⇦ Commissioner of Pay-Roll Tax ⇨ v Reserve Bank of Australia [1987] VicRp 19; [1987] VR 241 (20 May 1986)

⇦ COMMISSIONER OF PAY-ROLL TAX ⇨ v RESERVE BANK OF AUSTRALIA

SUPREME COURT OF VICTORIA FULL COURT

MURRAY, BROOKING and NATHAN JJ

16-17 April, 20 May 1986

Murray J: The appellant sought to levy payroll tax pursuant to the provisions of the Pay-roll Tax Act 1971 of the State of Victoria (the State Act) upon the sum of $798,433 which was said to be the value, assessed in accordance with the provisions of the State Act, of the benefit which accrued to certain employees of the respondent by virtue of the fact that such employees borrowed from the respondent housing loans at a rate of interest which was approximately half the rate of interest which would be payable on the open market. The appellant claimed that such benefits constituted part of the wages, as that term is used in the Act, paid by the respondent to its employees and rejected a notice of objection served by the respondent. The respondent then requested the appellant, pursuant to s33(1) of the Act, to treat the objection as an appeal and to cause it to be set down for hearing in the Supreme Court. The appeal came on for hearing before Fullagar J who, on 18 April 1985, allowed the appeal and ordered that the assessment be reduced by deducting from the tax payable so much tax as was referable to the amount of $798,433. This is an appeal from that decision.

It is necessary to set out the background of the State legislation. In 1941 the Commonwealth, no doubt as a wartime (and possibly temporary) measure, imposed a tax upon the payment of wages. It did this by the Pay-roll Tax Act 1941 and the Pay-roll Tax Assessment Act 1941. The tax imposed by these two pieces of legislation was a tax at the rate of 2.10 pounds per centum "on all wages paid or payable by any employer in respect of any period of time after 30th June 1941". The tax Act provided that the tax so imposed "shall be paid by the employer who pays or is liable to pay the wages". The Assessment Act provided, by s12, that the tax imposed by the Pay-roll Tax Act 1941 should be levied and paid on all wages paid or payable by any employer. The Act was entitled "An Act Relating to the Imposition, Assessment and Collection of a Tax upon the Payment of Wages". S13 provided: -

"Pay-roll tax shall be paid by the employer who pays or is liable to pay the wages."

There was no definition of payroll tax, but the expression thereafter became a well-known one.

S3(1) included the following definition of "wages": -

"'wages' means any wages, salary, commission, bonuses or allowances paid or payable (whether at piece work rates or otherwise and whether paid or payable in cash or in kind) to any employee as such and, without limiting the generality of the foregoing, includes -

(a) any payment made under any prescribed classes of contracts to the extent to which that payment is attributable to labour;

(b) any payment made by a company by way of remuneration to a director of that company;

(c) any payment made by way of commission to an insurance or time-payment canvasser or collector; and

(d) the provision by the employer of meals or sustenance or the use of premises or quarters as consideration or part consideration for the employee's services."

By subs(2) a provision was made for valuing, for the purposes of the Act, meals or sustenance and quarters provided by an employer. The Commonwealth legislation remained in force long after the war was concluded and in 1970 the power of the Commonwealth to impose the tax on the States in respect of their employees was unsuccessfully challenged by the State of Victoria: Victoria v Commonwealth [1971] HCA 16; (1971) 122 CLR 353. The Commonwealth, however, later decided to quit the field of pay-roll tax and at the same time to clear the way for the States to impose such a tax not only upon employers generally but also upon some Commonwealth instrumentalities many of which would otherwise have been beyond the taxing power of the States. By the provisions of Commonwealth Act No. 76 of 1971, the Commonwealth payroll tax legislation ceased to operate as from the end of August 1971. By virtue of the provisions of the Pay-roll Tax (State Taxation of Commonwealth Authorities) Act 1971 which came into operation on 1 September 1971 provision was made for removing the shield which would otherwise have protected certain Commonwealth instrumentalities, including the respondent, from the ambit of State payroll taxation. The Act was deemed to have come into operation upon the cessation of the Commonwealth payroll tax and provided by s3 and s4 as follows: -

"3. (1) In this Act - 'Commonwealth authority' means an authority or body constituted or established by an Act; 'Commonwealth authority subject to Commonwealth pay-roll tax' means a Commonwealth authority -

(a) that was registered as an employer under the Pay-roll Tax Assessment Act 1941-1969; or

(b) in respect of which an application for registration as an employer under that Act was pending, immediately before the commencement of this Act; 'Pay-roll tax law', in relation to a State, means a law of that State that relates to the imposition assessment and collection of a tax on wages.

