of June, 1947, further negotiations with Imperial were conducted by Dr. Smith and his committee leading up to the agreement of release and "the letter adding new terms", both as referred to in Exhibit 4.

In view, therefore, of the fact that the appellant has failed to adduce available evidence which was material to a determination of the true and full nature of the transaction entered into, I must find that he has not established

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to my satisfaction that there is error in fact or in law in the re-assessments under appeal. In these circumstances, it is unnecessary to consider the alternative submission of the respondent that the payments received by the appellant were benefits conferred on him by Standard within the meaning of s. 125(2) of the 1948 *Income Tax Act* and of s. 137(2) of the *Income Tax Act*.

Accordingly, the appeal will be dismissed and the re-assessments in appeal affirmed. The respondent is entitled to his costs after taxation.

Judgment accordingly.