"(2) For the purposes of this Act, an authority or body continued in existence by an Act shall be deemed to be constituted by that Act.

"4. Where the Act that constitutes or establishes a Commonwealth authority, being a Commonwealth authority subject to Commonwealth pay-roll tax, contains provision -

(a) to the effect that the Commonwealth authority is not subject to taxation under a law of a State to which the Commonwealth is not subject; or

(b) to the effect that the Commonwealth authority is not, except with respect to stamp duty, subject to taxation under a law of a State to which the Commonwealth is not subject, that provision does not have effect in relation to taxation under the pay-roll tax law of that State."

It was conceded that the respondent Bank was registered as an employer under the Commonwealth legislation. S79 of the Reserve Bank Act 1959-1973 provides: - "The Bank is not liable to taxation under any law of a State or of a Territory to which the Commonwealth is not subject ...."

This provision would, of course, ordinarily effectively protect the respondent from any State taxing legislation, but it was conceded that by virtue of the Commonwealth Pay-roll Tax (State Taxation of Commonwealth Authorities) Act 1971 the respondent became subject to State payroll tax law.

The Victorian legislature, consistently with the vacation of the field by the Commonwealth, entered that field as from 1 September 1971 by virtue of the Pay-roll Tax Act 1971. The long title of the Act is "An Act to Impose Tax Upon Employers in respect of certain Wages, to provide for the Assessment and Collection of the Tax, and for Purposes Connected therewith". S3(1) defined "wages" in a way almost identical with the Commonwealth Act as follows (including an irrelevant amendment passed in 1975): -

"'Wages' means any wages, salary, commission, bonuses or allowances paid or payable (whether at piece work rates or otherwise and whether paid or payable in cash or in kind) to an employe as such and, without limiting the generality of the foregoing, includes -

(a) any amount paid or payable by way of remuneration to a person holding an office under the Crown in right of the State of Victoria or in the service of the Crown in right of the State of Victoria;

(b) any amount paid or payable under any prescribed classes of contracts to the extent to which that payment is attributable to labour;

(c) any amount paid or payable by a company by way of remuneration to a director or member of the governing body of that company;

(d) any amount paid or payable by way of commission to an insurance or time-payment canvasser or collector; and

(e) the provision by the employer of meals or sustenance or the use of premises or quarters as consideration or part consideration for the employes' services."

S3(2) provided a method of evaluation of meals or sustenance provided by an employer.

By Act No. 9440 of 1980 the definition of "wages" was amended by deleting the words "or allowances" and substituting therefor the words "allowances or other benefits". By Act No. 9837 of 1982 further important amendments were made. S3 and s4 provided (so far as presently relevant): -

"3. S3 of the Principal Act is amended as as follows:

(a) ...

(b) In the interpretation of 'wages' -

(i) for the expression 'wages, salary', (where first occurring) there shall be substituted the expression 'wages, remuneration, salary'; and

(ii) in paragraph (ca) for the expression 'the provision of any wages, salary, commission, bonuses, allowances or other benefits' there shall be substituted the expression 'wages, remuneration, salary, commission, bonuses, allowances or other benefits paid or payable';

(c) In subs(2B) for the expression 'wages, salary' there shall be substituted the expression 'wages, remuneration, salary'; and

(d) After subs(2D) there shall be inserted the following sub-section: '(2E) In this Act in relation to wages, remuneration, salary, commission, bonuses, allowances or other benefits "paid" includes provided conferred and assigned and "pay" and "payable" have corresponding meanings.'.

4.(1) After s3 of the Principal Act there shall be inserted the following sections:

'3A.(1) In this section - "loan" means a loan or advance of any definite and certain sum of money or forbearance to be paid; "prescribed rate" means such rate as is from time to time fixed for the purposes of this section by the Governor in Council by Order published in the Government Gazette.'

(2) Where the wages paid or payable by an employer to or in relation to an employe in any financial year include a benefit in respect of the terms of repayment of a loan provided by the employer to or in relation to the employe, the amount of that benefit shall for the purposes of this Act be calculated in accordance with this section."

The amendments to the State Act in relation to loans to employees were part of an elaborate series of amendments designed to bring within the purview of the Act a number of benefits which are now commonly given to employees by employers in lieu of money payments and which are commonly referred to as part of a "salary package". The respondent, while not disputing that the amendments may be effective to compel employers to pay payroll tax upon the benefit conferred on employees by low interest loans, contends that the provisions do not fall within the ambit of the Pay-roll Tax (State Taxation of Commonwealth Authorities) Act 1971 because it is said that the extent to which the States are given authority to impose taxation upon Commonwealth authorities is limited by the terms of that Act to a State "pay-roll tax law" which is defined in the Act as a law of a State that relates to the imposition, assessment and collection of a tax on wages. It is submitted by the respondent that the attempt to tax the so-called benefits of low interest loans cannot, so far as the respondent is concerned, be characterized as a tax on wages. In this regard it may be observed that the respondent Bank appears to be in a unique position in that the evidence of Dr. WE Norton, the chief manager of the personnel department of the respondent, established that, while the Bank is authorized by the terms of s71 of the Reserve Bank Act to provide loans to employees for the purposes of housing and kindred purposes, it would be very difficult to estimate the cost to the Bank of providing those loans because the Bank, being a central bank, does not ordinarily make loans for housing purposes or for that matter go into the market place to make profits by lending money. Dr. Norton pointed out that in the case of a commercial bank the cost of making a low interest loan could be calculated by comparing the interest with the interest the bank would receive from its customers on making a similar loan. He did, however, concede that presumably there must be some cost to the Bank but he maintained that it would be extremely difficult to calculate what that cost was. The difficulty does not actually arise because by virtue of the provisions of s3A of the

State Act a formula is laid down whereby the value of the benefit of a low interest loan is computed by the Commissioner. It may be thought somewhat curious that a Commonwealth authority should be held liable to pay a tax the amount of which can be varied by order of the Governor in Council of a State. But if the bank is liable to pay payroll tax it would, of course, be open to the Parliament of a State to vary the rate of that tax and the same result would follow.

The broad question to be determined, however, is one which appears to apply to all Commonwealth authorities liable to State payroll tax. That question is whether the provisions of the State Act, as amended, in relation to imposing payroll tax in respect of the benefits conferred by low interest loans can properly fall within the description of a State payroll tax law being a tax on wages.

In my opinion there are at least three possible ways of construing the term "a tax on wages" as it is used in the Commonwealth Act of 1971. The first is to construe the term wages stricto sensu. This meaning must immediately be discarded because it would result in the exclusion of salaries. There is, in my opinion, no basis for thinking that in vacating the field to the States the Commonwealth intended to narrow the field to such an extent. Fullagar J in dealing with the problem said: "I have come to the conclusion that 'wages' in the expression 'a tax on wages' ought to receive its ordinary meaning. In my opinion the word wages refers to ordinary forms of remuneration for work done." It is clear, however that his Honour did not intend, by the use of the expression "its ordinary meaning", to refer to wages in that very narrow sense.

The second possible construction of the term "wages" is to limit its ambit to wages as defined in the Commonwealth payroll tax legislation at the end of August 1971. It could be argued that in allowing the States to impose payroll tax on Commonwealth authorities the Commonwealth did not intend that the States should be permitted to enlarge the area of the tax. An examination of the Commonwealth legislation between 1941 and 1971 does not reveal any attempt by the Commonwealth to extend the definition of wages for the purposes of payroll tax and the amendments made to the legislation in that period all appear to relate to remission of tax in relation to exports. As has been referred to, the State of Victoria on the other hand, since having the power, has repeatedly sought to enlarge the field. This, however, may be a natural concomitant of the greatly increased tendencies of employers to seek to remunerate their employees by conferring benefits other than payments of money.

If the Commonwealth had intended to limit the relaxation of the immunity of its authorities to the ambit of the Commonwealth payroll tax in 1971 it

would have been very easy for the draftsman to have said so and it appears to me that there is not sufficient reason for the Court to hold that such an intention should be inferred in the construction of the Act.

The third possibility is that the term "wages" should be construed as covering anything which would fairly fall within the expression "a payroll tax on wages". Thus, a tax imposed on employers simply in relation to the number of employees employed could not fairly be described as either a payroll tax or a tax on wages. In Mutual Acceptance Co Ltd v Federal Commissioner of Taxation [1944] HCA 34; (1944) 69 CLR 389 the High Court had to determine whether car allowances paid by the appellant to its travellers who used their own motor cars fell within the definition of wages in the Commonwealth Act. By a majority the Court held that such allowances did fall within the definition of wages. Latham CJ said, at p. 396: "The payments (in cash or kind) which are included in 'wages' are payments made 'to any employee as such.' They therefore comprehend only payments made to an employee in connection with and by reason of his service as an employee or in respect of some incident of his service. Thus a merely personal gift by an employer to a person who happened to be an employee would not be included within 'wages', though a bonus paid to employees because they were employees would be so included."

Starke J said, at p. 401: "Despite the generality of the definition of the word 'wages' payroll tax is a tax upon wages, that is, upon payments made in cash or in kind for services rendered, whether those payments be by way of pay, commission, bonus or allowances. And it is not, nor is it meant to be, a tax upon anything else."

The learned trial Judge quoted a passage from the judgment of Dixon J (as he then was) in the Mutual Acceptance Co. Case, at p. 403, in which the learned Judge said: "In the present case I think that the whole context and subject matter shows that the definition of wages is dealing with the emoluments of employment paid in money or made over in kind to an employee by an employer. The figure of speech 'payroll' used to describe the tax and supply a title to the Acts gives some indication of the subject taxed. In the definition of 'wages' the two first words 'wages' and 'salary' refer to ordinary forms of remuneration for work done. 'Commission' covers percentage rewards; and 'bonuses' occasional or periodical additions whether contracted for or voluntary. The next word 'allowances' seems to me naturally to follow as an attempt to make sure that any other kind of gain or reward allowed or conceded by the employer to the employee for his work is brought within the definition. In language borrowed from Lord Esher, it is intended to cover any payment beyond the agreed salary of the employee for services or additional services rendered by him ... That

remuneration for work is the subject is further shown by the four specified cases I mentioned above as included in the definition."

In Federal Commissioner of Taxation v J Walter Thompson (Australia) Pty Ltd [1944] HCA 23; (1944) 69 CLR 227, at p. 233, Latham CJ said: "Reference was made to the facts that the money paid was described as a 'fee' and that it was paid for 'a single performance (after rehearsals).' The definition of wages in Stroud's Judicial Dictionary, 2nd ed. (1903), vol.III., p. 2206, was quoted: 'It would therefore seem that "wages" are the personal earnings of labourers and artisans.' The use of the word 'fee' cannot be regarded as more than one element to be taken into account in determining the true character of the payments made. If a fee is really a reward for services rendered by a servant, then it falls within the category of wages or possibly salary."

The Chief Justice concluded his remarks by the following passage, at p. 234:

"In my opinion, in the Pay-roll Tax Assessment Act the word 'wages' should be held to include any remuneration paid or payable to an employee as a reward for his services as an employee." In Murdoch v **Commissioner of Pay-roll Tax** (Vic) [1980] HCA 33; (1980) 143 CLR 629, at p. 636; 31 ALR 637, at p. 640, Gibbs CJ said: "If the question for decision were simply whether the payments were made to the employees because they were employees, the answer would be in the affirmative, since the only persons eligible to share in the distribution under the provision of the will are employees for the time being engaged in the business. However, to attract tax the payments must be made to the employees in respect of the services which they rendered."

Although the majority of the Court took a different view from the Chief Justice on the facts of the case I do not think that they differed from the principles I have quoted above. In the judgments of the other members of the Court emphasis was laid upon the fact that the payments under consideration were made having regard to the value of the services rendered. Mason, Murphy and Wilson JJ said, at (143 CLR) p.642; (31 ALR) p. 645: "It is also accepted that in choosing the recipients and in determining the amount of the payment in each case the 'employer' had regard to the value of the services rendered to the business by the particular person. If that were all, then it would seem to follow without doubt that the payments were subject to payroll tax."

The learned trial Judge observed that the legislature in choosing to remove the Reserve Bank's protection from State-imposed taxation only to the extent of payroll tax on "wages" should be taken to have done so

deliberately. His Honour, therefore, was prepared to hold that by using the words "tax on wages" the Commonwealth Authorities Act removed the shield of the Reserve Bank only in respect of a State payroll tax which is imposed on "wages" within the ordinary signification of that word. His Honour, would, therefore, exclude from the ambit of the Act allowances and benefits and possibly commissions and bonuses notwithstanding that allowances, bonuses and commissions were included in the Commonwealth Act. With respect I am unable to agree with this view. Whereas I certainly do not believe that the intention of the Commonwealth was to permit the States to impose a very wide range of tax upon Commonwealth authorities provided that the legislation was called a payroll tax Act and provided that some attempt was made to bring the subject of the tax within a definition of wages artificially enlarged for the purpose, I do not think that there is sufficient justification to hold that the Commonwealth on the other hand intended substantially to narrow the field in which the States could operate upon the transfer of payroll tax to them.

The problem in the present case is a difficult one and one in which ultimately opinions may differ. In my opinion the Commonwealth has conferred upon the States the power to impose upon the designated Commonwealth authorities a tax which can fairly be described as a payroll tax on wages. That is not to say that anything which was not included in the Commonwealth Act in 1971 is beyond the power of the States, and the test must be whether the tax can fairly be described as a tax on wages in the sense that wages are remuneration or benefits paid to or conferred on employees directly in relation to their services or labour. In the present case employees of the respondent become eligible to apply for low interest home loans but they are granted loans only upon certain conditions. The first condition is that they must demonstrate some degree of permanence in their employment and for this reason their eligibility only commences when they have been employed by the respondent for two years. The decision whether to grant or to refuse a loan is made upon ordinary commercial considerations in relation to the security offered and the ability of the applicant to make repayments. The loans are usually made to the applicant and his or her spouse notwithstanding that the spouse is not an employee. No regard is paid to the rank of efficiency of the applicant and, as Dr. Norton pointed out, on the contrary most of the persons who apply for loans are young employees and therefore employees in junior positions, while older and more senior employees have either loans of a lesser amount, having paid off a considerable amount, or have no money outstanding at all. Loans have been made only to slightly more than half the Bank's present employees. No actual cost flows from the employer to the employee and the employee receives a benefit not by virtue of or in relation to work performed but simply by virtue of the fact that he or she is an employee of the respondent and fulfils the required conditions. It may well

be that employees of the respondent can get discounts at certain retail stores simply because they are employees of the respondent but this ability to obtain discounts could not in any sense be said to come within the definition, however broadly extended, of the term "wages". The loans are not directly related to the services performed by the borrowers. For example, an employee might be granted leave without pay but presumably his loan would not be terminated during the period of his absence on leave. Similarly, if an employee absented himself without leave his salary might be withheld in respect of the period of his absence but his housing loan would not be affected providing his employment was not terminated.

While the problem is a difficult one I have eventually come firmly to the conclusion that the ability, subject to certain conditions, of the employees of the respondent to obtain housing loans at a lower rate of interest cannot be said to fall within the term "wages" within the meaning of the Pay-roll Tax (State Taxation of Commonwealth Authorities) Act. It follows, in my opinion, that although the State may, if it chooses, impose a payroll tax upon employers not protected by constitutional considerations in respect of benefits obtained by their employees by way of low interest housing loans it has no power to impose a tax upon Commonwealth authorities upon the basis that the tax is a payroll tax upon wages. In my opinion, therefore, the learned trial Judge was quite correct in allowing the appeal although, as I have indicated, I have reached this conclusion for slightly different reasons.

MURRAY J: It follows that in my opinion the appeal should be dismissed.

Brooking J: I agree with the learned presiding Judge that the expression "wages" cannot be given its ordinary meaning in the definition of "payroll tax law" in s3(1) of the CommonwealthPay-roll Tax (State Taxation of Commonwealth Authorities) Act 1971, which I shall call "the federal Act". What then does "wages" mean? I should rather ask, What does the phrase "a tax on wages" mean? The federal Act and the other federal statute which it mentions in s2, the Pay-roll Tax (Termination of Commonwealth Tax) Act 1971, together give effect to a scheme whereby the Commonwealth is to vacate the field of payroll tax in favour of the States. As part of that scheme the federal Act, as was compendiously said in the second reading speech, removes the barrier to payment of State payroll tax that exists in the constituting legislation of a number of Commonwealth authorities.

By 1971 the Commonwealth had been imposing payroll tax for 30 years. The tax was its creature. The definition of "payroll tax law" in the federal Act, with its reference to a tax on wages, is not to be interpreted in a vacuum. A "tax on wages" - the federal tax, and no other - had been in existence for three decades, and indeed the two Acts relating respectively

to its imposition, assessment and collection and to its termination were themselves referred to in the federal Act. That the federal Act formed part of a scheme is manifest.

Neither party suggests that the federal Act, in defining "payroll tax law" of a State by reference to "a tax on wages", contemplated only a law which reproduced the definition of "wages" in the Pay-roll Tax Assessment Act 1941. This concession is rightly made by counsel for the Bank (as I shall call the taxpayer). It would be strange for Parliament to crystallize for all time the kaleidoscopic image seen upon a single shake of the legislative tube in a matter where - to change the metaphor - the fiscal fisherman is apt to be for ever mending his nets. And so counsel for the Bank does not suggest that "wages" has the meaning assigned to it by s3(1) of the Pay-roll Tax Assessment Act 1941 of the Commonwealth. The limiting factor, he says, is not that definition but "the essential boundaries" or "the core concept" of payroll tax as it existed at the time of the coming into operation of the federal Act. The Commissioner puts forward a similar view: the general scope of "a tax on wages" is to be ascertained by reference to the federal assessment Act.

Neither party, as I have said, suggests that by "a tax on wages" Parliament meant a tax on "wages" in the sense in which that expression was defined in the assessment Act. By 1971 the "tax on wages" - payroll tax - was as well recognized a category of tax as a tax on income or sales or land. In my view, when the federal Act referred to "a tax on wages" it meant a tax of the same general character as that which had then been with us for the last 30 years. There is no equity about a tax (Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 KB 64, at p. 71), and if it was a matter of interpreting the Commonwealth Pay-roll Tax Assessment Act there could be no talk of spirit and intendment. But the question is not one of determining the scope of the assessment Act in the course of applying that statute. It is whether the federal Act, in referring to "a tax of wages", meant to treat the assessment Act as showing the general scope of such a tax, in the sense that the assessment Act was to be taken, not as precisely delimiting the field, but only as showing the general subject matter of a tax on wages. Some such test as this may seem too vague to be accepted as what Parliament intended by its reference to "a tax on wages". But it should be remembered that the English law of charities rests upon the Statute of Elizabeth, in the sense that the preamble came to be regarded by the Court of Chancery as showing what objects were charitable, not by stating them exhaustively, but by providing a list of instances. A particular purpose was taken to be within the spirit and intendment of the Statute of Elizabeth if it was analogous to a purpose mentioned in the preamble. So vague was this test that it gave rise to a body of law that often seemed illogical and even capricious: Gilmour v Coats [1949] UKHL 1; [1949] AC 426, at p. 433.

The Commonwealth Pay-roll Tax Assessment Act always reached out far beyond wages in the ordinary sense. The reference to "salary" made it clear that the tax extended to the remuneration of "white-collar workers" or other persons who might have been thought to receive salary rather than wages: Federal Commissioner of Taxation v J Walter Thompson (Australia) Pty Ltd [1944] HCA 23; (1944) 69 CLR 227, at pp. 233-4; Mutual Acceptance Co Ltd v Federal Commissioner of Taxation [1944] HCA 34; (1944) 69 CLR 389, at p. 398. A bonus, also included in the definition, would not ordinarily be regarded as wages; neither would commission. Allowances are mentioned. Whatever might be said of "mud money" or a "height allowance", I doubt very much whether the car allowances in question in the Mutual Acceptance Case and WA Flick and Co Pty Ltd v Federal Commissioner of Taxation [1959] HCA 46; (1959) 103 CLR 334 would be viewed as part of wages in the ordinary sense of that term. A payment made to an independent contractor and caught by a prescription under para. (a) of the definition of "wages" would not otherwise be regarded as wages; nor would directors' fees, caught by para. (b). Moreover, para. (d) brings in the provision of meals or sustenance and the use of premises or quarters. So not only are payments in cash or in kind dealt with, but also the provision of a facility. I doubt whether anyone would otherwise think of an employee's meals or premises as part of his wages.

Paragraph (a), dealing with prescribed classes of contracts, and para. (b), dealing with directors' remuneration, show that an independent contractor and a company director who does not work under a contract of service can be an "employee" in receipt of "wages" within the meaning of the Act.

So it is seen that from its inception the Commonwealth tax was a tax on "wages" in a much extended sense. The notion of remuneration to an employee is common to all forms of payment or other benefit mentioned in the definition; but the limits are very wide. Payments in kind are included. The definition is not, however, confined to payments even in this wide sense: the provision of a facility is comprehended. The remuneration must be provided to an employee; but the employee will not necessarily be a servant. What is it that the different kinds of payment or other benefit mentioned in the definition have in common? The answer seems to be, they are all forms of remuneration to an employee (in the wide sense required by the definition) as such. What is meant by "as such" is explained in WA FLick and Co Pty Ltd v Federal Commissioner of Taxation and Murdoch v **Commissioner of Pay-roll Tax** (Vic) [1980] HCA 33; (1980) 143 CLR 629; 31 ALR 637.

In my view the benefit in question in the present case falls within the scope of the expression "a tax on wages" in the federal Act. It is similar to all the kinds of remuneration mentioned in the definition of "wages" in the

assessment Act, in that, like each of them, it is remuneration provided to an employee as such. In other words, the benefit afforded by a loan of money to the employee, or to the employee and his wife, at a rate of interest below prevailing rates, to finance the purchase of a home for the employee is sufficiently similar to (in that it has the same essential characteristics as) the kinds of remuneration in the definition of "wages" in the assessment Act to require the Victorian Act to be viewed in this regard as a law that relates to the imposition, assessment and collection of a tax on wages.

For the Bank it was argued that there must be a payment in cash or in kind. But this cannot be maintained in the face of para. (d) of the definition of wages. Then it was said that the remuneration must be provided because of something done in the service of the employer, and reference was made to the Mutual Acceptance and Flick Cases. Those decisions both concerned a car allowance and the distinction between the allowance viewed as a payment by the employer and the allowance viewed from the standpoint of what the employee "made". They certainly give no support to the notion that remuneration is not provided to an employee "as such" unless it is received in consequence of a special exertion or exercise of skill on his part, or something of that kind, which seemed to be the argument. The loans now in question were made to the employees in connection with and by reason of their service as employees: Mutual Case, at (103 CLR) p. 396, per Latham CJ, cited by Mason, Murphy and Wilson JJ in Murdoch's Case, at (143 CLR) p. 642; (31 ALR) p. 644. It should be noted that in the joint judgment in Murdoch's Case, at p. 645, their Honours made it clear that their decision did not rest on the criteria applied by the trustees in making the distribution and concluded by referring to the payments as "rightly described as remuneration paid to employees because they were employees".

I would allow the appeal and confirm the assessment of the Commissioner.

Nathan J: Payroll tax within the common law world is an antipodean impost. Nothing from the northern hemisphere will aid in interpreting its scope. However, it is known in some civil law countries of Europe, for example West Germany and Austria. The term "payroll" is unknown to the authors of the Oxford English Dictionary but in Australia it is defined in the Macquarie Dictionary as: "a roll or list of persons to be paid, with the amounts due: the money that is actually paid out" and "payroll tax" is defined as: "a tax levied by a government on employers based on the wages and salaries they pay out". The term was described in Mutual Acceptance Co Ltd v Federal Commissioner of Taxation [1944] HCA 34; (1944) 69 CLR 389 as a figure of speech to give some indication of the subject taxed: at p. 403, per Dixon J. It is necessary, in my view, to direct

attention to the meaning of "payroll" just as it is necessary to consider what is a "tax on wages" for the reasons given by Murray and Brooking JJ.

To do so I shall not rehearse the legislative or fact situation stated in the judgment of Murray J with whom I agree, but I concur forcefully with his conclusion and that of Brooking J, whose draft judgments I have read, that the correct approach here is to ascertain what is a "payroll tax on wages" being the area vacated by the Commonwealth and not that area which the State may recite as such, namely s3 and s3A of Act No. 9837. In my view, that search is assisted by characterizing what is the payroll upon which the tax is levied. That word has, as I have said, a common meaning in Australia as well as that legislatively ascribed to it; and as with any vernacular word is subject to changes in content: see also EF Mannix, Australian Payroll and Incentive Tax, 1970, p. 37. For example, a newspaper report that a drug addict had robbed the payroll of the shopkeeper would be readily comprehensible now; it might not have been so in 1940. The reader would know the villain had stolen the cash or cheques which the shopkeeper was to pay in specie to his workers. The essence of a payroll is that it is fixed or ascertainable sums which move from the employer to the employees. That this feature is critical is supported by the way it was originally and is presently assessed. Employers were and are required to register; they must lodge periodical returns. The employer calculates its liability on what it considers its outgoings in respect of each employee, is, and then pays upon lodgement. Note that the liability arises in respect of each individual employee's wages, not from groups or classes of employees. That the payroll which attracts the tax is a readily fixed and identifiable sum is borne out by the words of the section. The Commonwealth Act defines "wages" which comprise the payroll as including (the text is recited in full in the judgment of Murray J) in s3(1)(a) to s3(1)(d) any amount paid or payable; and "(e) provision ... of meals ... or the use of premises or quarters as consideration ... for the employee's services".

S3(2) provides the method of calculating the value of these meals or premises. The feature that should be noted is that the benefit passing to the employee by way of meals or accommodation is provided by the employer, not the employee's own meals or accommodation, and then only in respect of the employee's services. Pt(a) to Pt(d) specifically refer to amounts which can only mean monetary amounts. The linkage between the provision of a benefit as wages in return for work or services provided puts into statutory form the common sense meaning of wages which comprises the payroll.

Not every benefit provided by an employer to its workers, even if quantifiable, comprises an ingredient of its payroll. For example, an employer providing squash courts or holiday homes at subsidized rates

would be astounded if the provision of these amenities comprised part of its payroll and thus became taxable in its hand. There are many such conditions of employment commonly referred to as "perks" which do not form part of the payroll. Also in this case, access to the loan depends upon the employee's application; the option is his or hers whether or not to take advantage of this facility. Therefore depending upon usage, if these facilities were considered as wages, rates for workers doing identical work would vary widely, again an astounding result in Australian conditions.

In this case home interest rates, as a matter of notoriety, fluctuate considerably. If the differential were to be considered as part of the payroll, not merely would it vary in respect of each employee regardless of work done, but also at rates and times totally outside the control of either party.

In the present case the loan is commonly made to spouses, and each may be or become financially independent of the other; they may separate or rearrange their matrimonial relationship. The benefit passing to the spouse may have little to do with the other and nothing at all to do with the Bank. I consider that a tax on a payroll can only be made where an employer/employee relationship exists; where a benefit passes to a spouse for that reason alone; and is divorced from any benefit passing at the direction of the employee; such a benefit cannot be part of the employer's payroll; nor part of the wages of "the employee as such": Commissioner of Taxation v Barrett [1973] HCA 49; (1973) 129 CLR 395 (a case which concerned the distinction between servants and independent contractors but which is predicated upon the assumption that payroll tax is payable by the employer only in respect of employees as are also Commissioner of Taxation v J Walter Thompson (Australia) Pty Ltd [1944] HCA 23; (1944) 69 CLR 227 and Murdoch v **Commissioner of Pay-roll Tax** (Vic) [1980] HCA 33; (1980) 143 CLR 629; 31 ALR 637). Further in this case the loan is not automatically extinguished upon termination of employment but is often held over for a limited period when no employment relationship exists at all.

NATHAN J: I reiterate I concur with Murray J that the critical question in this case is the meaning of the phrase "a payroll tax on wages". For the reasons given by him and these additional ones I would also dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: TD Weerappah.
Solicitor for the respondent: Australian Government Solicitor.